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By Hook or by Cook: Exploring the Legality of an INS Sting Operation

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The Immigration and Naturalization Service (INS) is an agency with responsibility both for enforcing the immigration laws and conferring legal status and other benefits. At times these dual roles create conflict, mistrust in the community, and violations of the rights of aliens. This article critically examines an undercover operation conducted by the San Diego District Office which lured aliens to deportation by agency offers of legal status. The article discusses the regulatory and statutory provisions governing INS undercover operations and the rights of aliens subject to final orders of deportation. It continues with an analysis of the due process violations posed by undercover operations.

I. INTRODUCTION: THE STING

In July of 1993, 600 aliens received identical letters on official stationery of the INS, promising them amnesty in the United States and employment authorization cards.[1] These generous letters were sent by James B. Turnage, Jr., District Director of the INS in San Diego. The aliens only had to go to the INS District Office at a set

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1. *See* H.G. Reza, *Immigrants Deported in INS Sting Operation*, L.A. TIMES, July 31, 1993, at A1; *see also Would-Be Immigrants Stung in INS Operation*, 70 INTERPRETER RELEASES 1064 (1993).

time and date in order to receive the stated benefits. Mr. Turnage cited a "new provision in the amnesty program of the Immigration and Nationality Act of 1993," which allowed this "one-time" offer of amnesty.[2] But the letter was a ruse. There was no 1993 Immigration Act and there was no law creating an amnesty program.

The purpose of the letter was to entice the aliens into the INS office so they could be deported.[3] In other words, the INS was conducting an undercover or "sting" operation. The spokesperson for the INS District Office justified the sting on the ground that the INS lacked the resources to "knock on 600 doors."[4] As it carried out the scheme, the INS deliberately failed to send the "sting" letters to the lawyers who represented the aliens.[5] Similarly, the INS chose not to notify attorneys at the time of the aliens' apprehension.

INS undercover operations usually target criminal activities such as buying and selling illegal documents,[6] offering bribes to INS officials,[7] or smuggling aliens into the United States.[8] Individuals apprehended in those sting operations face criminal prosecution and

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2. The letter reads as follows:

> Dear :
> You may be eligible for employment authorization, for a period of one year, under a new provision in the amnesty program of the Immigration and Nationality Act of 1993.
> In order for you to receive your employment authorization card you need only to report to Room *B247* in the parking level of the Federal Building at 880 Front Street between 9:00 a.m. and 10:00 a.m. on Tuesday, July 20, 1993. Bring this letter and some other identification with you.
> Since this is a one-time event, failure to report to this office at this time will render you ineligible to receive your employment authorization under this section of the amnesty program.
> Signed: James B. Turnage, Jr., District Director

Letter from James B. Turnage, Jr., District Director, San Diego INS (July 14, 1993) (on file with author).

3. An INS spokesperson told the press that all of the aliens who received this letter had outstanding final orders of deportation. Reza, *supra* note 1, at A23. Some of the apprehended aliens disputed that they were under final orders of deportation. In fact, the INS admitted that two of the people apprehended in the sting were later released because they had actually become lawful permanent residents. *Id.*

4. Ed Jahn, *INS Insists its Work-Permit Sting Legal*, SAN DIEGO UNION-TRIB., Aug. 1, 1993, at B2 (quoting Rudy Murillo, spokesperson for the San Diego District Office).

5. Bob Mandgie, Assistant Director for Detention and Deportation in the San Diego District Office, said copies of the letter were not mailed to attorneys because "they feared that the lawyers would alert their clients to the sting." Reza, *supra* note 1, at A23.

6. United States v. An Chyi Liu, 960 F.2d 449 (5th Cir. 1992) (aliens were not entrapped in scheme to purchase "green cards"), *cert. denied*, 113 S. Ct. 418 (1992).

7. *See, e.g.*, United States v. Ahluwalia, 807 F. Supp. 1490 (N.D. Cal. 1992) (aliens convicted of bribing an INS officer for work authorization documents), *aff'd*, 30 F.3d 1143 (9th Cir. 1994).

8. United States v. Hernandez, 913 F.2d 568 (8th Cir. 1990) (smuggler enticed by undercover INS agent's offer of payment for illegal transportation of aliens).

correspondingly receive the due process protections afforded to criminal defendants. However, the single goal of the San Diego INS sting appears to have been the execution of outstanding deportation orders.[9] In other words, the sting was being used to enforce an order in a civil proceeding.[10]

Using a sting operation to execute an order of deportation is a marked departure from standard INS deportation procedures. Normally, the INS will send an alien who has a final order of deportation[11] outstanding a "Notice to Appear for Deportation."[12] This

9. There are few reported instances of the INS using a sting operation to apprehend aliens. The San Diego District used a similar ruse in 1990 when it sent letters to more than 1,400 people, inviting the aliens to renew work authorization papers. Chet Barfield, *INS Snares 140 in a "Papers Trap,"* SAN DIEGO UNION-TRIB., Oct. 18, 1990, at B-1. One-hundred and forty aliens were apprehended in this operation. In El Paso, Texas, INS agents masqueraded as a car dealership using the name "Argim Motors" when they sent letters to aliens telling them they had won a Ford Bronco and that they needed to show up to collect it. *Id.* at B-2. "Argim" is "Migra" spelled backwards. "La Migra" is a slang term used to describe the INS.

10. Courts have repeatedly characterized deportation and exclusion proceedings as civil, not criminal, proceedings. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) (*ex post facto* clause inapplicable); Linnas v. INS, 790 F.2d 1024, 1030 (2d Cir. 1986) (bill of attainder clause inapplicable), *cert. denied*, 479 U.S. 995 (1986). Accordingly, an alien has fewer rights in immigration hearings.

The San Diego sting was not being used to gather evidence for a criminal prosecution. In fact, only a limited class of aliens are subject to a criminal penalty for failure to report for deportation, and prosecution is rare for those aliens subject to these penalties. Section 242(e) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(e) (1988), makes failure to report after a final order of deportation has been entered a felony offense only for aliens who were found deportable under INA § 241(a)(2), 8 U.S.C. § 1251(a)(2) (1988) (criminal offenses); INA § 241(a)(3), 8 U.S.C. § 1251(a)(3) (1988) (failure to register and falsification of documents); or INA § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1988) (security and related grounds). The prosecution must establish that the failure to report was willful and occurred after a final order of deportation was entered or after completion of judicial review.

In the criminal law setting, similar types of stings have been used by federal and state governments to apprehend individuals who have failed to appear in response to a criminal summons, or who have failed to appear after being released on bail. In 1985, the federal government lured fugitives by offering free tickets to a Redskins football game. In the spring of 1994, the Ohio State Attorney General's office, in cooperation with the Cuyahoga County Sheriff's Department, sent letters offering tax refunds, class action settlement refunds, or other government benefits, to individuals with outstanding arrest warrants. *See* Laura Mansnerus, *Trap is Baited for Fugitives, and They Come Running*, N.Y. TIMES, Aug. 26, 1994, at A22. Although the Ohio sting, which relied on the individuals' trust in the government's promises of benefits, might have raised due process concerns as well, in criminal proceedings the apprehended individual has many greater due process protections that serve to mitigate some of the harm of the sting used to apprehend the individual. The harm to an alien subject to immediate deportation is described more fully in Section II.

11. 8 C.F.R. § 243.3(a) (1993) provides that a deportation order is final and subject to execution on the date of any of the following events:

(1) A grant of voluntary departure expires;

notice tells the alien to report and provides a minimum of seventy-two hours of advance notice. Once an alien has been physically removed from the United States, the alien loses the right to pursue administrative and judicial review of the action.[13]

The San Diego sting did not seek to induce aliens to commit a crime (such as bribing an official or procuring false documents), but instead appealed to the aliens' understandable desire to obtain legal residence in the United States and the aliens' beliefs that the INS could help them to achieve this elusive goal. The INS is a hybrid agency, with power both to grant benefits and to enforce immigration laws. The INS "sting" thus exploited any trust the aliens might have had in the agency.[14]

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(2) An immigration judge enters an order of deportation without granting voluntary departure or other relief, and the alien respondent waives his or her right to appeal;
(3) The Board of Immigration Appeals enters an order of deportation on appeal, without granting voluntary departure or other relief; or
(4) A federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action.

12. This Notice, Form I-166, is commonly referred to as the "Bag and Baggage" letter. It instructs the alien to appear, with luggage, at the local INS office for removal from the United States. It is not uncommon for the Notice to provide several weeks of advance notice. Until 1986, regulations required that this Notice be sent in every case before the INS executed an order of deportation. 8 C.F.R. § 243.3 (1985) (amended 1986). Although the regulations no longer mandate the mailing of the Notice, in most INS District Offices it is still the standard practice. 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 72.08[2][b] (rev. ed. 1993). The INS often requires that the alien post a bond to ensure appearance at all proceedings. 8 C.F.R. § 103.6(c)(3), (e) (1993). The INS can prove that the alien breached the conditions of the bond if the INS sent the alien a Bag and Baggage Letter and the alien failed to appear. This may explain the continued INS use of Form I-166, the Bag and Baggage Letter. Additionally, since the Immigration Act of 1990 created new consequences for the alien's failure to appear, the use of the Bag and Baggage letter aids the INS in enforcing these consequences by helping to prove the alien had notice of the duty to appear. *See* Immigration Act of 1990 § 242B(e), 8 U.S.C. § 1252b(e) (Supp. V 1993) (precluding voluntary departure, adjustment of status, change of status, and registry for failure to appear). Failure to report also can be used as the act that "breaches" any bond which might have been posted and thus may explain continued INS use of the form. The 1990 amendments to the INA made failure to report a factor that can foreclose relief from deportation. *See* Immigration Act of 1990 § 242B(e), 8 U.S.C. § 1252b(e) (Supp. V 1993) (precluding voluntary departure, adjustment of status, change of status, and registry).

13. This principle is discussed further in Section II.B of this article. There are limited, judicially created exceptions to this absolute rule. A sting used to effectuate deportation is particularly troubling because the alien might lose all forums in which to challenge the government's action and the underlying order of deportation.

14. Although any reference to Nazi tactics may seem excessive, there are reported instances of the use of offers of work permits to lure Jews to deportation during World War II. *See* LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933-1945, at 299, 305-06 (1975). "In late November 1942, the Germans declared that the Umschlagplatz [a ghetto] had been liquidated and offered amnesty to the 'illegals,' holding out the offer of food and employment as bait." *Id.* at 333.

In the United States, there is a long history of distrust of INS promises. In her memoir, *The Woman Warrior*, Maxine Hong Kingston reports that Chinese immigrants

As a hybrid agency, the INS has responsibility to serve both citizens and aliens in adjudicating the petitions of those who seek legal status and in enforcing deportation and exclusion laws. The San Diego sting operation highlights the long-standing tension between the INS' roles in service and enforcement, and the difficulty the agency has had in separating the two. A classic example of this tension is found in the very title of recent major legislation — The Immigration Reform and Control Act of 1986.[15] The Reform and Control Act created sanctions against employers who knowingly hired undocumented persons, but also granted amnesty to aliens who had lived without legal status and had entered the country before 1982 or worked within a certain class of agricultural laborers. Congress recognized the immigrants' long history of distrust of the INS and created special legalization offices and confidentiality provisions to encourage aliens to apply for the legalization benefits. The INS also worked with community groups to administer the legalization program, using those groups as centers that prepared and received applications.[16] The San Diego sting undermined years of INS work toward establishing credibility for its legalization program when it created a "false amnesty" offer as a tool for deportation. Ultimately, the use of deceit will erode the agency's ability to accomplish either of its missions, service and enforcement, for both require a measure of community trust and voluntary compliance.

In an effort to restore community trust after the sting, the Acting Commissioner of the INS, Chris Sale, issued a field memorandum instructing all INS offices that sting operations would no longer be

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feared betrayal by the INS:

> Occasionally the rumor went about that the United States immigration authorities had set up headquarters in the San Francisco or Sacramento Chinatown to urge wetbacks and stowaway, anybody here on fake papers, to come to the city and get their files straightened but . . . . "Don't be a fool," somebody else would say. "It's a trap. You go in there saying you want to straighten out papers, they'll deport you. . . . So-and-so trusted them, and he was deported. They deported his children too."

MAXINE HONG KINGSTON, THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS 184 (1976).

15. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

16. *See generally* Bill Ong Hing, *The Immigration and Naturalization Service, Community-Based Organizations, and the Legalization Experience: Lessons for the Self-Help Immigration Phenomenon*, 6 GEO. IMMIGR. L.J. 413, 413-98 (1992) (discussing the success of the INS in using community organizations to build trust in immigrant communities).

permitted without the express written authorization of INS headquarters and the Associate Attorney General.[17] Sale's memorandum cited the sharp criticism that the INS incurred after the sting from community groups and the media. It reminded INS officers that " 'Sting' operations have great potential for undermining the Service's credibility and negatively affecting the goodwill the INS has established in the communities we serve."[18]

Although not cited in Sale's memorandum, the Attorney General's Office had issued guidelines in 1984 that require INS officers to obtain advance written approval of a wide variety of undercover operations.[19] In December 1993, INS Commissioner Doris Meissner adopted additional formal administrative procedures to govern such "sting" operations.[20] The new procedures continued the requirement of advance written approval of undercover operations, but added a new express prohibition against:

> [A]ny INS-directed activity intended to induce, through misrepresentation conveyed in print, by voice, or in person, specifically targeted law violators of the Immigration and Nationality Act to present themselves to an INS facility or office for administrative proceedings or to receive some seemingly valid INS benefit, for the purpose of apprehending them.[21]

Thus, the INS Commissioner apparently banned the type of sting operation that was used in San Diego. Notwithstanding these new administrative procedures, many troubling issues remain regarding the use of sting operations by the INS.

