Deportation and Due Process: Does the Immigration and Naturalization Act or the Fifth Amendment Provide for Full Interpretation of Deportation and Exclusion Hearings? (El Rescate Legal Services v. Executive Office for Immigration Review, 941 F.2d 950 (9th Cir. 1991))

"I know you believe you understood what you think I said, but I am not sure you realize that what you heard is not what I meant."

Author unknown.

Lynne Mallya*

Deportation and exclusion hearings are the administrative proceedings through which an alien shows cause as to why he should not be required to leave the United States, or alternatively, proves that he is admissible to this country.[1] In 1988, Immigration and Naturalization Service (INS) officials deported 22,848 aliens.[2] This number, however, represents only a small portion of the number of aliens that are apprehended annually and subsequently required to leave the United States.[3] Many of these aliens do not

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1. Joseph Minsky, *Introductory Overview of Immigration Law and Practice*, C394 A.L.I.-A.B.A. 1 (1989), *available in* WESTLAW, IM-TP Database. *See* discussion *infra* text accompanying notes 28-37 for a general overview of deportation and exclusion proceedings.

2. U.S. DEPT. OF JUSTICE, 1989 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 474 (1990). The reasons for deportation include subversive or anarchistic activity, criminal behavior, immoral behavior, violation of narcotic laws, mental or physical defect, previous exclusion or deportation, failure to maintain or comply with conditions of non-immigrant status, entry into the United States without proper documents, entry into the United States without inspection or with false statements, becoming a public charge, inability of those over sixteen years of age to read, and "other." *Id.* Deportation is discussed *infra* text accompanying notes 25-27.

3. In 1984, for example, there were 1,246,981 aliens apprehended. U.S. DEPT.

speak English fluently.

El Rescate Legal Services filed a class action against the Executive Office for Immigration Review (EOIR) and, on behalf of its clients and their class, made a motion for partial summary judgment.[4] Plaintiffs' complaint alleged that, when the immigration judge rules an interpreter is necessary, the EOIR violates the statutory and Constitutional due process rights of non-English speaking plaintiffs by failing to interpret entire immigration court proceedings into the alien's language.[5] The policy of the EOIR is to interpret *into English* only those parts of an immigration proceeding that are in a foreign language.[6]

The District Court for the Central District of California granted partial summary judgment for the plaintiffs with respect to their cause of action as brought under the Immigration and Nationality Act and the Administrative Procedures Act.[7] The Ninth Circuit Court of Appeals reversed the district court decision and held that statutory interpretation of the Immigration and Nationality Act does not lead to the conclusion that immigration proceedings should be interpreted in their entirety.[8] The case was remanded to the district court for determination of the constitutional claims.[9]

This casenote examines an alien's right to full interpretation of an immigration proceeding into the alien's language. Part I of this casenote provides background on the structure of the INS, and discusses the statutes that regulate pertinent INS activities. Part II examines the Board of Immigration Appeals and circuit court decisions that have discussed Fifth Amendment due process and equal protection arguments in relation to immigration court proceedings. In Part III, *El Rescate II* is discussed: the faulty reasoning behind the court of appeals' statutory interpretation of the

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OF JUSTICE, 1984 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 188 (1984). Of these, INS expelled 930,539 aliens; 912,533 were required to depart and 18,006 were deported. *Id.* In that same year, 1221 aliens were excluded. *Id.* Exclusion is discussed *infra* text accompanying notes 21-24.

4. El Rescate Legal Services v. Executive Office for Immigration Review, 727 F. Supp. 557 (C.D. Cal. 1989)[hereinafter *El Rescate I*]. Plaintiff's class consisted of non- and limited-English speaking persons who currently were or possibly would be subject to immigration court proceedings in the immigration courts of Los Angeles, San Diego and El Centro. *Id.* at 558 n.1.

5. *Id.* at 558.

6. *Id.* at 559. The interpreting is done primarily for and at the discretion of the immigration judge and for the creation of the record. *Id.* at 559-60.

7. *Id.* at 564. The district court did not make a ruling on the Constitutional due process issue. *See* discussion *infra* text accompanying notes 38-49.

8. El Rescate Legal Services v. Executive Office for Immigration Review, 941 F.2d 950 (9th Cir. 1991) [hereinafter *El Rescate II*].

9. *Id.* at 956.

Immigration and Nationality Act is examined and a recommendation is made as to how the district court should resolve the Fifth Amendment issue on remand. Finally, this casenote concludes that the statutory interpretation of the Immigration and Nationality Act requires full translation, into the alien's language, of the immigration proceedings where the immigration judge deems it necessary to have an interpreter.

I. Overview of Immigration and Naturalization Service

Agencies Involved in INS Proceedings

The administration and enforcement of immigration laws is assigned to the Attorney General of the United States.[10] The Attorney General delegates most of his immigration responsibilities to the Immigration and Naturalization Service and the EOIR.[11]

The INS Commissioner, appointed by the President, has authority over all matters delegated to him by the Attorney General.[12] The four regional offices of the INS are further subdivided into district offices.[13] It is the district offices that institute exclusion and deportation hearings.[14] The legal staff at each district office are known as "general attorneys" or "trial attorneys" and serve as prosecutors in the immigration court proceedings.[15]

The Office of the Immigration Judges and the Board of Immigration Appeals comprise the EOIR.[16] Immigration judges hear deportation and exclusion cases.[17] The Board of Immigration Appeals acts as the appellate authority in exclusion hearings, deportation hearings, and certain other cases.[18] There are five members on the Board of Immigration Appeals who form panels of three to decide appeals.[19]

When all administrative appeals are exhausted, the United States Courts of Appeals have jurisdiction to review final orders of deportation.[20]

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10. Minsky, *supra* note 1 at 14.
11. *Id.*
12. *Id.* at 15.
13. *Id.* The four regional offices are designated Northern, Eastern, Southern, and Western. *Id.*
14. *Id.*
15. Minsky, *supra* note 1 at 15.
16. *Id.* at 16.
17. *Id.*
18. *Id.*
19. *Id.*
20. 8 U.S.C. § 1105a(a) (1970 & Supp. 1992).