This article will discuss the legality of the San Diego sting operation used by the INS to execute deportation orders. It will analyze the authority of the INS to conduct such a sting operation under the

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17. Memorandum from Chris Sale, Acting INS Commissioner, to District Directors, Chief Patrol Agents, and Officers in Charge (August 11, 1993), *in INS Issues New Standards for Sting Operations*, 70 INTERPRETER RELEASES 1209 & app. IV (1993).

18. *Id.*

19. Office of the Attorney General, Attorney General's Guidelines on INS Undercover Operations (March 5, 1984) [hereinafter Guidelines] (on file with author). These Guidelines are discussed in Section III.A *infra*. *See also INS Guidelines for Undercover Operations Uncovered*, 64 INTERPRETER RELEASES 572 (1987) (discussing the Guidelines and the requirement of written approval by the INS Commissioner or the INS Associate Commissioner for Enforcement, with the concurrence of the Assistant Attorney General for the Criminal Division).

20. Memorandum from Doris Meissner, INS Commissioner, to District Directors, Chief Patrol Agents, and Officers-In-Charge (December 17, 1993) (on file with author). This document was obtained by the author in March 1994, pursuant to a Freedom of Information Act Request under 5 U.S.C. §§ 551-552 (1988). *See also* Lenni B. Benson, *INS Undercover Operations*, 71 INTERPRETER RELEASES 777 (1994) (analyzing the new procedures and the conflicts between INS procedures and the Attorney General's Guidelines).

21. Memorandum from Doris Meissner, *supra* note 20, at 2 (to be included as § 20.017, *INA Authorization Procedures for "Sting" Operations*, of the INS Administrative Manual). This memorandum also lowers the level of review in the Attorney General's Office from the Associate Attorney General to the Deputy Commissioner of the INS. *Id.* at 1.

regulations and statutes that govern the execution of final orders of deportation. The article also will identify the constitutional limitations on such operations under the Due Process Clause of the Fifth Amendment, and will argue that INS stings used in civil proceedings or to enforce civil orders offend due process. Finally, the article will suggest that statutory changes should be made to block future undercover operations and to provide aliens with more protection against outrageous government conduct.

II. THE STING IN CONTEXT

In the San Diego sting, the INS only targeted aliens who had outstanding orders of deportation. Assuming that INS records were accurate, the only individuals to receive the sting letter were those who already had been through administrative deportation procedures and had been found deportable.

Nevertheless, the individual aliens still may have been entitled to statutory judicial review of their cases. The aliens also might have wished to seek discretionary administrative relief, such as a motion to reopen, because facts and circumstances had changed since the original hearing. Other aliens may have wanted to seek collateral review, perhaps by filing a writ of *habeas corpus*. It is also possible that some of the aliens apprehended in the sting had exhausted every feasible avenue of appeal or discretionary relief.

Notwithstanding the aliens' possible statutory or discretionary rights to further review of their cases or their rights to remain in the United States, I believe the INS sting was not an appropriate use of INS authority. For the reasons discussed below, I believe the sting exceeded INS regulatory authority and violated due process. However, to fully understand the impact of a sting used to expel aliens — even those with an outstanding order of deportation — it is important to consider some of the classes of aliens that might have been affected, as well as the consequences of deportation itself.

A. Deportation Scenarios

An alien might have been ordered deported *in absentia*. She might have learned of the deportation order only when she was apprehended in the sting. If she can establish that she never received notice of the deportation proceedings, she could file a motion to reopen

her case and the INS regulations would support that reopening.[22]

In another scenario, the alien may have been ordered deported and may have appealed her deportation order to the Board of Immigration Appeals (BIA). The Immigration and Nationality Act (INA) generally allows an alien ninety days from the date of the final order of deportation to file the petition for review.[23] For most aliens, the filing of a petition for review creates an automatic stay of the deportation order. In this scenario, the INS cannot lawfully remove the alien until judicial review is complete.[24] In the window between issuance of the final order and the filing of the petition for review, the alien is vulnerable to INS enforcement of the deportation order. If the INS removes the alien, his right to seek judicial review will end.[25]

There are many areas in the complex appellate rules governing deportation or exclusion in which the alien could be vulnerable to deportation and to the loss of right to pursue judicial review. For example, an alien might have successfully defeated the government's order to show cause seeking her deportation. On appeal, the BIA might reverse and order the individual deported. The INS could then arrest the alien upon receipt of the BIA's decision, even though years may have passed since the original deportation hearing.[26]

The alien also may have exhausted all administrative and judicial appeals. Even so, there are a variety of forms of discretionary relief, such as deferred deportation or the reinstatement of voluntary departure, which the alien still may ask the INS to consider. The chances of securing relief may be small, but nevertheless, removal and execution of the order of deportation would eliminate the ability of the alien to pursue such relief.

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22. 8 C.F.R. § 103 (1993).

23. The period is reduced to 30 days for aggravated felons. Until the 1990 amendments, an alien had six months to file the petition for review. INA § 106(a), 8 U.S.C. § 1105a(a)(1) (1988).

24. The right of an automatic stay for aggravated felons was removed in recent amendments. Immigration Act of 1990, Pub. L. No. 101-649, § 513(a), 104 Stat. 5052 (1990) (effective for petitions for review filed on or after January 28, 1991). Aliens convicted of aggravated felonies must seek discretionary stays. For a discussion of stays for aggravated felons, see IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 635-36 (4th ed. 1994).

25. See the discussion of INA § 106 and the foreclosure of judicial review, in Section II.B *infra*.

26. In a case in which I was the attorney of record, five years after the alien prevailed in the deportation hearing, the BIA reversed its ruling. The BIA mailed the decision to another attorney with the last name of "Benson." The alien learned of the adverse decision only when he received a Bag and Baggage letter, the "Notice to Report for Deportation."

B. The Legal Consequences of Deportation

There are many consequences to the removal or departure of an alien from the United States under an order of deportation. The legal consequence that is perhaps most central to the discussion of the San Diego sting is that the physical act of deportation effectively ends administrative or judicial review of the deportation order. Whether the alien left of his own volition or whether he was physically removed by the INS, his departure under a deportation order will end administrative deportation proceedings[27] and the alien's right to file a motion to reopen or reconsider.[28] More dramatically, the alien's departure often forecloses any opportunities for judicial review. Section 106(c) of the INA provides in part that:

> An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations *or if he has departed from the United States after the issuance of the order.*[29]

An alien who does not seek a discretionary stay or file a petition for review under section 106 and is then removed, will by this section have lost the ability to pursue judicial review of the BIA determination. The harshness of this rule has led a few courts of appeals to create an exception to the bar where the INS has violated its own regulations in removing the alien or where the removal violates due process.[30]

If the alien was not able to argue that the sting met one of the exceptions to the bar to judicial or administrative review, the alien might not have any forum in which to challenge the conduct of the INS. This procedural problem inherently protects the INS practice of removing an alien from the country after violating the alien's civil rights or government regulations. Many commentators have noted this glitch in the system.[31] It may be one of the main reasons that

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27. *See In re* Yih-Hsiung Wang, 17 I. & N. Dec. 565, 567 (BIA 1980) (departure concludes the proceedings absent procedural defects).

28. 8 C.F.R. § 3.2 (1993). The regulations provide in relevant part: "Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion." *Id.*

29. INA § 106(c), 8 U.S.C. §1105a(c) (1988) (emphasis added).

30. *See, e.g.*, Mendez v. INS, 563 F.2d 956 (9th Cir. 1977); Marrero v. INS, 990 F.2d 772, 777 (3d Cir. 1993). These exceptions will be discussed further as this article examines the legality of the sting operation.

31. *See, e.g.*, Stephen A. Rosenbaum, *Keeping an Eye on the INS: A Case for Civilian Review of Uncivil Conduct*, 7 LA RAZA L.J. 1, 24 (1994) (discussing the "forced migration" or deportation of aliens who may have been injured by INS behavior); *see*

inappropriate INS conduct is infrequently challenged successfully.

There are many other consequences of deportation. For example, aliens who have been deported within the past five years are excludable from the United States, and cannot be admitted unless they secure a waiver of excludability.[32] These waivers are time-consuming and difficult to obtain.[33] Aliens who otherwise may qualify for lawful immigration to the United States, such as those who have married U.S. citizens, will find their immigration blocked until the waiver can be processed.[34] Aliens who may have held permanent resident status lose that status when they are deported or, in some circuits, if they fail to contest a finding of deportability.[35] Once the alien has lost permanent residence, family members who might have spent years awaiting permanent resident classification under the Family-

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also IMMIGRATION LAW ENFORCEMENT MONITORING PROJECT, SEALING OUR BORDERS: THE HUMAN TOLL 17-41 (1992) (reporting on the administrative complaints filed against immigration officers).

32. INA § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B) (Supp. V 1993). Aliens convicted of an aggravated felony and who are subsequently deported are excludable for a period of 20 years. "Aggravated felony" is defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (Supp. V 1993), and includes convictions (including attempt or conspiracy to commit murder), trafficking in any controlled substance, trafficking in any firearms or destructive devices, or any crime of violence for which the term of imprisonment imposed (regardless of suspension of sentence) is at least five years.

33. The waiver is commonly referred to as an I-212 waiver or, more formally, the Permission to Reapply for Admission After Deportation or Removal. The application procedure is discussed in THE IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 5.6 (3d ed. 1992) [hereinafter IMMIGRATION LAW AND DEFENSE]. This treatise notes that delays of one to four years are not uncommon. *Id.* at 5-42.

34. A news article that reported the San Diego sting stated that one of the people apprehended in the sting, Antonio Martinez, appears to face this dilemma. Reza, *supra* note 1, at A23. Mr. Martinez is the beneficiary of an approved immigrant petition filed by his U.S. citizen wife. *Id.* His expulsion would preclude the issuance of an immigrant visa unless the INS grants an I-212 waiver of the ground of excludability.

35. The courts of appeals differ widely in their view on the exact point in time in deportation proceedings when an alien loses lawful permanent resident status. Judge Trott, dissenting in Butros v. INS, 990 F.2d 1142 (9th Cir. 1993), summarizes the varying standards determining when an alien will be denied relief as follows:

> (1) [I]n Louisiana, Mississippi, Texas, Indiana, Illinois, and Wisconsin, when a deportation order becomes administratively final; (2) in Alabama, Florida, and Georgia, when the order to show cause is issued; (3) in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands, when the Board may no longer reconsider or reopen the case; (4) in Connecticut, New York and Vermont, under a rule which is different from the rule in Louisiana, Mississippi, Texas, Indiana, Illinois, and Wisconsin but not clearly stated; and (5) elsewhere, depending on the option chosen by the judges of the U.S. Courts of Appeal.

Id. at 1152.

Based Second Preference of the INA will completely lose their ability to immigrate.[36] Loss of permanent resident status also will preclude the alien from use of the waiver of excludability available to returning residents. This waiver is known as the 212(c) waiver.[37] In many situations, it is the only waiver that will allow an alien to continue to reside in the United States.[38]

One of the most dramatic results of deportation is that an alien who subsequently re-enters the United States without documentation can be prosecuted for a felony offense and fined, or can be imprisoned for up to two years.[39] The alien cannot, in many circumstances, collaterally attack the deportation order that made his or her subsequent re-entry a crime.[40] Collateral attack is possible only where the alien can raise due process concerns establishing that the deportation

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36. 8 C.F.R. § 205.1(a)(9) (1993) (providing for automatic revocation of a relative visa petition upon loss of permanent residence except in cases of naturalization). At one point, persons chargeable to the quota for Mexico might wait 12 years before the priority date of their preference petition for a spouse or child became current and an immigrant visa became available. The February 1994 backlogs in the Family-Based Second Preference, INA § 203(2)(a), 8 U.S.C. § 1153(a)(2)(A) (Supp. V 1993), for spouses and children (under 21) of permanent residents, were more than three years. As of April 1994, the priority date for the unmarried adult children (over 21) of permanent residents, INA § 203(2)(b), 8 U.S.C. § 1153(a)(2)(B) (Supp. V 1993), was standing still at a minimum of five years. *See, e.g.*, Bureau of Consular Affairs, *Immigrant Numbers for April 1994*, VISA BULL., Apr. 1994, at 1 (recording the movement of preference petition priority dates).

37. *See* INA § 212(c), 8 U.S.C. § 1182(c) (Supp. V 1993). To meet the threshold of eligibility for this waiver, the individual must have maintained a lawful residence in the United States for at least seven years. See *supra* note 35; *see also* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 11.4(c)(2) (rev. ed. 1993).

38. For example, a permanent resident who has been convicted of one of most drug offenses would not be able to use any other waiver to avoid deportation. If the INS removes the alien under an order of deportation, the alien's permanent resident status technically ends with the removal. Many aliens become eligible for this waiver after an order of deportation but before their actual departure, and they seek to reopen their deportation proceedings to apply for § 212(c) relief. *See* KESSELBRENNER & ROSENBERG, *supra* note 37, § 11.4(c)(3).

39. INA § 276, 8 U.S.C. § 1326 (1988). The statute increases the length of imprisonment for felons and aggravated felons who reenter after deportation. INA § 276, 8 U.S.C. § 1326(b), *as amended by* The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345(a)-(b), 102 Stat. 4181, 4471 (1988). The penalty is increased to 5 years if one is deported as a felon and to 15 years if deported as an aggravated felon. The term "Aggravated felony" is described in note 32, *supra*.

Note that although an alien can be prosecuted for the crime of entry without inspection or entry via willfully false or misleading representations, prosecutions are rare and the first offense is classified as a misdemeanor. *See* INA § 275, 8 U.S.C. § 1325(a) (Supp. V 1993).

40. *See* United States v. Mendoza-Lopez, 481 U.S. 828, 837 (1987) (preserving limited collateral attack); KESSELBRENNER & ROSENBERG, *supra* note 37, § 5.4(b).

hearing was fundamentally unfair, as when the nature of the hearing fundamentally precluded or eliminated judicial review.[41] In some circuits, the alien must demonstrate actual prejudice. In other words, the alien must prove that she would have been entitled to some form of relief before a court will allow a collateral attack to set aside the deportation order. This is true even if the alien establishes that there was a fundamental error in the deportation proceedings.[42]

As mentioned above, several courts have recognized an exception to the ban on judicial review if the alien can show that her removal was achieved by a violation of government regulations or a denial of due process. I will next address the authority of the INS to use undercover operations, and whether the San Diego sting violated INS regulations.

III. Analysis of INS Stings Under INS Regulations and Statutes

Although there is no statute or regulation that expressly authorizes an INS undercover operation, Congress has authorized a wide range of enforcement techniques that provide the INS with broad powers to enforce immigration laws. For example, the INS may interrogate a person it believes to be an alien without first procuring a warrant.[43] The INS also may conduct warrantless searches of vessels or cars within 100 miles of the U.S. border.[44] In a recent case, *United States v. Chen*,[45] the Ninth Circuit found that a warrantless search of a ship that was conducted 300 miles from shore was authorized by the broad language of Section 103 of the INA, which describes the authority of the Attorney General to enforce the immigration laws.[46] The court of appeals found authority for the search in language stating that the Attorney General may perform "such other acts as he deems necessary for carrying out his authority under the provisions" of the INA.[47] The Ninth Circuit found that Congress meant to authorize this search, notwithstanding its direct conflict with INS regulations that limit warrantless searches only to locations within *100 miles* of the international border.[48]

The search in *Chen* was the denouement of an undercover operation to apprehend alien smugglers. The Ninth Circuit opinion noted

41. *See* United States v. Palacios-Martinez, 845 F.2d 89 (5th Cir. 1988), *cert. denied.*, 488 U.S. 844 (1988).
42. *See* United States v. Proa-Tovar, 975 F.2d 592 (9th Cir. 1992).
43. INA § 287(a)(1), 8 U.S.C. § 1357(a)(1) (1988).
44. 8 C.F.R. § 287(a)(2) (1993).
45. 2 F.3d 330 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1558 (1994).
46. INA § 103, 8 U.S.C. § 1103 (1988).
47. INA § 103(a), 8 U.S.C. § 1103(a) (1988).
48. *Chen*, 2 F.3d at 333.

that the INS had obtained express approval of the extraterritorial undercover operation from the Undercover Operations Review Committee of the Department of Justice.[49] This approval bolstered the argument that the INS had the Attorney General's authority to exceed the express 100-mile limitation of the regulation. But nowhere in the opinion did the court raise any challenge to the legality of the undercover operations themselves.

A. INS Undercover Operations and Attorney General Guidelines

The Attorney General's Guidelines on INS Undercover Operations, referred to in *Chen*, begin by reciting the statutory authority that allows the INS to conduct undercover operations: "The following guidelines on use of undercover operations by the [INS] are issued under authority of the Attorney General as provided in 28 U.S.C. 509, 510, 533, and 8 U.S.C. 1103."[50]

The first two statutes refer merely to the general authority of the Attorney General to allow the operations.[51] Section 533 of Title 28 provides that the Attorney General may appoint officials "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General."[52]

The opening statement of the Attorney General's Guidelines reflects the purpose of INS undercover operations. The introduction asserts, without any citation to authority, that the use of undercover

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49. *Id.* at 334.
50. Guidelines, *supra* note 19, at 1.
51. 28 U.S.C. § 509 (1988) provides:
§509. Functions of the Attorney General. All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions —
(1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;
(2) of the Federal Prison Industries, Inc.; and
(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.

Id. (footnote omitted). 28 U.S.C. § 510 (1988) provides:
§510. Delegation of authority. The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

Id.
52. 28 U.S.C. § 533 (1988).

operations by the INS is a "lawful and essential technique."[53]

The Guidelines then define three categories of undercover operations and the corresponding review procedures within the Department of Justice that must be followed prior to initiating an undercover operation. The type of undercover operation involved will require the consent of either: (1) the INS Commissioner, with the concurrence of the Assistant Attorney General for the Criminal Division; (2) the Regional Commissioner; or (3) the District Director or Chief Patrol Agent.[54] The "graver the risk of harm or intrusiveness, the higher the approval level required."[55]

The Guidelines are written in a manner which limits the highest level of review to those situations identified as involving enumerated "sensitive circumstances."[56] In essence, if the local officer believes the proposed sting technique or mode of undercover operation does not involve any "sensitive circumstance," the INS District Director or Chief Border Patrol Agent may assume that no authorization from superiors is required. The enumerated "sensitive circumstances" provide for high-level review in several situations. A high degree of scrutiny is appropriate if the INS operation may interfere with a confidential relationship or induce a false confidential relationship, such as when agents pose as attorneys or members of the clergy.[57] Property matters also create a uniquely sensitive circumstance requiring the highest level of approval, such as when the INS uses funds to establish or operate a business or deposits funds in a bank or other financial institution.[58]

Other "sensitive circumstances" are designated to avoid criminal entrapment. For example, the highest level of review is required whenever the INS is acting as a "major participant" in a smuggling operation, or when an undercover INS employee or agent must commit a felony or other serious crime as a part of the operation.[59]

Additionally, where the undercover operation involves a "sensitive circumstance," District Officers must seek prior written authorization from the Commissioner and the Associate Attorney General.

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53. Guidelines, *supra* note 19, at 3. Although this statement appears to authorize general undercover operations as an investigatory technique, the procedural requirements of the Guidelines make it clear that requests for authorization must identify the "federal crimes" which have been or will be committed. *Id.* at 6-7.

In a section labeled "General Authority," the Guidelines state: "The INS may conduct undercover operations pursuant to these guidelines when such operations advance the enforcement of criminal statutes assigned to the investigatory jurisdiction of the INS or when otherwise appropriate to carrying out the Service's investigative function." *Id.* at 3.

54. *Id.* at 4.

55. *Id.*

56. *Id.*

57. *Id.* at 5-6.

58. *Id.* at 6.

59. *Id.* at 5.

The Guidelines itemize the contents of this request. Central to the request is the identification of the "criminal enterprise" under investigation.[60]

Even where a "sensitive circumstance" is not involved and the Guidelines simply delegate the authority to the District Director or Chief Border Patrol Agent to begin the operation, they require that the office involved prepare a written authorization request containing the following information:

> 1. A summary of the operation, and facts or circumstances that reasonably indicate that a federal crime, which is within the investigatory jurisdiction of the INS, has or will be committed.
> 2. Facts explaining why the undercover operation will be effective, what prior investigation has been conducted, as well as an estimate of the likelihood that the operation will produce evidence of the alleged criminal conduct or criminal enterprise.
> 3. An explanation that the operation will be conducted with minimum intrusion.
> 4. An explanation that the operation does not involve a "sensitive circumstance," and that one is not expected to arise.
> 5. An explanation of how any foreseeable participation in any illegal activity or the making of false representations by an undercover employee is justified by one the following factors:
> a. It is necessary to obtain information or evidence necessary for "paramount prosecutive" purposes;
> b. It will establish or maintain the credibility or the cover of the persons involved in the investigation; or
> c. It will prevent or avoid the risk of death or serious bodily injury of the persons involved in the investigation.
> 6. A statement indicating that the District Director or Chief Patrol Agent contacted the affected U.S. Attorney or Strike Force Chief and a statement describing their position towards the operation.[61]

When the request is submitted to the INS Commissioner, it is assigned to the Undercover Operations Review Committee. The Committee includes enforcement personnel and other INS employees designated by the Commissioner, as well as attorneys appointed by the Assistant Attorney General in charge of the Criminal Division.[62] The Committee reviews the authority request and may recommend approval to the Commissioner. In evaluating the benefits of the operation, the Committee is charged with examining its cost and other relevant factors including: the risk of harm to employees; the risk of financial loss to private individuals and businesses; the risk of liability and loss to the government; the risk of harm to reputation; the

60. *Id.* at 9-10.
61. *Id.* at 6-7, 13.
62. *Id.* at 11.

risk of harm to private or confidential relationships; the risk of invasion of privacy; the degree to which undercover employees might "entrap" a subject; and the "suitability" of the activity contemplated.[63]

Finally, as a general caveat, the Guidelines state that the District Director or Chief Patrol Agent must consult with the Central Office (now called "Headquarters") whenever "a serious legal, ethical, prosecutive, or Departmental policy question is presented by the operation."[64] If the District Director or Chief Patrol Agent approved the operation on his or her own authority, the District Director must submit a request to the INS Commissioner for continued authorization of the existing application.[65]

Before the July 1993 sting, Turnage and his subordinates at the San Diego District Office apparently believed that promises of work authorization and "amnesty" did not involve a "sensitive circumstance," and therefore did not require Commissioner pre-approval of the undercover operation.[66] In addition, the District Director appears to have violated the Guidelines when his office failed to prepare the written report that must follow every undercover operation not authorized by the Review Committee.[67]

One of the flaws of the approval delegation system detailed in the Guidelines is apparent in the San Diego sting. The San Diego District did not believe the sting raised any "serious legal" or ethical questions that would have required contact with the INS Commissioner and submission of the written authorization request.

Moreover, the Guidelines repeatedly indicate that the undercover operations are needed to prevent, detect, or prosecute "criminal" violations. As previously noted, in most cases the failure of aliens to appear at deportation proceedings after receiving a Bag and Baggage Letter is not a crime. Even for the few classes of deportable aliens who could be prosecuted for failure to appear, there is no history or practice of prosecution under this statute. In fact, deportation orders are issued after civil proceedings.

Since the Guidelines were enacted to regulate criminal investigations, their misuse could provide a legal basis for a challenge to the operation. The Guidelines expressly try to prevent a subject of an

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63. *Id.*
64. *Id.* at 17.
65. *Id.*
66. Marcus Stern, *Federal Officials Take the Sting out of INS*, SAN DIEGO UNION-TRIB., Aug. 13, 1993, at B-1, B-4. "The operation was hatched at the INS San Diego headquarters and approved by INS regional headquarters in Laguna Niguel and by midlevel headquarters officials in Washington." *Id.*
67. *See* Guidelines, *supra* note 19, at 17. The San Diego District Office did not produce such an authorization request in response to a Freedom of Information Act Request filed by the author in January 1994.

undercover operation from using the Guidelines to create legal rights. In part VII of the Guidelines, the following statement appears:

> *Reservation*
> These guidelines on the use of undercover operations are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, and they do not place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.[68]

This nicely drafted paragraph might be sufficient to prevent a legal challenge based solely on the Guidelines. The failure to comply with these Guidelines and the absence of any express statutory or regulatory authority for the INS to conduct undercover operations might, however, be part of a challenge to administrative action as violating the scope of the agency's authority or *ultra vires.*

As noted above in the *Chen* case, the lack of specific statutory or regulatory authority to conduct a warrantless search in international waters 300 miles from shore led a U.S. District Court to dismiss an indictment that was later reinstated by the Court of Appeals in part because the INS had followed the undercover Guidelines.[69] If, despite the "Reservation" provision, a court can use the Guidelines to uphold government action, it is possible that individuals could use the Guidelines to challenge government action.[70]

B. The Revised INS Policy

Shortly after the San Diego sting, Acting Commissioner Chris Sale issued a memorandum to INS District Offices and agents instructing them about new procedures for undercover operations.[71] Citing a need for special caution "concerning the Service's standing in the community and the social sensitivity of immigration enforcement actions," the memorandum required that "all future operations

68. *Id.* at 19.
69. *See supra* notes 45-49 and accompanying text.
70. *But see* Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1511 (11th Cir. 1992) (INS Guidelines on interdiction of aliens on international waters did not create substantive enforceable rights), *cert. denied*, 502 U.S. 1122 (1992). The dissent in this case believes the Administrative Procedure Act does allow a cause of action based on INS regulations and guidelines. *Id.* at 1519-24 (Hatchett, J., dissenting); *see also* Montilla v. INS, 926 F.2d 162, 167 (2d Cir. 1991) (stating that violations of procedures which are not yet formal regulations may state a cause of action even where the internal procedure is more rigorous than otherwise required by statute) (quoting Morton v. Ruiz, 415 U.S. 199, 235 (1974)).
71. Memorandum from Chris Sale, *supra* note 17.

employing 'sting' techniques must be approved, in writing, by the Executive Associate Commissioner, Operations and by the Associate Attorney General prior to implementation."[72] The memorandum reaffirmed the requirement that a complete description of the operation be submitted at least thirty days in advance of its proposed start.

In December 1993, the new INS Commissioner, Doris Meissner, revised the August 11th memorandum and established a more detailed procedure for the authorization of sting operations.[73] Her memorandum continued the requirement that all undercover operations be authorized in writing and added an important prohibition. The memorandum specifically prohibited any sting operation that includes:

> [A]ny INS-directed activity intended to induce, through misrepresentation conveyed in print, by voice, or in person, specifically targeted law violators of the [INA] to present themselves to an INS facility or office for administrative proceedings or to receive some seemingly valid INS benefit, for the purpose of apprehending them.[74]

The memorandum shows that it is clearly Commissioner Meissner's intention to prohibit sting operations that involve false statements relating to work authorization or other immigration benefits. Yet the memorandum assumes that sting operations could be used apart from criminal enforcement. However, there is no statutory citation authorizing undercover operations in a civil context other than a general reference to the authority of the Attorney General to enforce the immigration laws.

C. Analysis of INS Regulations Related to the Sting Operation

This Section will consider whether the San Diego sting operation violated specific INS regulations. Generally, the federal courts have allowed aliens to challenge INS actions which violate INS regulations. The Supreme Court strongly articulated the requirement that the INS follow its own regulations in *Accardi v. Shaughnessy*,[75] and this principle became known as the *Accardi* doctrine. This doctrine has been widely used to require administrative agencies to follow their own regulations.[76] It is based on the fundamental concept of

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72. *Id.*
73. Memorandum from Doris Meissner, *supra* note 20.
74. *Id.* at 2.
75. 347 U.S. 260 (1954). In the earlier case of Bridges v. Wixon, 326 U.S. 135 (1945), the Supreme Court had reversed a deportation order because the government failed to follow its own regulation regarding the form and type of evidence to be used in the proceeding.
76. *See* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974). See the discussion of equitable estoppel against the INS in Section IV, *infra*.

due process — that the government must apply rules fairly and uniformly. The *Accardi* doctrine holds that an agency cannot issue rules that affect individual rights and then choose to disregard them.[77] Under this doctrine, an alien can seek a new deportation hearing based on the INS' failure to follow its regulations.