Exclusion

The method of proceeding against an alien seeking admission to the United States is an exclusion hearing.[21] Deportation hearings are proceedings against an alien who is already physically present in the United States.[22] To distinguish between deportation and exclusion, exclusion can best be remembered by picturing an alien knocking on the door; if he does not get in, he is excluded.[23] There are numerous grounds for excludability of aliens from the United States.[24] Charging the alien with one of these grounds entitles him to an exclusion hearing.

Deportation

Deportation is the removal of an alien from the United States, pursuant to an "Order to Show Cause."[25] This order notifies the alien of pending deportation proceedings, states the reasons INS believes the alien to be deportable, and specifies the alleged facts on which INS has determined deportability.[26] The

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21. Landon v. Plasencia, 459 U.S. 21, 25 (1982).

22. *Id.* Deportation and exclusion hearings differ in a number of ways. Under 8 U.S.C. § 1105a(a), if the alien loses at a deportation hearing, he may appeal directly to the Court of Appeals. An alien who loses at an exclusion proceeding may challenge the order only by petition for writ of habeas corpus. 8 U.S.C. § 1105a(b). *See infra* notes 28-37 and accompanying text for further discussion of the differences between exclusion and deportation hearings.

23. Denyse Sabagh, *Deportation, Exclusion, Discretionary Relief, and Waivers*, C505 A.L.I.-A.B.A. 337 (1990), *available in* WESTLAW, ALI-ABA Database.

24. 8 U.S.C. § 1182(a) (1992). A partial list of the grounds for exclusion includes the following:

> 1. Aliens who have a communicable disease of public health significance;
> 2. Aliens who have a physical or mental disorder and behavior associated with that disorder that poses a threat to the property, safety, or welfare of the alien or others;
> 3. Aliens who are drug abusers or addicts;
> 4. Aliens convicted of crimes involving moral turpitude;
> 5. Aliens convicted of violating any law or regulation related to a controlled substance;
> 6. Aliens convicted of two or more offenses with an aggregate sentence of 5 years or more;
> 7. Aliens coming to the United States to engage in prostitution.

8 U.S.C. § 1182(a).

25. Sabagh, *supra* note 23 at 6.

26. *Id.* Grounds for deportation are codified in the Immigration and Nationality Act which contains 20 provisions pertaining to this issue. Grounds for deportability include:

> 1. Any alien who was excludable at the time of entry;
> 2. Any alien who entered the United States without inspection or is in the United States in violation of law;
> 3. Any alien who is convicted of a crime involving moral turpitude commited within five years after the date of entry and is sentenced to confinement for one year or longer;

alien must then show cause, before the immigration judge, why he is not deportable and request any discretionary relief applicable.[27]

Exclusion and Deportation Hearings

The Immigration and Nationality Act enumerates the requirements that must be adhered to in deportation and exclusion hearings.[28] As discussed, these two types of hearings have separate and distinct procedures and consequences but will be collectively referred to in this note as "immigration court proceedings."[29]

Although civil rather than criminal in nature, the burden of proof in a deportation hearing rests with the government to prove deportability by "clear, unequivocal, and convincing evidence."[30] In addition to the rights enumerated in the Immigration and Nationality Act,[31] other rights are also safeguarded.[32] These include the right to continuance for good cause,[33] the privilege against self-incrimination,[34] the right to make motions,[35] and the right to designate the country of deportation.[36]

Aliens in exclusion hearings have fewer options and procedural protections than those in deportation proceedings. For instance, the excludable alien can be held in detention without bond, has the burden of showing admissibility to the United States, and, if found excludable, must return to the country from which

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4. Any alien who has engaged, is engaged, or at any time after entry engages in any terrorist activity;

5. Any alien who participated in Nazi persecution.

8 U.S.C. § 1251(a) (Supp. 1992).

27. Sabagh, *supra* note 23 at 6-8.

28. Requirements for deportation hearings are found in 8 U.S.C. § 1252(b) (Supp. 1992) while 8 U.S.C. § 1226 (1970 & Supp. 1992) sets forth the requirements for exclusion hearings.

29. Landon v. Plasencia, 459 U.S. 21, 25-27 (1982).

30. Woodby v. INS, 385 U.S. 276, 277 (1966).

31. *See infra* note 40 and accompanying text.

32. There are a number of substantive rights available to the deportable alien which are not available to an alien denied admission in an exclusion hearing. *Landon*, 459 U.S. at 26-27. Although there are limits, the alien being deported may generally designate the country of deportation. *Id.* He may also choose to depart voluntarily and thus avoid the stigma of deportation and the limitations on his selection of deportation. *Id.* Lastly, he may seek a suspension of deportation. *Id. See* 8 U.S.C. §§ 1252(b); 1252(e) (Supp. 1992); 1253(a) (1970 & Supp. 1992); 1254(e) (Supp. 1992).