In the Ninth Circuit, before a new hearing will be ordered, the alien must demonstrate that the regulations were designed to benefit the alien and that he or she was prejudiced by the INS' failure to adhere to them.[78] In adopting the Ninth Circuit's modification of the doctrine, the Board of Immigration Appeals held that prejudice may be presumed where compliance with the rule is mandated by the Constitution or "where an entire procedural framework designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency."[79]

As mentioned above, no regulations specifically address undercover operations. Nevertheless, the San Diego sting, carried out to execute outstanding orders of deportation, may have violated the INS' own regulations governing the execution of deportation orders.[80]

The regulations that concern the execution of a deportation order allow the INS to apprehend an alien and hold her in custody for seventy-two hours before executing the final order of deportation.[81] The regulations also allow the alien to sign a waiver of the seventy-two-hour delay.[82] Assuming that aliens apprehended in the San Diego sting were under a final order of deportation and that the INS complied with the seventy-two-hour delay or obtained signed waivers, the sting operation would not, on the surface, appear to violate 8 C.F.R. § 243.3 (1993). However, the regulations might have been violated by this sting operation if (1) the alien was represented by counsel and counsel was not notified, or (2) the alien could demonstrate that the waiver was not a "knowing and voluntary" waiver as required by the regulation.[83] To analyze these issues, it is important

77. *Accardi*, 347 U.S. at 266-67.

78. *See* Calderon-Medina v. United States, 591 F.2d 529, 532 (9th Cir. 1979). *But see* Montilla v. INS, 926 F.2d 162, 168-69 (2d Cir. 1991) (specifically refusing to adopt a prejudice requirement).

79. *See In re* Garcia-Flores, 17 I. & N. Dec. 325, 329 (BIA 1980).

80. It is my contention that all sting operations used to enforce non-criminal immigration laws raise due process concerns. The general due process considerations are raised in Section IV, *infra*.

81. 8 C.F.R. § 243.3(b) (1993).

82. *Id.* The waiver must be "knowing and voluntary." *Id.*

83. *Id.*

to have some background about the history of INS enforcement of deportation orders and about the prior regulation, which required advance notice before arrest for deportation.

1. The Statutory Right to Counsel

Until 1986, the INS regulations required that the INS send the alien a Bag and Baggage Letter.[84] The purpose of the letter was to allow the alien time to prepare for departure. Even more significantly, the letter signalled that the alien must take action if he wished to prevent deportation. Depending on the procedural posture of the case, the alien would seek a discretionary stay of deportation, file a petition for review with the court of appeals, or file a writ of *habeas corpus* and request a stay to prevent removal.[85]

In 1986, the INS amended the regulation to delete the requirement of a Bag and Baggage letter because the INS found that seventy-six percent of the aliens ordered to surrender failed to appear.[86] The INS argued that the Bag and Baggage procedure interfered with the "orderly and just administration" of the immigration laws.[87] While the physical presence of the alien within the United States is essential to obtaining judicial review, the INS maintained that the regulation eliminating the requirement of written notice prior to execution of the deportation order was not substantive in nature and did not affect constitutional rights.[88]

Although not addressed in the regulatory comments, many advocates believe the change was made to reverse a series of Ninth Circuit decisions (described below), which used the failure of the INS to provide a copy of the Bag and Baggage Letter to the alien's attorney as a basis for finding that the deportation orders had not been legally executed and were therefore void. A second and very important ground for the Ninth Circuit decisions was that the successful

84. *See supra* note 12.

85. *See* INA § 106, 8 U.S.C. § 1105a (1988). The right to appeal is not completely open-ended. Aliens who wish to file a petition for review must file within 90 days of the final decision of the BIA, or within 30 days if the aliens are considered to be aggravated felons. If that time has passed, the alien may have only the writ of *habeas corpus* as a final method of seeking review of the deportation order. For a discussion of the proper avenues to seek judicial review or a stay of an order of deportation, see Chapters 9 and 10 of IMMIGRATION LAW AND DEFENSE, *supra* note 33.

86. *See* 51 Fed. Reg. 3471 (1986). The INS does not say what portion of the 76% of the aliens failing to appear upon receipt of a Bag and Baggage letter went on to pursue lawful judicial review or other permissible avenues of staying the deportation order.

87. *Id.*

88. 51 Fed. Reg. 23,042 (1986). In the comment accompanying the notice of the change in the regulations concerning the removal of the Bag and Baggage letter requirement, the INS stated, "The rule is procedural and not substantive in nature; neither constitutional due process not [sic] statutory language require provision of such a notice." 51 Fed. Reg. 3471 (1986).

removal of the aliens also would have ended their ability to seek judicial review. Thus, the Ninth Circuit had effectively carved out an exception to the absolute rule that physical removal ends judicial review under Section 106 of the INA, in large part because the regulations required advance notice before executing the deportation order and that all notice had to be furnished to the alien's attorney.[89]

In the first Ninth Circuit case, *Mendez v. INS*,[90] Mr. Mendez was found deportable as an alien who had been convicted of a crime of moral turpitude with a sentence of at least one year. He appealed the deportation order to the BIA. Sixteen days after the BIA dismissed his appeal, the court in which he was convicted vacated his original criminal sentence and reduced it to nine months. This vacation of the original sentence removed the ground of deportability. Twenty-four days after the BIA dismissal, the INS mailed Mr. Mendez a Notice to Appear for Deportation.[91] The INS did not notify Mr. Mendez's attorney of record. Mr. Mendez reported to the INS as requested and explained that his sentence had been vacated. Despite this, the INS immediately deported Mr. Mendez, without giving him a chance to contact his lawyer.

The Ninth Circuit found that deporting Mr. Mendez without sending notice to the counsel of record violated both regulatory and statutory rights to counsel.[92] Because the Ninth Circuit found that the INS had violated its own procedural regulations, it did not reach

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89. As previously noted, the ability to seek judicial review after removal would be of particular importance to the aliens deported after apprehension in the San Diego sting operation, because it might provide their only forum in which to challenge the legality of the sting and to prevent the dramatic legal consequences of an executed order of deportation. *See supra* Section II.

90. 563 F.2d 956 (9th Cir. 1977).

91. The regulations in effect until 1986 required the INS to send the notice 72 hours in advance of the time set for the execution of the deportation order. 8 C.F.R. § 243.3 (1985) (amended 1986). The relevant text of the prior regulation provided:

> Once an order of deportation becomes final, an alien, not in the physical custody of the Service, shall be given not less than 72 hours advance notice in writing of the time and place of his surrender for deportation. . . . The advance notice requirement above does not preclude taking an alien into custody at any time, including any time within the 72 hour period. . . . However, in such an instance, the alien's deportation shall not be effected prior to the expiration of 72 hours from the time of apprehension or of the 72 hour notice period, whichever is less.

Id.

92. *Mendez*, 563 F.2d at 959. The regulation involved was 8 C.F.R. § 292.5(a) (1993), which provided that whenever notice was required to be given to an alien, the same notice must be given to the attorney of record. The court cited a statutory right to counsel in INA § 242(b), 8 U.S.C. § 1252(b) (1988). *See* GORDON & MAILMAN, *supra* note 12, § 72.04[12][D] (discussing the right to counsel in deportation hearings).

the issue of whether the INS action had violated constitutionally protected due process. It ruled that the section 106(c) bar to judicial review did not apply to aliens who had been removed illegally by the government.[93]

In a later case, *Zepeda-Melendez v. INS*,[94] the Ninth Circuit again addressed the requirement of advance notice to the alien and his counsel. In that case, the alien already was in INS custody during the proceedings and was removed without prior written notice to the alien or his counsel. The alien sought review of his deportation, arguing that the failure to provide written advance notice violated the regulation requiring notice and also violated his statutory right to counsel.[95] The INS argued that the notice requirement did not apply to aliens already held in INS custody. The Ninth Circuit found that, regardless of whether the alien was in or out of custody, "an alien's counsel must be made aware of the alien's deportation in order to provide representation."[96] The Ninth Circuit held that the INS' failure to inform the attorney of record that the alien was about to be deported violated the alien's statutory right to counsel under section 242(b) of the INA.[97]

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93. *Mendez*, 563 F.2d at 958. Not all of the federal courts of appeals have agreed with the Ninth Circuit exception to the bar to further judicial review after the departure or removal of the alien. The Fifth Circuit, in Quezada v. INS, 898 F.2d 474 (5th Cir. 1990), held that once an alien has been deported, the court has no jurisdiction to consider a petition for review under the plain, unequivocal language of INA § 106(c). *Id.* at 476. In *Quezada*, the Fifth Circuit relied on its earlier *dicta* in Umanzor v. Lambert, 782 F.2d 1299, 1303 (5th Cir. 1986), in which the court had characterized the *Mendez* exception as a "sinkhole" where the exception would swallow the rule. *Quezada*, 898 F.2d at 476. The Tenth Circuit also has refused to allow review once the alien has been deported. *See* Saadi v. INS, 912 F.2d 428 (10th Cir. 1990) (a *per curiam* decision which relies on the language of the statute; there was no allegation of illegal execution of the deportation order or of a violation of due process). In a 1993 decision, the Second Circuit squarely adopted the Fifth Circuit position that because the language of INA § 106(c) is "unequivocal" if an alien has been removed from the United States, the court of appeals lacks subject matter jurisdiction to review the deportation proceeding. Roldan v. Racette, 984 F.2d 85, 90-91 (2d Cir. 1993).

Other circuit courts have created an exception to the bar to further judicial review where the alien can raise a "colorable claim" that due process was violated. *See* Marrero v. INS, 990 F.2d 772 (3d Cir. 1993) (due process allegation concerning adequate time to retain counsel and failure to properly serve the Order to Show Cause); *see also* Juarez v. INS, 732 F.2d 58 (6th Cir. 1984) (stating a willingness to find a due process exception); Castaneda-Suarez v. INS, 993 F.2d 142, 145 (7th Cir. 1993) (removing an alien who had raised "good faith" challenges to a deportation order would raise "significant equitable, if not constitutional concerns"); Joehar v. INS, 957 F.2d 887 (D.C. Cir. 1992) (discussing the *Mendez* exception without adopting it).

94. 741 F.2d 285 (9th Cir. 1984).

95. *Id.* at 287.

96. *Id.* at 289.

97. *Id.* As this article was being finalized for publication, a panel of three Ninth Circuit judges issued an opinion cutting back on the *Mendez* exception and limiting the scope of the *Zepeda-Melendez* requirement of notice to counsel. In Arreaza-Cruz v. INS 39 F.3d 909 (9th Cir. 1994), the court ruled that where the BIA found the alien deportable and granted a 30 day period of voluntary departure, the subsequent failure to notify

Due to regulatory changes, an alien apprehended in a sting operation can no longer demand the advance warning of a Bag and Baggage Letter.[98] However, the language of these Ninth Circuit cases supports the argument that the statutory and constitutional right to an attorney prohibits the removal of an alien who is represented by counsel unless prior notice is given to that counsel. The INS regulations concerning representation specifically provide that where the INS is required to give notice to the alien, the INS also must give the same notice to the alien's attorney or representative of record.[99] And, although the current language of the deportation regulation does not require advance notice of the intention to apprehend the alien and execute the deportation order, the INS is required to serve the alien with a Form I-294.[100] Based on the regulation requiring notice to the counsel and alien, and the holding of *Zepeda-Melendez*, it appears that the alien's attorney must also be given this form and must be notified that the alien is in custody.[101]

2. *A Knowing and Voluntary Waiver*

The aliens who were arrested in the sting operation were entitled to a seventy-two-hour delay of their deportation. While it was permissible for the alien to waive that delay, the waiver must have been

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counsel of the imminent execution of the order of deportation seven weeks following the expiration of the period of voluntary departure did not violate the statutory right to counsel. 39 F.3d at 911. Further, the Ninth Circuit ruled that the INS did not have to hold Mr. Arreaza for 72 hours prior to the execution of the order of deportation because the court interpreted 8 C.F.R. § 243.3(b) as firmly establishing that the 72 hour period began to run from the date of service of the final order of deportation when the alien is not in custody at the time of the service of the final order. 39 F.3d at 911. This decision might indicate that the Ninth Circuit is moving away from the broader due process protections suggested in *Mendez* and *Zepeda-Melendez*, and that it will be much harder for aliens removed by the INS to argue exceptions to the bar to judicial review found in INA § 106.

98. *See supra* note 12.

99. 8 C.F.R. § 292.5(a) (1993).

100. INS Operating Instruction § 243.3(c). This form must recite the waiver language if the INS is not going to wait the 72-hour period before deportation. *But see* Arreaza-Cruz v. INS, 39 F.3d 909 (9th Cir. 1994). This operating instruction was not examined in *Arreaza-Cruz*.

101. The INS apparently believes that only telephonic notice to an attorney of record is required. On Form I-294, Notice of Country to Which Deportation Has Been Directed and Penalty for Re-Entry Without Permission, if the alien is waiving the 72-hour hold, there is a space for the deportation officer to note that he or she called the attorney of record (if applicable). *See* INS Operating Instruction § 243.3(c). However, 8 C.F.R. § 292.5(a) (1993) states that the attorney must be served whenever the alien must be served.

"knowing and voluntary."[102] Aliens who were not told of their rights to seek additional review of the outstanding deportation order or to request discretionary relief may not have made a knowing and voluntary waiver because they would not have known what rights they were giving up.