33. 8 C.F.R. § 242.13 (1992).

34. Tashnizi v. INS, 585 F.2d 781, 782 (5th Cir. 1978).

35. Sabagh, *supra* note 23 at 7. *See e.g. In re* K, 5 I. & N. Dec. 347 (B.I.A. 1953)(motion to change venue); 8 C.F.R. § 242.13 (1992) (motion for continuance).

36. 8 U.S.C. § 1253(a) (1992).

he came.[37]

Acts Governing the INS

A. The Immigration and Nationality Act

The Immigration and Nationality Act (INA) provides that an alien will be given reasonable notice of the charges against him, and of the time and place of the hearing.[38] The Act grants the alien the privilege of being represented by retained counsel.[39] Most importantly, the act provides that "the alien shall have a *reasonable opportunity* to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. . . ."[40]

Similarly, the official administrative regulations for exclusion hearings require the immigration judge to advise the applicant about the nature and purpose of the hearing, advise him that he is entitled to representation by an attorney at no cost to the government, and inform him of the availability of free legal services.[41] They also require that "the alien shall have a *reasonable opportu-*

37. Sabagh, *supra* note 23 at 4. Another difference is that excludable aliens receive closed hearings unless they request an open hearing. *Id.* Also, the immigration judge in the exclusion proceeding has no authority to grant voluntary departure, a remedy for the potential deportee. The alien will be excluded unless she is allowed to withdraw her application for admission. *Id.*

38. 8 U.S.C. § 1252(b)(1) (1992).

39. *Id.* at § (b)(2).

40. *Id.* at § (b) (emphasis added). The act provides the following:

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

Id.

41. *Id.* The regulation states that the immigration judge must do the following:

> [I]nform the applicant of the nature and purpose of the hearing; advise him of the privilege of being represented by an attorney of his own choice at no expense to the Government, and of the availability of free legal services programs qualified under Part 292a of this chapter and organizations recognized pursuant to § 292.2 of this chapter located in the district where his exclusion hearing is to be held; and shall ascertain that the applicant has received a list of such programs; and request him to ascertain then and there whether he desires representation; advise him that he will have a reasonable opportunity to present evidence in his own behalf, to examine and object to evidence against him, and to cross-examine witnesses presented by the Government; and place the applicant under oath. *Id.*

nity to examine the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government."[42]

The Administrative Procedures Act and Its Interaction With the Immigration and Nationality Act

Under the Administrative Procedures Act (APA), "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[43] This statute has two components. First, there must be an agency action that affects the complainant in the specified manner.[44] Section 551 defines agency action as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[45] Second, the party seeking review must show that he has "suffer[ed] legal wrong" because of the challenged agency action, or is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute."[46]

The Supreme Court has recognized that a statute has a "zone of interests" it is designed to protect.[47] In order to show he has been "adversely affected or aggrieved [by] a statute, the injured party must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[48] By definition, therefore, the APA is only applicable in those actions in which a relevant statute has been violated and that violation "forms the legal basis for the complaint."[49]

Plaintiffs' Cause of Action Under the Administrative Procedures Act

Based on the above rationale, for the APA to apply to *El Rescate*, plaintiffs would have had to show that the EOIR policy of failing to interpret entire immigration court proceedings for non-English speaking aliens violated a statutory provision of the Immigration and Nationality Act. The district and appellate courts differed in their conclusions as to whether the EOIR had violated the

42. *Id.* (emphasis added).
43. 5 U.S.C. § 702 (1992).
44. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).
45. 5 U.S.C. § 551(13) (1992).
46. 5 U.S.C. § 702 (1992).
47. *See* Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 396-97 (1987).
48. *Lujan*, 497 U.S. at 883 (citing *Clarke*, 479 U.S. at 396-97).
49. *Id.* at 882-83.

Act, and therefore ruled differently as to the legitimacy of plaintiffs' cause of action under the APA. The district court, finding a statutory violation under the Immigration and Nationality Act, granted partial summary judgment to plaintiffs' third cause of action brought under the APA.[50] The court of appeals reversed, holding that the policy did not violate the Immigration and Nationality Act and there was no violation of the APA.[51]

II. Prior Caselaw on the Right to Interpretation

Board of Immigration Appeals Decisions

The Board of Immigration Appeals (BIA) has examined the question of the right to an interpreter at immigration court proceedings in several decisions.[52] In *Matter of Exilus*, the Board of Immigration Appeals considered whether due process required INS to provide consecutive and full translation of an applicant's exclusion proceeding.[53] The Board of Immigration Appeals held that an alien is entitled to a fair hearing but that due process does not require the translation of an entire proceeding.[54] They indicated that only certain portions of a proceeding require translation, including: the immigration judge's statements to the alien, the examination of the alien by his counsel, the attorney for the Service, and the immigration judge, and the alien's responses to their questions.[55] They further concluded that the immigration judge, at his own discretion, may decide if it is essential for the alien to understand other dialogue that may be essential to the alien's ability to assist in the presentation of her case.[56]

The Board of Immigration Appeals further elaborated on the

50. *El Rescate I*, 727 F. Supp. at 564.

51. *El Rescate II*, 941 F.2d at 956. "There is no right to sue for a violation of the APA in the absence of a 'relevant statute' whose violation 'forms the legal basis for [the] complaint.'" *Id.*

52. *See In re* Tomas, 19 I. & N. Dec. 464 (BIA 1987); *In re* Exilus, 18 I. & N. Dec. 276 (BIA 1982).

53. 18 I. & N. Dec. at 80. Applicant, a citizen of Haiti, appealed a decision of the immigration judge that denied her application for asylum. Her appeal alleged, *inter alia*, that her motion for simultaneous translation of the entire immigration court proceeding was erroneously denied and resulted in a denial of her due process rights to a fair hearing. *Id.* at 276, 280. She contended that her inability to understand the entire proceeding, by virtue of the judge delegating authority to the interpreter to determine when translation was necessary, prejudiced her case. *Id.* at 280. The Board of Immigration Appeals noted that after her motion was made, there was no part of the hearing that was not either translated or explained to the applicant. *Id.* at 280-81. They concluded, therefore, that her contention of denial of a fair hearing was completely without merit. *Id.* at 281.

54. *Id.* at 281.

55. *Id.*

56. *Id.*

due process requirements with respect to interpretation of immigration court proceedings in *Matter of Tomas*.[57] They found that the presence of a competent interpreter for an alien defendant who cannot speak fluent English is important to the fundamental fairness of a hearing.[58] Though the Board reaffirmed that due process does not require the translation of the *entire* proceeding, they specified that due process requires that respondents "must be able to participate meaningfully in certain phases of their own hearing."[59]

The Board of Immigration Appeals noted in *In re Tomas* that reliance on the daughter of the respondents as an interpreter for the Spanish of the official interpreter into the native Kanjobal language of the respondents, violated due process.[60] The Board of Immigration Appeals indicated that there is a great difference between the ability to understand a language and the ability to fully translate thoughts from one language to another.[61]

These decisions failed to address the statutory interpretation of the necessity to give the alien a "reasonable opportunity to examine the evidence against him" as delineated by the Immigration and Nationality Act.[62] They are, however, reflective of the Board of Immigration Appeals' position regarding full interpretation of immigration court proceedings as a requirement of due process. Specifically, these decisions show that the Board of Immigration Appeals believes that a full interpretation of immigration court proceedings is not justified.

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57. 19 I. & N. Dec. 464 (BIA 1987). The respondents in this case were citizens of Guatemala who spoke Kanjobal. *Id.* A Spanish interpreter was present at the deportation hearing and the judge determined that the respondents' 15 year old daughter, who spoke both Kanjobal and Spanish, could adequately assist in presenting the respondents' case. Respondents appealed on the basis that they were not given a reasonable opportunity to present evidence on their own behalf. *Id.* The Board of Immigration Appeals stated that "a desire to avoid excessive continuances is not sufficient reason to allow a hearing to proceed where the right of a respondent to present testimony may be abridged" and remanded the case to the immigration judge. *Id.*

58. *Id. See also* Tejeda-Mata v. INS, 626 F.2d 721, 726 (9th Cir. 1980)(dictum), *reh'g denied*, 665 F.2d 269 (9th Cir. 1981), *cert. denied*, 456 U.S. 994 (1982); Niarchos v. INS, 393 F.2d 509 (7th Cir. 1968)(dictum); Gonzales v. Zurbrick, 45 F.2d 934 (6th Cir. 1930).

59. *In re* Tomas, 19 I. & N. Dec. at 464. *See In re* Exilus, 18 I. & N. Dec. at 281.

60. *In re* Tomas, 19 I. & N. Dec. at 464. The court insisted the daughter act in this capacity despite her disclaiming her ability to perform this role. *Id.*

61. *Id.* at 464. The Board of Immigration Appeals noted that this task would tax the skill of even a professional interpreter. *Id.*

62. 8 U.S.C. § 1252(b) (1992). *See supra* note 40 and accompanying text.

The Federal Courts: Interpretation and Due Process

The Second Circuit

The federal courts have rendered several decisions that explore the failure to interpret immigration court and other proceedings. One of the earlier and often cited cases addressing translation for criminal proceedings is *United States ex rel. Negron v. New York*[63] (*Negron*). In this case, Negron neither spoke nor understood English and his lawyer spoke no Spanish.[64] An interpreter, who simultaneously translated Spanish into English for the benefit of the court, prosecution and jury, was present at the trial.[65] Just twenty minutes before trial, the court provided an interpreter to enable Negron to confer with his lawyer.[66] During the course of the trial, the court interpreter met twice with Negron and his lawyer, for ten to twenty minutes each time, and summarized the testimony of some of the witnesses for Negron's benefit.[67] Other than these few instances, the proceedings were never translated from English into Spanish for Negron during the course of the trial.[68]

Prior to this decision, there was very little case law on point.[69] The court, with little or no precedent on which to rely, acknowledged that Negron "deserved more than to sit in total incomprehension" as his trial progressed.[70] The court in *Negron*

63. 434 F.2d 386 (E.D.N.Y. 1970). Negron, a native of Puerto Rico, entered the United States for the second time in 1966. He had been here only a few months when he got into a verbal altercation with his house-mate, DelValle. During this altercation, Negron fatally stabbed DelValle. *Id.* at 387. Negron was arrested, charged and convicted of second degree murder and sentenced to twenty years to life. *Id.* at 387-88. Negron exhausted his opportunities for direct review and then filed a pro se application for writ of habeas corpus in the Eastern District of New York. *Id.* at 388. The Judge granted Negron's release subject to the states' prerogative to appeal or retry within a thirty day period. *Id.* The state took the appeal within the allotted time. *Id.*

64. *Id.* Negron's lawyer testifed that without an interpreter he was unable to speak with Negron "at all." *Id.* at 388 n.2.