However, even if the aliens were told what rights they were waiving, a waiver could still be invalid if it was not express. In the case of *Montilla v. INS*,[103] although the immigration judge had informed Mr. Montilla of his right to counsel, the Second Circuit found that the judge failed to follow INS regulations concerning the alien's right to counsel in deportation proceedings because the judge *inferred* a waiver of that right from Mr. Montilla's silence and appearance without an attorney. In finding the waiver "unknowing and involuntary," the Second Circuit noted that the BIA had set forth a "meticulous care" standard to determine whether the waiver of the right to counsel was competently and knowingly made.[104]

In *Padilla-Agustin v. Ins*,[105] the Ninth Circuit reviewed the INS notice of appeal form and found that the inadequacy of the forms and instructions created a constitutional denial of due process. The court ruled that the form did not adequately explain the alien's need to state the grounds of his appeal with specificity.[106] The court noted that immigration laws and regulations are exceedingly complex and that due process requires aliens who seek to appeal to be given a fair opportunity to present their cases.[107]

Cases such as *Montilla* and *Padilla-Agustin* strongly support a due process challenge to the INS waiver language on the I-294 form, which only discusses the waiver of the seventy-two-hour waiting period and fails to explain the consequences of removal. Accordingly, an alien might be able to set aside his deportation if she were removed after the insufficient warning on Form I-294.

D. Other Regulations Governing INS Actions

The INS is a division of the Department of Justice, and INS personnel are subject to regulations governing the professional conduct of the department's employees.[108] Employees who fail to follow INS regulations, including the regulation requiring notice to counsel, could be subject to discipline by the Department of Justice. While these regulations might not create substantive rights for the aliens

102. 8 C.F.R. § 243.3(b) (1993).
103. 926 F.2d 162, 169 (2d Cir. 1991).
104. *Id.* (quoting Matter of Gutierez, 16 I. & N. Dec. 226, 228 (BIA 1977)).
105. 21 F.3d 970 (9th Cir. 1994).
106. *Id.* at 975. The form in question was Form EOIR-26.
107. *Id.* at 977.
108. *See* INS Operating Instruction § 207; 8 C.F.R. § 287 (1993).

who were harmed by the sting operation, they could add weight to the constitutional due process arguments discussed below. Other effects of filing disciplinary charges might be deterrence and the prevention of future unauthorized sting operations by INS officials.[109]

Moreover, attorneys representing the INS who knew that the INS was purposely and intentionally not contacting aliens' attorneys of record might be in violation of ethical rules controlling the state bar.[110] Ethical rules prohibit lawyers from directly communicating with a person who is represented by another lawyer without first notifying that counsel.[111]

IV. STING OPERATIONS AS A VIOLATION OF DUE PROCESS

Having explored statutory and regulatory arguments that might be raised to challenge the San Diego sting, I now turn to constitutional due process arguments. The focus of this discussion will be on the San Diego sting. However, as a general principle, due process considerations might prohibit the use of *any* undercover operation as a tool to gather evidence for a civil immigration proceeding or to enforce deportation or exclusion orders.

A. Aliens Are Entitled to "Some" Due Process of Law

Aliens are "persons" under the Fourteenth Amendment and, accordingly, are entitled to due process of law.[112] The amount of process due to an alien depends in large part on the legal classification

109. The presence of these types of disciplinary rules and procedures was a part of the Supreme Court's justification for refusing to apply the exclusionary rule to deportation proceedings. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1051 (1984). *See generally* Rosenbaum, *supra* note 31 (discussing INS disciplinary actions).

110. *See generally* Robert G. Heiserman & Linda K. Pacun, *Professional Responsibility in Immigration Practice and Government Service*, 22 SAN DIEGO L. REV. 971, 995-96 (1985).

111. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1983). Attorney General Janet Reno has recently proposed regulations which would govern and restrict the ability of government attorneys to contact represented parties. 59 Fed. Reg. 10,086 (to be codified at 28 C.F.R. pt. 77) (proposed Mar. 3, 1994). Although not specifically mentioned, INS attorneys should be covered by these new regulations as other attorneys "employed by the Department of Justice [and] authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States." *Id.* at 10,100.

112. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (the 14th Amendment is not limited to citizens but protects all persons within the United States); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (aliens, whether in the United States lawfully or not, are entitled to 5th and 6th Amendment protections). For a discussion of the historical development of due process and other constitutional rights of aliens, see

of the proceeding. Over the years, courts have repeatedly characterized deportation proceedings as "civil, not criminal" in nature.[113] In the landmark case of *Bridges v. Wixon* the Supreme Court stated:

> Though . . . not technically a criminal proceeding, [a deportation proceeding visits] a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[114]

Despite this careful language, in reality the rights of aliens in deportation proceedings are much more limited than in criminal proceedings. For example, indigent aliens do not have the right to counsel at the government's expense in deportation or exclusion proceedings.[115] The prohibition on bills of attainder[116] or *ex post facto* laws[117] do not apply, and there is no right to a speedy trial.[118] Additionally, the Supreme Court ruled in *INS v. Lopez-Mendoza*[119] that the Fourth Amendment exclusionary rule need not be applied to bar the introduction of illegal evidence in deportation proceedings. The Supreme Court based its decision on the important distinction between civil and criminal proceedings. According to the majority, the need for the exclusionary rule in deportation proceedings was obviated by opportunities for aliens to complain of improper conduct by INS officers, and by the lesser liberty interests at stake as compared to those of a criminal proceeding. Nevertheless, the Supreme Court and other courts have repeatedly ruled that aliens are entitled to protection of the right to a proceeding that meets the standards of fundamental fairness inherent in our understanding of due process of law.[120] Importantly, in *Lopez-Mendoza*, the Supreme Court acknowledged that the exclusionary rule might be used if there was a policy of widespread abuse or egregious violations which transgress notions of fundamental fairness.[121]

Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

113. Bridges v. Wixon, 326 U.S. 135 (1945).

114. *Id.* at 154.

115. The alien's right to counsel is expressly protected in the INA. *See* INA §§ 292, 242(b), 8 U.S.C. §§ 1362, 1252(b) (1988). The extent to which the right to counsel found in the 6th Amendment is the basis for the alien's right to counsel in civil deportation proceedings is disputed. *See generally* GORDON & MAILMAN, *supra* note 12.

116. Linnas v. INS, 790 F.2d 1024 (2d Cir. 1986), *cert. denied*, 479 U.S. 995 (1986).

117. Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952).

118. Argiz v. INS, 704 F.2d 384, 387 (7th Cir. 1983).

119. 468 U.S. 1032 (1984).

120. *Id.* at 1051 n.5.

121. *Id.* at 1050-51.

B. Does a Sting Operation Violate Due Process?

Usually, due process rights are analyzed under two broad categories: "procedural" and "substantive" due process. Procedural due process refers to the right to fair procedures and an opportunity to be heard.[122] Substantive due process refers to the fundamental rights and liberties of individuals who are entitled to, and therefore cannot be arbitrarily denied, constitutional protection, and individuals who have the right to be free from outrageous or unconscionable governmental conduct.[123] Both procedural and substantive due process claims can be used to protect alien rights.[124]

1. Procedural Due Process

The San Diego sting operation provoked a number of aliens to appear voluntarily at the INS office to receive promised work authorization benefits. Instead, these individuals were apprehended, and several were immediately expelled from the country. The expulsions

122. Mathews v. Eldridge, 424 U.S. 319 (1976).

123. I will focus on the substantive due process cases which discuss whether government conduct is outrageous or unconscionable rather than on those cases concerning a protected liberty interest. It might be possible to create a substantive due process argument by asserting that the alien has a liberty interest that is violated by undercover operations. However, recent Supreme Court cases would indicate that this argument would most likely fail. *See, e.g.*, Reno v. Flores, 113 S. Ct. 1439 (1993) (majority found no liberty interest in juvenile alien's challenge to INS regulations concerning release from detention prior to deportation or exclusion hearings; concurring opinion found the regulation met a heightened level of scrutiny that satisfied due process); *see also* Collins v. City of Harker Heights, 503 U.S. 115 (1992) (articulating a standard of cautious expansion of liberty interests).

124. Although both procedural and substantive due process claims can be brought, many commentators have noted that procedural arguments succeed where substantive claims fail. *See, e.g.*, Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965. The main obstacle to the development of alien substantive rights has been the plenary power doctrine. This doctrine argues that Congress has plenary power to define the rights of aliens as an inherent power to define the nation's sovereignty. The degree to which the plenary power doctrine survives intact is debatable. I have not chosen to discuss the plenary power doctrine in part because I believe that the use of undercover operations to enforce deportation orders in no way touches on issues of national sovereignty. Further, the doctrine would not unduly control, although it may shadow, the constitutional due process analysis.

For a discussion of the plenary power doctrine, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Constitutional Power*, 1984 SUP. CT. REV. 255; Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Motomura, *supra* note 112. *See also* Brian K. Bates & Bruce A. Hake, *A Tale of Two Cities: Due Process and the Plenary Power Doctrine*, 92-94 IMMIGR. BRIEFINGS, Apr. 1992, at 1.

terminated the aliens' rights to further discretionary relief and to administrative and judicial review. As discussed above, the Ninth Circuit has allowed exceptions to this absolute rule only where aliens have shown the expulsion was illegally executed, or where other circuits have expressed a willingness to continue judicial review because the alien has raised a colorable claim of a due process violation.[125] The Ninth Circuit did not reach the issue of whether failure to provide notice to the alien before executing the deportation order violated due process because the INS had violated statutory or regulatory rights.

If an alien deported pursuant to the sting were to challenge the expulsion as a violation of due process, the Ninth Circuit (and possibly the Third, Sixth and Seventh Circuits) might find that, given the serious legal effects of the expulsion, fundamental fairness requires that the alien, at a minimum, be given an opportunity to avail herself of statutory rights to judicial review and regulatory rights to seek discretionary relief.[126]

The usual procedural due process analysis begins with the balancing test set forth in *Mathews v. Eldridge*.[127] Under this test, a court must consider the private interest at stake, the government interest involved, and the increase in the accuracy of determinations that would be gained from added procedures or precaution.[128] To apply this balancing test to a sting aimed at individual aliens, one must weigh the interests of the alien and the increase in decisional accuracy that further process could bring against the interest of the government in expeditious enforcement.

The individual, private interests involved are the alien's rights (1) to remain in the United States, (2) to seek administrative or judicial review afforded by Congress, and (3) to seek relief from deportation, such as a discretionary grant or a reinstatement of voluntary departure, which would not in itself be an obstacle to future entries by the alien. In addition, aliens may have other protected interests, such as the statutory right to counsel.

The government has a legitimate interest in enforcing deportation orders and in the efficient use of resources to remove aliens who are under final orders of deportation.[129] Another interest might be to find those aliens who have evaded detection.[130] The INS has reported

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125. *See supra* notes 74-81 and accompanying text.

126. An example of discretionary relief would be to request a reinstatement of voluntary departure. Leaving under a grant of voluntary departure has fewer legal consequences. *See* IMMIGRATION LAW AND DEFENSE, *supra* note 33, § 8.6.

127. 424 U.S. 319 (1976).

128. *Id.* at 335.

129. In defense of the San Diego sting operation, the INS claimed that the agency did not have the resources to "knock on 600 doors." Jahn, *supra* note 4.

130. This motive would not appear to be present in the San Diego sting, as the

that it has great difficulty achieving voluntary compliance with Bag and Baggage Letters, which inform aliens of the date and time that the deportation order will be executed. One report said that seventy-six percent of the aliens failed to respond to these letters.[131] Members of Congress have repeatedly called for stricter enforcement, and the Clinton Administration has increased the number of border patrol officers. The INS has a legitimate interest in enforcing deportation orders. Failure to execute the orders would vitiate a large part of the federal government's power to control immigration, because to control the borders, the government must have the power to prevent illegal entry and to remove those who escape detection or who violate immigration laws after entry.

The third factor of the *Mathews v. Eldridge* balancing test requires an analysis of how more process would increase the accuracy of government decision making. The arrest after the sting undoubtedly took the aliens by surprise and gave them little or no opportunity to consult with counsel. The apprehended aliens could argue that they could have properly prepared requests for discretionary relief only if they had notice of the execution of the deportation order. Further, the aliens need to be afforded an opportunity to challenge the underlying premise that they are subject to a valid deportation order, because as the facts of this situation attest, the INS *does* make mistakes and might have arrested people who are not actually subject to deportation.[132] Finally, as previously explained, the successful removal of the alien would potentially raise a bar to further judicial review because of the statutory prohibition on review once the alien has physically left the United States.[133] Accuracy in decision making is safeguarded by opportunities for administrative and judicial review. This loss of all rights to further judicial review and to challenge the government conduct adds great weight to the alien's claim of a procedural due process violation in the sting operation and subsequent deportation. Further, there is the huge loss of trust in the INS that will make future dealings with many aliens more difficult.

In balancing the government's goal of executing outstanding orders and the alien's rights to due process, a court may well find that,

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aliens were located by mailing letters to addresses in INS files.

131. *See supra* note 86.

132. In newspaper accounts, the INS reported that a number of aliens were released and not immediately removed because they were able to convince the INS officer that the deportation order was not final, or in the case of at least two individuals, that they had become lawful permanent residents. *See supra* note 3.

133. *See supra* notes 27-31 and accompanying text.

under the totality of the circumstances, the government's interests in efficiency, and even in enforcing immigration laws, were outweighed by the need to provide fundamental fairness to the aliens. In part, this might be based on the fact that the efficiency goal was not well served by using the sting as an enforcement technique. The San Diego INS sent 600 registered letters and reported that approximately sixty people appeared in response. This ten percent response rate is much less than the twenty-five percent rate reported in response to the usual Bag and Baggage Letter.[134] Further, a large number of the aliens apprehended in the sting were released because the INS discovered that some had established other rights to remain in the United States, or because the INS had arrested a person of the same name who was not the person intended to be deported. Ultimately, the INS deported twenty people pursuant to this sting.