65. *Id.* The interpreter, when not translating Spanish into English, remained "on call" at her home. *Id.* Therefore, none of the testimony presented in English was interpreted for Negron while the trial was in progress. *Id.*

66. *Id.*

67. *Id.* The interpreter also translated the trial court instructions at the beginning of the trial regarding Negron's right to make peremptory challenges. *Id.*

68. *Negron*, 434 F.2d at 388. Twelve of the fourteen witnesses called against Negron testified in English, rendering a large portion of the proceedings incomprehensible to the non-English speaking defendant. *Id.*

69. *Id.* at 389.

70. *Id.* at 390. The court further stated that "particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy." *Id.*

required that once a court is put on notice of a defendant's difficulty with the English language, it must inform the defendant of his right to a competent translator, available at state expense if need be, throughout his trial.[71]

Fourteen years later, the Second Circuit discussed both statutory and due process rights in the context of deportation proceedings in the case of *Augustin v. Sava*.[72] Augustin's counsel spoke no Creole. Augustin spoke no English and the translation services provided by INS were inadequate at best.[73] Augustin's counsel requested a continuance from the immigration judge so that she would have time to obtain material she had requested from the translating service.[74] She explained that without these materials she did not know who to call to substantiate Augustin's persecution claim.[75] The motion, though unopposed, was denied by the immigration judge, whereupon, in protest, counsel withdrew from representing Augustin.[76] The court never informed Augustin of the denial of the continuance or that his counsel had withdrawn.[77]

The Second Circuit held that the hearing denied Augustin of certain procedural rights protected by statute, INS regulations and the Constitution.[78] The limited translation that did occur was deemed to be so "nonsensical" that it put into doubt the accuracy and scope of the proceeding.[79] It also gave rise to a question whether Augustin understood the nature and finality of the hearing.[80] The court quoted, with approval, a Ninth Circuit decision that indicated that "[i]t is particularly important that an applicant

71. *Id.* at 391.

72. 735 F.2d 32 (2nd Cir. 1984). Augustin was an Haitian refugee who claimed that he came to the United States to escape political persecution by the Haitian government. The boat on which he escaped Haiti sank off the Florida coast. Augustin survived, but was arrested as he walked into town after making his way to shore. *Id.* at 34.

73. *Id.* The translator who assisted Augustin in filling out the asylum form indicated that Augustin had fled Haiti for fear of arrest because his uncle had a "disease." *Id.* His counsel twice provided the translator with a series of written questions to be returned to her with Augustin's answers. *Id.* Counsel did not receive the answers in time to properly prepare for the hearing. *Id.* at 35 n.3. When the translator asked Augustin if he was a native of Haiti, his answer was translated by the interpreter as "I am not married yet, but I know I am a Haitian." *Id.* When asked if he had anything else to add, the translated response was "He said because I said everything before and then I have nothing to say today. I will come back again here to call me for the other hearing." *Id.*

74. *Id.* at 34-35.

75. *Id.* at 35.

76. *Id.*

77. *Id.*

78. *Id.* at 38.

79. *Id.*

80. *Id.*

for relief . . . have a reasonable opportunity to present his proofs, for the stakes are high."[81]

The Sixth Circuit

The Sixth Circuit addressed the issue of due process and fair deportation hearings in *Gonzales v. Zurbrick*.[82] Gonzales claimed that, during the INS questioning to ascertain her deportability subsequent to her arrest, she did not understand the translation of the interpreter, Le Doulx, who had questioned her regarding allegations that she had engaged in certain activities.[83] She claimed that she made several incriminating answers due to the incompetency of the interpreter and her inability to understand him, and these answers were not true.[84]

The court considered the testimony of Le Doulx, the results of Spanish reading and speaking tests they had him complete, and all other testimony in the record, and concluded that Le Doulx "was unable to interpret in a manner calculated to insure the alien a fair hearing."[85] The court stated "[t]he function of an interpreter is an important one. It affects a constitutional right. The right to a hearing is a vain thing if the alien is not understood. Deportation is fraught with serious consequences."[86]

The Seventh Circuit

In the case of *Niarchos v. INS*, Niarchos, a Greek crewman, jumped ship in Canada and entered the United States a year later.[87] A show cause order issued against him in 1967 alleged that

81. *Id.*, *citing* Kovac v. INS, 407 F.2d 102, 108 (9th Cir. 1969). *Kovac* is discussed *infra*, note 98 and accompanying text.

82. 45 F.2d 934 (6th Cir. 1930). The alien, Helen Gonzales, was arrested during a liquor raid conducted at her place of residence. *Id.* She was questioned through an interpreter, Le Doulx, by INS at police headquarters and she initially denied an involvement with prostitution. *Id.* at 935. After another housemate testified that she (the housemate) was a prostitute, the INS, through the interpreter, again questioned Gonzales. *Id.* This time, Gonzales indicated that she was a prostitute. *Id.* At her hearing, Le Doulx was again the interpreter, but this time Gonzales indicated she was unable to understand him. *Id.* Le Doulx was replaced by another and then a third interpreter. *Id.* During the hearing, Gonzales testified that she had never engaged in prostitution and that she had not understood the questions when presented by Le Doulx. *Id.*

83. *Id.*

84. *Id.* at 936. Le Doulx, a Frenchman, testified that he learned to "speak Mexican" while working as a jeweler in Egypt where he occasionally met Mexicans and others who had resided in Mexico. *Id.* The court subjected him to reading and speaking tests to test his competency. *Id.*

85. *Id.*

86. *Id.* at 937.

87. Niarchos v. INS, 393 F.2d 509, 510 (7th Cir. 1968).

he was deportable.[88] The order noted that Niarchos had entered the United States as a visitor, but without the requisite crossing card, and had been deported five years earlier.[89] Petitioner did not challenge the order but alleged that the court should reverse his 1962 deportation because he was not provided with an interpreter at that hearing.[90]

The court denied the petition on other grounds but in dicta it discussed the need for fundamental fairness in deportation hearings. They noted that although INS has discretion "in dealing with violations of the crewman provision, 8 U.S.C. § 1281 et seq., it would seem clearly not within the Service's discretion to conduct an official inquiry, without an interpreter, in a language the subject of the inquiry [could] neither understand nor speak."[91] The court, referring to the lack of translation at the prior hearing, further indicated that if petitioner were to appeal to the Attorney General for reentry, the Attorney General should consider his petition in light of the "shocking circumstances" surrounding the 1962 deportation proceeding.[92]

The Ninth Circuit

Similarly, the Ninth Circuit has addressed this issue on several prior occasions. The court in *Tejeda-Mata v. INS* held that the immigration judge abused his discretion by not permitting simultaneous translation of testimony against the defendant, by either defendant's counsel or an official interpreter.[93] The court noted that, despite the fact that deportation hearings are considered civil rather than criminal in nature, it was well established that an alien charged with entering the United States illegally is entitled

88. *Id.*

89. *Id.*

90. *Id.* Unless the previous deportation order were reversed, petitioner would be unable to apply for reentry into the United States without the permission of the Attorney General. *Id.*

91. *Id.* at 511.

92. *Id.*

93. 626 F.2d 721 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982). Tejeda-Mata, a native of Mexico, was arrested after an immigration officer, recognizing an alien who was subject to voluntary departure three weeks earlier, stopped to speak to that alien and was approached by petitioner who owned the car in which the other alien was riding. *Id.* at 723. The officer informed both parties that he was an immigration official and, after questioning petitioner in Spanish, determined that petitioner was from Mexico. *Id.* Petitioner refused to sign a voluntary departure form and was subsequently arrested. *Id.* At Tejeda-Mata's deportation hearing, the officer was the only witness offered by the government. *Id.* Petitioner's counsel requested that an official interpreter be provided or alternatively, that he be permitted to simultaneously translate for his client. *Id.* Both requests were inexplicably denied. *Id.* at 726.

to a full and fair hearing prior to deportation.[94] The court also stated that a fundamentally fair hearing necessitates the presence of an interpreter if the alien cannot speak fluent English.[95]

In *Orozco-Rangel v. INS*, the Ninth Circuit approved of the presence of an interpreter.[96] In assessing whether the deportation hearing comported with due process requirements, the court considered the presence of the official interpreter at the proceedings despite the fact that the petitioners admitted the essential charges forming the basis for the deportation order.[97] This demonstrates the court's belief that fundamental fairness dictates an interpreter be provided when deemed necessary by the immigration judge.

The Ninth Circuit recognized the high stakes present for the alien in deportation and exclusion hearings in *Kovac v. INS*.[98] In discussing Kovac's inability to understand English, the court noted that all of his testimony was "elicited under interrogation through an interpreter, by a trial attorney, whose funcion [sic] at deportation hearings is to represent the government, not the alien."[99] Kovac asserted that he was unable to understand the nature of the proceedings and the meaning of the questions presented to him.[100] Because of his lack of understanding, he was also unable to convey the full basis for his fear of persecution when answering the attorney's questions.[101] The court expressed "grave doubt" whether the hearing was conducted in such a way as to give Kovac a *reasonable opportunity* to present his proofs, given the high stakes involved.[102]

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94. *Id.* at 726. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 49-51 (1950); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1239 (9th Cir. 1979).

95. *Tejeda-Mata*, 626 F.2d at 726. *See Niarchos*, 393 F.2d at 511; Orozco-Rangel v. INS, 528 F.2d 224 (9th Cir. 1976); Leung v. INS, 531 F.2d 166, 168 (3d Cir. 1976); Haidar v. Coomey, 401 F. Supp. 717, 720 (D. Mass. 1974). The court regretfully held that despite the judge's abuse of discretion and inherent lack of fairness in failing to provide an interpreter, the error was harmless because the untranslated testimony only confirmed petitioner's admission of alienage. *Tejeda-Mata*, 626 F.2d at 727. The court limited this holding to the specific circumstances of the case. *Id.*

96. 528 F.2d 224 (9th Cir. 1976).

97. *Id.* at 224.