Finally, a court might conclude that the sting's negative impact on the credibility and trustworthiness of the INS would erode its ability to obtain voluntary compliance, and that any short-term efficiency would be outweighed by long-term detrimental effects. Perhaps the greatest problem in raising a procedural due process challenge is the nature of the remedy. Traditionally, the remedy to a due process violation is to afford more process. If the court found that the sting had violated procedural due process, the relief to the apprehended aliens probably would be limited. Aliens apprehended in the sting and deported might argue that, at a minimum, they must be returned to the United States or allowed to proceed with petitions for review or *habeas corpus* proceedings.

Ultimately, despite winning the procedural due process challenge, many of the aliens who were apprehended in the sting might be deported because no amount of procedural process could immunize them against this consequence. Succeeding in the due process challenge only ensures that the government uses fair procedures in exercising its deportation power.[135] A long-term consequence of challenging the sting on procedural due process grounds would be

134. The San Diego INS stated that a Bag and Baggage letter had previously been sent to the 600 aliens who received the sting letter. *See* Reza, *supra* note 1, at A23. Assuming that this is true and the aliens received the prior letter, the 10% response would be an increase in the overall rate of apprehension because these 60 people had previously been in the 76% who disregarded the surrender notice.

135. Joshua Schwartz has suggested that in situations where additional due process will not correct the harm suffered, a court might create a form of "remedial due process" which would in effect estop the agency from enforcing the regulation or law against the person deprived of due process. *See* Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its Own Regulations or Other Misconduct*, 44 ADMIN. L. REV. 653, 736-42 (1992). The doctrine of estoppel against the government is discussed in the following section.

either that a court might enjoin future sting operations used to execute deportation orders, or that stings would not be used in the future due to the INS' reluctance to face further litigation.

Procedural due process probably is not implicated in undercover operations other than those used to execute deportation orders. For example, if the INS used an undercover operation to detect and commence deportation proceedings, procedural due process would not necessarily be at issue provided that the undercover actions did not eliminate any of the alien's rights to the usual deportation hearing procedures. However, if the undercover operation was conducted in an outrageous manner, the alien might seek an exclusionary-type remedy such as suppression of the arrest or dismissal of the deportation proceedings. These types of challenges, however, traditionally have been cast as substantive due process challenges, and it is to substantive attacks on governmental conduct that I now turn.

2. *Substantive Due Process*

Sting operations used in non-criminal proceedings raise substantive due process issues, particularly the right to be free from unreasonable and unconscionable government behavior. To date, the cases discussing the substantive due process implications of undercover operations have been confined to criminal prosecutions. To my knowledge, the ability of an agency to use undercover operations in connection with civil enforcement efforts has not previously been explored by the courts. In administrative law, equitable estoppel has been used as a theoretical basis for seeking a remedy to unfair governmental conduct. The doctrine of equitable estoppel is related to the constitutional due process protections in that both seek to prevent overreaching or unfair behavior. This Section will begin with a discussion of the limited availability of successfully using estoppel against the government before turning to a substantive due process analysis.

a. Equitable Estoppel As a Due Process Remedy

The doctrine of equitable estoppel is used to correct a harm that one party has caused another due to reliance on a false statement or misrepresentation. Although not directly styled as a substantive due process challenge, individuals have argued that the agency is equitably estopped from enforcing its regulations due to the agency's misrepresentations or its affirmative misconduct. In the vast majority of

cases where an individual has claimed equitable estoppel against the government, the government has prevailed on a theory of government immunity from estoppel.[136] However, the Supreme Court has continued to suggest that there may be exceptions to the bar — in other words, that some forms of governmental or agency conduct should be subject to equitable estoppel, with the most likely exception being where the government conduct can be characterized as "affirmative misconduct."[137]

Aliens seeking to challenge the INS sting would most likely try to use this "affirmative misconduct" exception to raise a claim of equitable estoppel. This could be a successful theory if the court was convinced that the INS sting operation violated its own regulations and that the INS' deliberate deceit in making false promises of amnesty constituted affirmative misconduct.[138] In a rare case granting equitable estoppel to an alien, the Second Circuit Court of Appeals was influenced by the agency's violation of its own regulations as well as the harshness of the deportation sanction.[139] In the majority of cases in which an alien has sought estoppel, however, courts have not been willing to find affirmative misconduct or to grant estoppel on another theory.[140]

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136. *See, e.g.*, Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), *reh'g denied*, 497 U.S. 1046 (1990).

137. *See* INS v. Hibi, 414 U.S. 5, 8 (1973) (the first case using the test of "affirmative misconduct"). Joshua Schwartz has summarized these potential exceptions as "cases involving proprietary activities, those alleging affirmative governmental misconduct, those not involving the federal fisc, those involving irrevocable prejudice to private interests or infringement of some minimum standard of decency, and cases diverging in some factual respect from the pattern of private estoppel claims." *See* Schwartz, *supra* note 135, at 665-66 (footnotes omitted).

138. A court might prefer to review the INS conduct in the sting operation under a theory of equitable estoppel, for it would narrow the decision to the conduct of this particular sting operation and the misrepresentation made in the amnesty letter. By limiting the analysis to equitable estoppel and using the "affirmative misconduct" exception to government immunity, the court would not have to reach the question of whether the sting violated either procedural or substantive due process.

139. *See* Corneil-Rodriguez v. INS, 532 F.2d 301 (2d Cir. 1976) (failure of State Department officer to follow regulations by warning alien resulted in alien taking an action which made her deportable). *But see* Dhine v. Slattery, 3 F.3d 613 (2d Cir. 1993) (expressly limiting *Corneil-Rodriguez* to its facts). *See also* Moser v. United States, 341 U.S. 41 (1951) (alien was allowed to naturalize due to his reliance on erroneous government advice). Although the Supreme Court does not expressly use the term "equitable estoppel," and in fact denied relying on an estoppel theory, this case is used to exemplify an exception to the absolute government immunity. It is difficult to reconcile the Supreme Court's action in *Moser* with the many subsequent decisions denying aliens equitable estoppel in similar situations.

140. *See, e.g.*, Reno v. Catholic Social Serv., Inc., 113 S. Ct. 2485, 2504-05 (1993) (rejecting equitable estoppel as a ground for extending the legalization application period although the INS failed to properly define eligibility criteria in its regulations); INS v. Pangilinan, 486 U.S. 875 (1988) (no affirmative misconduct in revoking authority of American Vice Consul to naturalize aliens before end of application period, thus barring applications by Filipino war veterans for naturalization); INS v. Miranda, 459 U.S. 14

The Supreme Court's threshold requirement of proving "affirmative misconduct" before equitable estoppel can be granted focuses on the improper or excessive action of the government.[141] Similarly, in cases challenging undercover operations, criminal defendants have attacked the deceit inherent in an undercover operation and have sought to estop the government from bringing the prosecution. These challenges are usually raised under the Due Process Clause as violations of the substantive right to be free from outrageous governmental conduct. Given the difficulty of successfully maintaining an equitable estoppel claim, aliens apprehended in undercover operations may need to employ these closely related substantive due process challenges in criminal law.

b. Criminal Cases Raising Substantive Due Process Challenges to Undercover Operations

The cases that have considered the legitimacy and constitutionality of undercover operations usually begin with the recitation from *Sorrells v. United States*[142] that undercover operations are not in and of themselves unconstitutional because the government agents must use "artifice and stratagem . . . to catch those engaged in

(1982) (18 month delay in adjudicating case, notwithstanding resulting prejudice, is not affirmative misconduct); Stone v. INS, 13 F.3d 934 (6th Cir.) (wrong advice from INS employee about deadline to file appeal is not affirmative misconduct), *cert. granted*, 114 S. Ct. 2098 (1994); Dhine v. Slattery, 3 F.3d 613 (2d Cir. 1993) (limiting *Corneil-Rodriguez* to its facts and rejecting estoppel claim); Jeziorski v. INS, 990 F.2d 1258, 1993 WL 94714 (9th Cir. 1993) (unpublished disposition) (no affirmative misconduct in government's rejection of claim for political asylum); Azizi v. Thornburgh, 908 F.2d 1130 (2d Cir. 1990) (negligent conduct of INS insufficient to support estoppel); Chien-Shih Wang v. Attorney General, 823 F.2d 1273 (8th Cir. 1987) (INS failure to tell alien his application was incomplete was not a basis for estoppel even when law subsequently changed and alien lost right to immigrate); Taneja v. Smith, 795 F.2d 355 (4th Cir. 1986) (INS delay and carelessness insufficient to support estoppel); Mukherjee v. INS, 793 F.2d 1006 (9th Cir. 1986) (no estoppel of two year foreign residence requirement notwithstanding misrepresentation of government officer); Paul v. Smith, 784 F.2d 564 (4th Cir. 1986) (border officer's misrepresentation insufficient to support estoppel); Bolourchian v. INS, 751 F.2d 979 (9th Cir. 1984) (INS misrepresentation about nonimmigrant status insufficient to support estoppel); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976) (failure of American consul to explain the ability of family members to qualify for immigrant status as "following to join" under regulations was not sufficient misconduct for estoppel). *See also* Roxana C. Bacon, *Estopping INS—'Affirmative Misconduct' Makes Positively Bad Law*, 5 IMMIGR. J. 8 (1982).

141. *See* INS v. Hibi, 414 U.S. 5 (1973).

142. 287 U.S. 435 (1932).

criminal enterprises."[143] The courts reason that in order to apprehend individuals engaged in crime, the government may lawfully use methods which are "neither appealing nor moral if judged by abstract norms of decency."[144] The cases cautiously but deliberately approve undercover actions, such as the use of paid informants,[145] the supplying of contraband to criminal defendants in order to gain confidence or establish credibility,[146] and the infiltration of criminal organizations.[147] With hestitation, the Ninth Circuit approved the INS infiltration of church organizations where the INS had evidence that the church members were engaged in a conspiracy to violate criminal immigration laws.[148] The idea that the defendants participated in a crime was central to the holdings in all of these cases.

The Supreme Court has explored the use of criminal prosecution mechanisms in civil prosecutions brought by the government. In *United States v. Sells Engineering, Inc.*,[149] the Supreme Court ruled that attorneys for the Civil Division of the Department of Justice could not automatically use evidence gathered by the Criminal Division during grand jury proceedings.[150] The Court examined the history and power of the grand jury proceeding as a tool necessary to criminal enforcement and found that unlimited access to the evidence raised three fundamental concerns. First, the disclosure of evidence gathered during a grand jury proceeding would weaken the secrecy of those proceedings and would necessarily broaden the number of individuals who had access to the information. The Court also recognized that witnesses testifying at grand jury proceedings might fear later exposure if the testimony could be used in civil cases. Second, prosecutors might unscrupulously manipulate grand jury proceedings to assist their colleagues in civil prosecutions. Third, the ability to use grand jury evidence would undermine the discovery and investigation limits normally imposed in civil and administrative proceedings. The Court concluded that access to grand jury material

143. *Id.* at 441.

144. United States v. Bogart, 783 F.2d 1428, 1438 (1986), *vacated on reh'g, cause remanded by* United States v. Wingender, 790 F.2d 802 (1986).

145. United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980), *cert. denied sub nom.* Perluss v. United States, 449 U.S. 1080 (1981).

146. United States v. Russell, 411 U.S. 423 (1973).

147. United States v. Marcello, 731 F.2d 1354 (9th Cir. 1984).

148. United States v. Aguilar, 883 F.2d 662 (1989), *cert. denied*, 498 U.S. 1046 (1991) (holding that the INS was permitted to infiltrate church organizations participating in the Sanctuary Movement, provided the undercover operation was made in good faith to detect criminal activity). *Cf.* Presbyterian Church v. United States, 870 F.2d. 518 (9th Cir. 1989) (vigilant review where the government conduct threatens protected constitutional rights such as the free exercise of religion).

149. 463 U.S. 418 (1983).

150. *Id.* at 428.

must be limited by judicial supervision of the release of the evidence,[151] and required that the attorney seeking release of the information provide a "strong showing of particularized need"[152] supporting the disclosure.[153]

Following the Supreme Court's lead, one can argue that INS undercover operations aimed at civil prosecutions are an improper use of a powerful tool and an unlawful expansion of the government's ability to gather evidence and conduct investigations for civil proceedings. The INS already has broad power to enforce the immigration laws. For example, border patrol agents and INS investigators do not need to have probable cause to question an individual about his status. The statute grants the power to interrogate "any alien or person believed to be an alien."[154] In addition, the INS may conduct warrantless searches at the border or its functional equivalent.[155] But these specific enforcement tools do not mean that the INS may use any method it chooses.[156] The ultimate limits on its activity are the notions of fundamental fairness and the Fifth Amendment right to due process.

Aliens who are in the United States and who cannot establish or maintain lawful status usually are not classified as "criminal" aliens.[157] Aliens who fail to maintain lawful status or who entered

151. Rule 6(e) of the Federal Rules of Criminal Procedure describes the grand jury secrecy and sets forth exceptions to the bar to disclosure.

152. *Sells Eng'g, Inc.*, 463 U.S. at 443 (adopting the test developed to determine if grand jury evidence could be released to a private party in Douglas Oil Co. v. Northwest Petrol Stops Northwest, 411 U.S. 211 (1979)).

153. This ruling was modified in United States v. John Doe, Inc., 481 U.S. 102 (1987), when the majority of the Supreme Court found that Rule 6(e) of the Federal Rules of Criminal Procedure did not prohibit the attorney who conducted the grand jury proceeding from consulting with a government attorney who would be bringing a civil complaint.

154. *See* INA § 287, 8 U.S.C. § 1357 (1988).

155. *Id.*; 8 C.F.R. § 287.1(a)(2) (1993) (defining the border as covering territory up to 100 miles away from the border). *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (applying a reasonable suspicion standard to uphold a warrantless search).

156. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (race and alienage alone are not sufficient to establish reasonable suspicion that person is present in the country without authorization); *see also* Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (racially motivated stop found to be an egregious violation of alien's constitutional rights).