98. 407 F.2d 102, 108. Kovac, a Yugoslavian citizen, claimed that he had been discriminated against and would be subject to physical persecution in his native country because of his Hungarian background. *Id.* at 104. A crewman on a Yugoslavian vessel, he sought political asylum after his ship docked in the United States. *Id.* The court noted that Kovac did not speak English and was unable to fully understand the proceeding but it overruled the Board of Immigration Appeal's decision to deny him asylum on other grounds. *Id.* at 108.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

III. *El Rescate Legal Services v. Executive Office for Immigration Review*

Statement of the Case and Procedural History

The District Court Decision

Plaintiffs filed a class action against the Executive Office for Immigration Review.[103] They alleged that failure to interpret the entire deportation or exclusion proceeding deprives the class members of their statutory rights under the Immigration and Nationality Act.[104] These include the right to a reasonable opportunity to present evidence, cross-examine witnesses, and be represented and effectively assisted by retained counsel.[105] They also alleged that the EOIR policy of failing to fully translate immigration court proceedings violated the Fifth Amendment due process and equal protection guarantees.[106] Finally, the complaint alleged that the practice violates the APA.[107]

The EOIR, in a deposition submitted to the district court, indicated that their policy is to translate only those portions of the proceeding that are "related to a witness, whether it be a respondent or another witness needing language translation . . . and [the] primary purpose is to assure that the official record will be available for review in English."[108] They further indicated that no policies exist to interpret a witness' English testimony to Spanish (or any other language) for the benefit of the alien.[109] Finally, they showed they had policies of interpreting counsels' arguments, interpreting counsel's objections, or interpreting the judge's decision.[110]

According to the EOIR, if the judge decides that there is a need for an interpreter because the alien speaks little or no English, the interpreter serves the sole function of translating the foreign language into English. This translation is for the record, so that those reviewing the decision have a full record in English.[111]

According to the EOIR, justification for this policy of less than full translation derives from the notion that if counsel represents the alien the need for interpretation is mitigated, especially

103. *El Rescate II*, 941 F.2d at 952.
104. *Id.*
105. 8 U.S.C. § 1252(b) (1992). *See* discussion *supra* text accompanying notes 38-51.
106. *El Rescate II*, 941 F.2d at 952.
107. *Id.*
108. *El Rescate I*, 727 F. Supp. at 560.
109. *Id.*
110. *Id.*
111. *Id.*

if counsel speaks the client's language.[112] Defendants assured the district court that, if the alien is not represented by counsel, the policy *is* to interpret the entire proceeding.[113] The EOIR based its third argument on economic reasons: additional judges and support staff would be needed to provide such a service.[114]

The District Court for the Central District of California easily dismissed these justifications and suggested that the EOIR, for numerous reasons, balks at full interpretation of immigration proceedings.[115] The court held that the Immigration and Nationality Act should be construed to require that the entire immigration court proceedings be interpreted when the immigration judge concludes that an interpreter is necessary.[116] It held that violating the statutory provisions of the Immigration and Nationality Act also violated the Administrative Procedures Act.[117] The district court granted partial summary judgment for the plaintiffs on these issues.[118] The court permanently enjoined the EOIR "from failing to provide for interpretation of the entire proceedings in immigration court when an immigration judge concludes that an interpreter is required for non- or limited-English speaking class members."[119]

Defendants appealed to the 9th Circuit Court of Appeals on the grounds that plaintiffs had not exhausted their administrative remedies.[120] They also alleged that the organizational plaintiffs

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112. *Id.* at 563.

113. *El Rescate I*, 727 F. Supp. at 563. The district court noted that the testimony given by immigration judges and immigration court interpreters belied this assertion, at least at the lower level of the immigration court proceedings. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 564.

117. *Id. See* discussion *supra* text accompanying notes 38-51.

118. *El Rescate I*, 727 F. Supp at 564. The District Court granted partial summary judgment to the plaintiffs' first and third causes of action, brought under the Immigration and Nationality Act and the Administrative Procedures Act, respectively. *Id.* The court discussed plaintiffs' second cause of action, i.e., the Constitutional claims, in dicta, but did not make a ruling as to the effect these claims should have. *Id.* at 562-63.

119. *El Rescate II*, 941 F.2d at 952.

120. *Id.* 8 U.S.C. § 1105a(c) (1992) states that "[a]n 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." The court of appeals noted that this requirement is coextensive with § 1105a(a) which names the courts of appeals as the exclusive means of reviewing final orders of deportation. *El Rescate II*, 941 F.2d at 953. The court concluded that exhaustion of administrative remedies is statutorily required only when attacking a final order of deportation or exclusion. *Id.* The court distinguished between its jurisdiction to rule on the merits of individual deportation orders and its jurisdiction to rule on alleged patterns or practices of Constitutional or statutory violations. *Id.* After analyzing a number of decisions from the Ninth and other circuits, the court

lacked standing.[121] The court dismissed both arguments in favor of plaintiffs and then discussed the statutory requirements of the Immigration and Nationality Act.[122] The court held that the Immigration and Nationality Act does not require translation of the entire immigration proceeding.[123] It also held that as there was no violation of the Immigration and Nationality Act, there could be no violation under the Administrative Procedures Act.[124] The court declined to address the due process and equal protection claims because the district court did not address them.[125] The case was remanded to the district court for consideration of the Constitutional claims.[126]

The Court of Appeals' Decision

Courts generally accord great deference to an executive de-

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held that there was no statutory requirement of exhaustion because the appellees were not challenging final deportation orders, but were challenging a "blanket provision on constitutional and statutory grounds. . . ." *Id.* *See also* National Center for Immigrants' Rights, Inc. v. INS, 913 F.2d 1350, 1352 (9th Cir. 1990), *cert. granted in part*, 111 S. Ct. 1412 (1991).

When exhaustion is not mandated statutorily, the court applies a prudential exhaustion requirement in cases in which:

> (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision;
> (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and
> (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.

Montes v. Thornburgh, 919 F.2d 531, 537 (9th Cir. 1990)(quoting United States v. California Care Corp., 709 F.2d 1241, 1248 (9th Cir. 1983)).