157. There are some classes of aliens whose presence or entry is considered to be a criminal act, and whose continuing presence is considered to be criminal conduct. An alien who reenters the United States after deportation without express permission within the statutory prescribed period has violated 8 U.S.C. § 1326 (1988). The statute is also violated by aliens who enter or attempt to enter by evading inspection through willful misrepresentation or concealment of a material fact, and are guilty of a misdemeanor.

the country without documentation are known in the common vernacular as "illegals," but this term does not in and of itself transform those people into criminals.[158]

More important than the name given to these individuals is the reality that deportation proceedings repeatedly have been characterized as "civil" in nature. The problem here is that the INS is using criminal enforcement techniques in civil proceedings. But although civil proceedings contain fewer protections, they are still subject to the overarching test of fundamental fairness. If the government is going to use an undercover operation, a criminal law enforcement technique, as a part of civil enforcement of deportation laws, fairness dictates that a higher level of protection be afforded to those aliens caught in the sting. Either the INS must criminally prosecute the aliens who fail to appear to the Bag and Baggage Letter thus affording them more due process protections, or the Supreme Court must fashion a remedy to restore fairness to the deportation proceeding. In other words, the adoption of criminal enforcement techniques recasts the deportation proceeding and renders it a hybrid proceeding neither purely civil nor criminal. A recognition of this hybrid status mandates the reevaluation of the rights at stake and the procedures needed to ensure fundamental fairness. In reevaluating the limits on criminal enforcement techniques in deportation proceedings, courts may want to examine the general challenges raised against undercover operations in criminal proceedings and the types of concerns expressed by the Supreme Court about the scope and conduct of undercover operations.

In *United States v. Russell*,[159] the Supreme Court noted that in cases where the criminal defendant might not be able to prove that he was entrapped (a subjective standard), he might be able to challenge the government's action by arguing that it objectively violated due process, regardless of the defendant's character, predisposition, or conduct. The Supreme Court stated:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due

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Such violations can be prosecuted as felonies. *See* INA § 275, 8 U.S.C. § 1325 (1988); *see also* KESSELBRENNER & ROSENBERG, *supra* note 37, § 5.3.

158. Advocates of alien rights usually prefer the term "undocumented" to describe persons who remain in the United States without formal status. Although this language may seem like "politically correct" speech, the fact is that many United States citizens do not realize that merely being undocumented does *not* make a person a criminal, and the U.S. government is not using criminal sanctions to enforce the immigration statutes.

159. 411 U.S. 423 (1973).

Process Clause of the Fifth Amendment.[160]

The challenge against government conduct is usually raised in a motion to dismiss the criminal indictment and is a question of law for the court.[161] Few cases have found that government conduct reached the standard of fundamental unfairness outlined in *Russell*. A summary of the case law appears in the Ninth Circuit decision *United States v. Bogart*.[162] The opinion notes how sparsely the doctrine has been used to actually dismiss criminal indictments. The court discusses the difficulty in developing a standard test that could define conduct which deviates so far from fundamental fairness as to be "shocking to the universal sense of justice."[163] While the Ninth Circuit does not adopt any specific test in *Bogart*, the opinion does note that outrageous conduct is not limited only to examples of physical abuse, such as forcible pumping of the stomach,[164] but also includes those instances where the government engineers or directs the criminal enterprise.[165]

The Ninth Circuit mentions an earlier decision, *United States v. Valdovinos-Valdovinos*,[166] in its discussion of the case law considering due process limitations. Mr. Valdovinos-Valdovinos was charged with illegally transporting aliens into the United States. The San Francisco INS Office had used an undercover telephone line to speak with Mexican citizens. The INS officers who answered the phone pretended to be U.S. employers offering jobs if the Mexican citizens would enter the United States. The officers told the Mexican citizens that it was lawful to enter the United States without "immigration papers" and offered a cash reward to the person who brought the

160. *Id.* at 431-32 (citations omitted).

161. FED. R. CRIM. P. 12(b) is used to present the pretrial motion. *See* United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983).

162. 783 F.2d 1428, 1434 (1986), *vacated on reh'g, cause remanded by* United States v. Wingender, 790 F.2d 802 (1986). *See also* United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991) (noting the cases rejecting motions to dismiss and stating that the "[g]overnment's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice").

163. *Id.* at 1435 (quoting *Russell*, 411 U.S. at 432).

164. *See* Rochin v. California, 342 U.S. 165 (1952) (noting that actions of the government which shock the conscience transgress notions of fundamental fairness and undermine the probative value of the evidence obtained, and thus will be suppressed as violations of the Fifth Amendment).

165. *Bogart*, 783 F.2d at 1436; *see also* United States v. Citro, 842 F.2d 1149 (9th Cir. 1988) (rejecting a motion to dismiss where the indictment found that the government's manufacture and supply of false credit cards was not so egregious as to shock the universal sense of justice), *cert. denied*, 488 U.S. 866 (1988).

166. 743 F.2d 1436 (9th Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1114 (1985).

Mexican citizens into the United States.[167]

The district court granted Mr. Valdovinos-Valdovinos' motion to dismiss. The court found that the INS telephone operation was outrageous and violated due process rights of the Mexican citizens and of Mr. Valdovinos-Valdovinos, who would not have been arrested but for the improper undercover operation.[168] The district court opinion noted that the aliens already had been deported back to Mexico.[169] The opinion based its finding of outrageousness on the fact that the INS actions went beyond the infiltration of crime in their creation.[170] Both the district court and the Ninth Circuit recognized injuries of the aliens who were apprehended through this undercover operation. However, the Ninth Circuit reversed the dismissal of a criminal indictment on the ground that the criminal defendant lacked standing to bring the due process challenge.[171] There is no record of the Mexican citizens challenging their arrests in deportation proceedings.

Aliens also have tried to use a motion to dismiss against criminal indictments, arguing that sting operations induce defendants to commit a crime or that stings were improperly used to obtain evidence. In a 1992 case, *Ahluwalia v. United States*,[172] the alien defendant sought to use this due process defense to dismiss a criminal indictment charging him with bribing the Chief Legalization Officer of the INS Legalization Office in Salinas, California, in order to obtain a Temporary Work Authorization Card (Form I-688A). Mr. Ahluwalia alleged that the INS sting operation constituted outrageous and unconscionable government behavior and that due process barred the government from pursuing his conviction.

The sting began when the Chief Legalization Officer, Mr. Ward, was offered a single bribe. Mr. Ward contacted the FBI, which in turn decided it would conduct an investigation to determine if there was a broad conspiracy to bribe legalization officers, using Mr. Ward as its undercover agent. Within a few months, the sting operation had netted more than $1,000,000 in bribes and more than 1,000 individuals received work authorization cards in exchange for the money.[173]

The federal magistrate who considered Mr. Ahluwalia's motion to

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167. The District Court opinion noted that there were no formal guidelines or regulations governing the operation of the telephone line or the conduct of the INS officers who answered the telephone. 588 F. Supp. 551, 553 (N.D. Cal. 1984). Approximately one month after the decision, the Attorney General adopted undercover guidelines for the INS. For a discussion of the guidelines, see *supra* note 19.

168. 588 F. Supp. at 553.

169. *Id.* at 553 n.2.

170. *Id.* at 556.

171. 743 F.2d at 1437 (relying on United States v. Payner, 447 U.S. 727 (1980)).

172. 807 F. Supp. 1490 (N.D. Cal. 1992), *aff'd*, 30 F.3d 1143 (9th Cir. 1994).

173. *Id.* at 1493.

dismiss found that, under the totality of the circumstances, the government's conduct in the sting operation was outrageous. The magistrate recommended dismissal of several of the charges. Although the district court ultimately did not agree with the magistrate's ruling, the court did review the behavior of the INS and applied the factors developed in *Abscam*[174] litigation to determine whether the conduct was sufficiently outrageous to require dismissal.

Although many of the factors considered relate to whether the government induced the criminal behavior and thereby entrapped the defendant, other factors concern the general appropriateness of the government's behavior. For example, the court asked whether the informant or undercover agents engaged in activities, not directly related to the crime, which "violated the law or were dishonorable."[175] The court also considered whether the government agents showed "a proper regard for judicial and police processes."[176] The court found that the INS and FBI did not deliberately disregard procedures, although it noted that Mr. Ward sometimes failed to follow instructions or acted without his supervisor's approval. For example, he arbitrarily broadened or narrowed the scope of the sting or accepted bribes without carefully noting the source of the funds.[177]

The court also considered whether the government's conduct injured innocent citizens who were not the subject of the investigation.[178] The court did receive evidence that some people entitled to temporary resident status were unable to process their applications because of the large numbers of people who were at the office to purchase false cards. Further, the crowds required the police to patrol the legalization site.

The court also considered whether the activities of the government agents had "any direct adverse social consequences."[179] The district court found that "[u]nquestionably, the immigration system suffered

174. Abscam was an undercover sting operation that resulted in the prosecution of a number of public officials who accepted bribes. Specifically, the court referred to United States v. Myers, 527 F. Supp. 1206, 1223 (E.D.N.Y. 1981). *Ahluwalia*, 807 F. Supp. at 1496-97. In affirming the district court's denial of the motion to dismiss, the Ninth Circuit specifically expressed no opinion as to the use of the factors in *Myers*. 30 F.3d at 1143 n.1. For a general discussion of undercover operations and the entrapment defense, see Robert I. Blecker, *Beyond 1984: Undercover in America-Serpico to Abscam*, 28 N.Y.L. SCH. L. REV. 823 (1983).

175. *Ahluwalia*, 807 F. Supp. at 1498.

176. *Id.* at 1499.

177. *Id.* at 1493-94.

178. *Id.* at 1499.

179. *Id.*

some damage as a result of this operation. Some people were led to believe that bribery was the only way to obtain a permit to work in this [country]."[180]

The district court also considered how important the sting was to the detection of the crime in this situation.[181] In a bribery case, courts acknowledge that undercover activities are essential because the crime is difficult to detect given the facts that contacts are brief and evidence is difficult to obtain.

However, the district court concluded that, although the government's investigation was sloppy, poorly supervised, and hurt the immigration system, the government's conduct was not sufficiently outrageous to offend due process.[182]

In a recent opinion that was later reversed and vacated on appeal, an alien was able to raise a number of due process objections to INS conduct, and was initially successful in limiting the length of his criminal sentence. In *United States v. Sanchez-Montoya*,[183] the alien plead guilty to illegal reentry after deportation. In his sentencing hearing, he sought to limit the term of his imprisonment to no more than two years. He argued that the INS provided him with a Form I-294 at the time of his deportation and it stated that the maximum punishment for illegal reentry was two years in prison. In reality, the penalty had been changed by the Anti-Drug Abuse Act of 1988[184] to a maximum of fifteen years. The INS did not update Form I-294 to contain the accurate penalty until June 12, 1992, more than three years after the effective date of the Anti-Drug Abuse Act.[185]

The district court ruled that the INS acted in a "grossly negligent" fashion and inexcusably misinformed deportees of the consequences of their unlawful reentry.[186] The court further stated that, although the INS had no statutory obligation to warn the deportees of the consequences of their illegal reentry, once it assumed that obligation it had a duty to do so accurately and with reasonable

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180. *Id.*

181. *Id.* at 1500.

182. *Id.*

183. 834 F. Supp. 315 (C.D. Cal. 1993), *vacated*, 30 F.3d 1168 (9th Cir. 1994). A number of circuit courts have rejected motions to dismiss in these same circumstances. *See, e.g.*, United States v. Smith, 14 F.3d 662 (1st Cir. 1994); United States v. Martinez-Contreras, 16 F.3d 413 (4th Cir. 1994). The Ninth Circuit also rejected the due process argument in a motion to dismiss in United States v. Arzate-Nunez, 18 F.3d 730 (9th Cir. 1994) (noting that no authority was cited to support the claim of a denial of due process).

184. Pub. L. No. 100-690, § 7345(a)-(b), 102 Stat. 4181, 4471.

185. Form I-294 was apparently revised without any announcement in the Federal Register or review by the Office of Management and Budget, which usually is required for changes in such forms. This change may have violated the Administrative Procedures Act, which requires that the government publish changes to regulations and forms. *See* 5 U.S.C. §§ 552-553 (1966).

186. *Sanchez-Montoya*, 834 F. Supp. at 320.

care.[187] The court analogized the government's conduct to the element of improper inducement in entrapment cases. The opinion noted that the motivation for refusing to convict defendants when the government goes too far in inducing criminal behavior is found in preserving " 'the institutional integrity of the system of federal criminal justice.' "[188] Further, the court relied on a principle from civil law that an " 'action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other.' "[189] The district court found that the grossly negligent and continuing misrepresentation of the INS, and concepts of due process and entrapment, prevented a greater sentence than the two years stated on the form which the defendant received.[190] The Ninth Circuit rejected the analysis of the district court and joined the other courts of appeals in rejecting both due process and equitable estoppel challenges to either the prosecution or the length of sentence.[191]

c. Substantive Due Process Claims in Deportation Proceedings

In deportation proceedings, aliens also have challenged outrageous government conduct through motions to suppress evidence. They have argued that the government's conduct was so outrageous or unconscionable that to allow it to introduce the challenged evidence would violate traditional notions of due process.[192] While there is no bright line test of "unconscionability" or "outrageous conduct," a review of the successful challenges in deportation cases sheds some light on the limits on INS enforcement techniques.

In the case of *Navia-Duran v. INS*,[193] an alien was arrested by

187. *Id.*

188. *Id.* at 321 (quoting Justice Stewart's dissent in United States v. Russell, 411 U.S. 423, 441 (1973)).

189. *Id.* (quoting Sorrells v. United States, 287 U.S. 435, 455 (1932)).

190. The district court opinion also noted that its decision to limit the sentence was permitted under the Federal Sentencing Guidelines because it promoted respect for the law. *Id.* at 323.

191. United States v. Sanchez-Montoya, 834 F. Supp. 315 (C.D. Cal. 1993), *vacated*, 30 F.3d 1168 (9th Cir. 1994); *see also* United States v. Ullyses-Salazar, 28 F.3d 932 (9th Cir. 1994) (rejecting both due process and equitable estoppel as a basis for limiting the sentence); United States v. Perez-Torres, 15 F.3d 403 (5th Cir. 1994) (rejecting estoppel), *cert. denied*, 115 S. Ct. 125 (1994); United States v. Shaw, 26 F.3d 700 (7th Cir. 1994) (criminals cannot establish reasonable reliance and therefore cannot assert estoppel; also, no due process violation in erroneous form).

192. *See* IMMIGRATION LAW AND DEFENSE, *supra* note 33, § 7.2 (discussing motion to suppress).

193. 568 F.2d 803 (lst Cir. 1977).

deportation officers late at night, taken to INS offices, and interrogated until the early morning hours. The INS failed to advise Ms. Navia-Duran of her right to counsel, failed to comply with their own arrest regulations,[194] and threatened her with immediate deportation without explaining she had the right to a hearing. The First Circuit Court of Appeals ruled that all inculpatory statements made by Ms. Navia-Duran would be suppressed because, although the INS is not required to give *Miranda* warnings at the time of arrest, the basic notion of fundamental fairness would not allow a finding of deportability to rest solely upon a coerced statement.[195] In this case, the absence of warnings, the detention at the INS office, and the violation of the INS regulations were factors which led the court to find that Ms. Navia-Duran's statements were involuntary.[196]

In *Bong Youn Choy v. Barber*,[197] the involuntary statements of an alien were suppressed and his deportation order reversed. The INS interrogated the alien for more than seven hours, threatened him with prosecution for perjury, and told him he would be forced to leave the country within three weeks. The Ninth Circuit ruled that statements obtained by INS officers who induced fear and threatened the alien with prosecution were not voluntary and could not be used as a basis for deportation.[198]

The BIA has similarly found that coercive tactics used by the INS violate due process. In *In re Garcia*,[199] the BIA ruled that it was a denial of due process when the INS failed to inform the alien of his right to counsel, told him he had no rights, claimed his deportation was inevitable, and detained the alien without explanation. In this situation, statements by the alien were ruled involuntary and therefore could not form the basis of a finding of deportability.[200] In *In re Toro*,[201] the BIA ruled that evidence would be excluded if the circumstances surrounding the arrest and interrogation would render use of the evidence "fundamentally unfair" and violative of due process.[202] More recently, the BIA found that it was a denial of due

194. *Id.* at 809 n.6. Note that 8 C.F.R. § 287.3 (1993) requires that an alien arrested without a warrant be advised of the reason for the arrest, her right to counsel, and that any statement made may be used against her in a subsequent proceeding.

195. 568 F.2d at 808.

196. *Id.* at 809.

197. 279 F.2d 642 (9th Cir. 1960).

198. *Id.* at 647. *See also* Ali v. INS, 661 F. Supp 1234 (D. Mass. 1986) (suppressing statements where the INS threatened the spouse of an alien, a U.S. citizen, with criminal prosecution, and told her to ignore her attorney). *But cf.* Bilokumsky v. Tod, 263 U.S. 149 (1923) (stating in *dicta* that involuntary statements could be used in deportation proceedings).

199. 17 I. & N. Dec. 319 (BIA 1980).

200. *Id.* at 321.

201. 17 I. & N. Dec. 340 (BIA 1980).

202. *Id.* at 343; *see also In re* Ramira-Cordova, No. A21-095-659 (BIA 1980) (suppression when evidence was gained after a nighttime warrantless entry into alien's

process for the INS to use statements gained in an interview with an unaccompanied eleven-year-old child.[203]

In *Gonzalez-Rivera v. INS*,[204] the Ninth Circuit reversed the BIA and upheld the immigration judge's grant of a motion to suppress. Mr. Gonzalez was riding in a car with his father on a highway north of San Diego. The Border Patrol stopped the car and asked Mr. Gonzalez to provide documentation of his right to legally reside in the United States. Mr. Gonzalez challenged the Border Patrol stop, alleging that he had been stopped solely because of his Hispanic appearance and that a racially-based stop constituted an egregious violation of his Fourth Amendment rights. The immigration judge granted the motion to suppress. The BIA reversed, claiming that this type of stop was not an egregious violation of the law regarding Fourth Amendment stops, which necessitated the use of the exclusionary rule under the holding of *INS v. Lopez-Mendoza*.[205]

In upholding the motion to suppress, the Ninth Circuit discussed the "egregious violation" exception to the exclusionary rule bar of *Lopez-Mendoza*, and stated that the exception was not limited to situations involving physical brutality (such as the force used in *Rochin*). Rather, an egregious violation could be established where the INS acted in deliberate violation " 'of the Fourth Amendment, or by conduct a *reasonable officer should know* is in violation of the Constitution.' "[206] The Ninth Circuit gave three main reasons why it

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residence).

203. *In re* Hernandez-Jimenez, No. A29-988-097, slip op. at 6 (BIA 1991) (unpublished decision) (discussed with approval in Davila-Bardales v. INS, 27 F.3d 1, 4 (1st Cir. 1994)).

204. 22 F.3d 1441 (9th Cir. 1994).

205. 468 U.S. 1032 (1984). *See supra* notes 119-21 and accompanying text (discussing when the exclusionary rule should be applied). The BIA also found that Mr. Gonzalez had failed to state a *prima facie* case in his motion to suppress because he did not clearly state how he was injured by the illegal stop. The Ninth Circuit held that the INS had waived this objection to the motion to suppress because the INS attorney did not object at the introduction of the motion. *Gonzalez-Rivera*, 22 F.3d at 1444.

206. *Id.* at 1448-49 (emphasis added) (quoting Adamson v. Commissioner, 745 F.2d 541, 545-46 (9th Cir. 1984)). In a partial dissent, Judge Choy disagreed with the majority, holding that violations of constitutional rights which occurred during "*peaceful* arrests" need not result in exclusion of evidence in civil deportation proceedings. 22 F.3d at 1454 (emphasis in original). Judge Choy commented that:

> Absent resort to reliable but shocking methods of obtaining evidence represented by the emetic solution administered in *Rochin*, this [holding of *Lopez-Mendoza*] suggests that the exclusionary rule will not apply to civil deportation hearings where the INS refrains from unpeaceable (but not necessarily brutal) tactics which commonly undermine both fundamental fairness and the probative value of the evidence seized thereby.

Id. (relying in part on Cervantes-Cuevas v. INS, 797 F.2d 707, 711 (9th Cir. 1985)

ruled that the racially based stop was made in bad faith and thus constituted an egregious violation. First, the violation was egregious because racial discrimination is one of the most "serious threats to our notion of fundamental fairness."[207] Second, it was egregious because the INS officers had completed extensive training regarding prior court decisions concerning the Fourth Amendment, and because of the adoption of official INS policies prohibiting racially based stops. Thus, INS officers should have known that a racially motivated stop was a violation of the Constitution. Finally, by applying an objective standard to evaluate the actions of the INS officer, the Ninth Circuit avoided allowing an egregious violation to occur simply because the INS officer was not subjectively aware of his or her unconscious racism.[208]

Based on the factors outlined in these cases concerning substantive due process, challengers of the underlying constitutionality of the San Diego sting could mount a substantive due process attack on several grounds. These grounds could be presented in a motion to suppress or in a claim for injunctive relief as part of a writ of *habeas corpus*.[209]

First, the sting was outrageous because it used government stationery to falsely offer a benefit that aliens reasonably could have believed the INS had the power to offer. One of the factors used to evaluate the reasonableness of the undercover operation is whether the dishonorable action impinges on the integrity of the federal system of justice. It did so here.

Second, the INS sting did not target criminal behavior, but was used solely to execute a civil deportation order. The use of a criminal law enforcement tactic is excessive, especially in light of the fact that the INS had the specific addresses of the aliens involved and could have arrested them following normal procedures. The criminal law cases that have upheld undercover operations noted the government's particular need to be able to ferret out criminal behavior or

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(allowing the admission of statements made by an alien following an unlawful detention absent evidence which cast doubt on the probative value of the voluntary statements)). Judge Choy recommended that civil injunctions of egregious INS conduct would be a better method of deterring such behavior. *Id.*

207. *Id.* at 1449.

208. *Id.*

209. Rosenbaum, *supra* note 31, at n.42. See also text accompanying note 31 for a discussion of using civil rights statutes to enjoin INS misconduct. In an interesting use of injunctive relief, attorneys successfully enjoined the U.S. government from removing a citizen of the People's Republic of China who was brought to testify in a criminal trial. *See* Wang Zong Xiao v. Reno, 837 F. Supp. 1506 (N.D. Cal. 1993). The Northern District Court in California found that the U.S. Attorney had acted outrageously and in violation of due process in not investigating facts, such as contradictions in testimony, which suggested that the Chinese interrogators had tortured the witness. *Id.* at 1551-53. Mr. Wang also simultaneously pursued a claim for political asylum.

to gather evidence which would otherwise be undetectable, such as evidence in bribery cases.

Although the civil proceeding characterization traditionally has been used to justify fewer due process protections, the ultimate standard of "fundamental fairness" would require a court to consider whether the sting and the subsequent deportations would be an excessive exercise of the government's power to enforce civil violations. In a sense, by using an undercover operation, a criminal law enforcement technique, the INS is trying to have its cake and eat it, too. The INS wants to have deportation classified as a civil proceeding, but does not want to limit its own conduct to the traditional realms of civil law enforcment, or to use the criminal laws available in this situation.[210] Given that deportation results in the end of further administrative or judicial review in addition to many other harsh consequences, a court may find that the removal of an alien following an undercover operation was a denial of due process. Moreover, the use of undercover operations to enforce deportation orders may have violated due process by going beyond the scope of the agency's authority or by violating its own internal guidelines.[211]

Third, the INS did not comply with its own regulations in failing to contact attorneys of record, and interfered with statutory rights to counsel.[212]

Fourth, the San Diego sting had direct and adverse social consequences because it greatly decreased the public's ability to trust the federal government and, in particular, the INS. If the government desires to have voluntary compliance through government letters and summons, the citizen or alien involved must not believe that the summons is actually a ruse for some unforeseen punishment.

Fifth, an INS sting operation, although not in all cases expressly violating any INS regulation, does impinge on the due process rights of aliens. Failure to notify the aliens' counsel violated INS regulations and impermissibly interfered with the right to counsel. Aliens who were apprehended in this sting should have been held for seventy-two hours before removal or should have been informed of the many rights they were relinquishing. The coercive nature of the sting

210. Some aliens can be prosecuted for failure to appear after a Bag and Baggage Letter. *See* INA § 242(e), 8 U.S.C. 1252(e) (1988).

211. The INS Guidelines for undercover operations require approval of sting operations by INS Headquarters in Washington, D.C. *See supra* note 19 and discussion in Section III, *supra*.

212. *See* GORDON & MAILMAN, *supra* note 12, § 72.04[12][d] (discussing the statutory right to counsel).

itself would preclude the characterization of any waiver of rights as "knowing and voluntary."

In summary, it is my contention based on all of these factors that the sting was unconscionable and violated traditional norms of fairness.

V. CONCLUSION

Congress should act to protect the rights of aliens and safeguard the right to judicial review. Statutory change would guide the INS toward executing final orders of deportation in a lawful manner with scrupulous regard for the due process rights of aliens. At a minimum, the seventy-two-hour hold before execution of a deportation order should be required by statute. Further, any waiver of that right should have to be documented by a written recitation[213] of the many rights that the aliens would be foregoing. This recitation should include an acknowledgement of all rights forgone, including the alien's right to counsel, to appeal, to file a motion for reconsideration, to file a motion to reopen an administrative decision, and to seek discretionary stays of deportation.

More broadly, Congress should clearly limit INS undercover operations to the enforcement of *criminal* laws. The failure to separate the criminal enforcement, deportation, and benefit-provider roles of the INS from its civil enforcement role continues to breed abuse of basic due process rights, and diminishes the credibility of the agency in seeking voluntary compliance with its orders.

The INS also should act to protect the rights of aliens. Although Commissioner Meissner may have intended to establish procedures that control the use of undercover operations in order to avoid a repeat of the San Diego sting, the new procedures do not sufficiently protect the rights of aliens or the general public from overzealous undercover operations. The procedures must be amended to clarify a number of points:

First, an amendment to the procedures should clearly limit undercover operations to the enforcement of criminal violations within the jurisdiction of the INS, and should not allow their use for regulatory or statutory violations. The INS and its officers are not fully trained in law enforcement procedures and may violate constitutional and civil rights in the undercover efforts.

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213. Congress recently made a similar recitation of rights mandatory in its changes to the Order to Show Cause (OSC) recitations. The regulations implementing the new changes to the OSC became effective June 13, 1992, 57 Fed. Reg. 11,568 (April 6, 1992). For the legislative history, see INA § 242B, 8 U.S.C. § 1252B (1988 & Supp. V 1993) (added in the Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 5061) (amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(g)(6), 105 Stat. 1753).

Second, the procedures should more clearly delineate the duty of the INS to comply with the Attorney General's Guidelines. The reporting requirements of those Guidelines go much further in requiring the INS to demonstrate that other possible methods have failed and that the undercover operation is nevertheless justified. The INS procedures should repeat and require the post-operation report, complying with the Guidelines, and the post-operation report must be sent to the office of the Attorney General.

Finally, I join other commentators in strongly recommending that the INS consider adopting a civilian oversight committee to review the post-operation reports and to make recommendations about the conduct and continuance of any undercover operation. Perhaps the Citizens' Advisory Panel newly created in February 1994 could examine the INS' use of undercover operations.[214] Establishing and maintaining the trust of the community was one of Commissioner Meissner's stated goals in adopting the new procedures. Only by allowing external review of INS conduct will the agency be able to develop a measure of credibility and trust.

214. *See* 59 Fed. Reg. 6658 (1994).