The court of appeals found that the first two requirements were inapplicable because further development of the record was not necessary and because a district court would have jurisdiction only in the rare cases that alleged a pattern or practice of violating the rights of a class of applicants. *El Rescate II*, 941 F.2d at 954 (quoting *Montes*, 919 F.2d at 537). With respect to the third requirement, the court noted that the Board of Immigration Appeals had previously announced and reaffirmed its policy regarding translation of immigration proceedings and its understanding of the requirements of the Due Process Clause in Matter of Exilus, 18 I & N Dec. at 280-81 (BIA 1982) and Matter of Tomas, Interim Dec. # 3032 (BIA Aug. 6, 1987)("[A]ll of the hearing need not be translated for the hearing to be fair . . . . See Matter of Exilus."). *El Rescate II*, 941 F.2d at 954. In light of these prior Board of Immigration Appeals decisions, the court felt that it would be futile to require plaintiffs to exhaust their administrative remedies by first bringing their claims to the Board of Immigration Appeals. *Id.*

121. *El Rescate II*, 941 F.2d at 954-55. The court of appeals termed this issue moot because the scope of the injunction was no broader than it would have been had the class members been the only plaintiffs. *Id.* They also stated that the organizations alleged sufficient injury to support standing. *Id.* at 955.

122. *Id.* at 955-56. *See supra* note 40 and accompanying text.

123. *Id.* at 956.

124. *Id.*

125. *Id.*

126. *El Rescate II*, 941 F.2d at 956.

partment's construction of a statute when that department is charged with administering the statute.[127] Review of an agency's construction of a statute that it is empowered to administer must confront two initial questions.[128] First, has Congress directly spoken to the precise question at issue?[129] If so, the court must defer to the unambiguously expressed intent of Congress.[130] If the court determines Congress has not directly addressed the precise question at issue, the court still does not impose its own construction on the statute.[131] The court will look to the administrative agency's interpretation of the statute to determine whether the agency's interpretation is based on a permissible construction of the statute.[132]

Second, has Congress explicitly left a gap for the agency to fill?[133] If yes, Congress delegates to the agency the authority to clarify the provision of the statute which it leaves ambiguous.[134] The agency does this through regulation.[135] If agency regulations are not arbitrary, capricious, or manifestly contrary to the statute, they are given great weight.[136]

If Congress implicitly delegates authority to an agency on a particular question, a reasonable interpretation made by the agency's administrator controls.[137] In such a case, the court may not substitute its own construction of the statutory provision.[138]

The appeals court acknowledged that it should give deference to the Board of Immigration Appeals' interpretation of the Immigration and Nationality Act.[139] On the specific question of translation of immigration court proceedings, however, the Board of Immigration Appeals had only determined those requirements imposed by the Due Process Clause.[140] They had never considered, however, the requirements imposed by the Immigration and Na-

127. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984) ("[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ").

128. *Id.* at 842.

129. *Id.*

130. *Id.* at 842-43.

131. *Id.* at 843.

132. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

133. *Id.* at 843-44.

134. *Id.*

135. *Id.*

136. *Id.* at 844.

137. *Id.*

138. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984).

139. *El Rescate II*, 941 F.2d at 954.

140. *Id.* at 955. The Board of Immigration Appeals has announced and reaf-

tionality Act.[141] Because the Board of Immigration Appeals's position on the due process issues appeared set and a decision from them regarding their statutory interpretation of the Immigration and Nationality Act would be highly predictable, the court held that it would be futile and inefficient to allow the Board of Immigration Appeals to consider the question first.[142] The court therefore claimed jurisdiction to resolve these statutory issues despite the fact that the Board of Immigration Appeals had never considered them.[143]

The court then enumerated the various provisions covering deportation and exclusion hearings. They noted that aliens must have a "reasonable opportunity to be present" at their deportation proceedings.[144] In both exclusion and deportation proceedings, an alien has "the privilege of being represented (at no expense to the Government), by such counsel . . . as he shall choose."[145] The alien must also be given a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government.[146]

The court then examined the requirements that an alien must be given a *reasonable opportunity* to be present, to examine and present evidence, and to provide his own representation.[147] They concluded that the statute does not deny an alien a right to provide his own translator.[148] Therefore, the EOIR's failure to provide an interpreter does not undermine the alien's reasonable

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firmed its policy on translation of immigration proceedings and its understanding of the requirements of the Due Process Clause. *Id.*

141. *Id. See Matter of Exilus*, 18 I. & N. Dec. at 276; *Tomas*, Interim Dec. #3032. *See supra* part II for a discussion of the cases that examine due process issues related to translation of immigration court proceedings. Plaintiffs contend that the EOIR and the Board of Immigration Appeals have no discretion to decide whether a hearing should be fully interpreted because the Immigration and Nationality Act requires full interpretation. The court of appeals considered this a question of statutory interpretation and therefore decided the issue de novo. *El Rescate II*, 941 F.2d at 955. Courts give deference when an agency applies a statute to particular facts but not in a pure statutory construction question. INS v. Cardoza-Fonseca, 480 U.S. 421, 445-48 (1987). Courts decide issues of pure statutory construction. *Id. See also* Briggs v. Sullivan, 886 F.2d 1132, 1144-45 (9th Cir. 1989)(no deference was due where plaintiffs did "not contend that the Secretary's discretionary judgment was wrong; they claim(ed) he has no discretion under the statute to make any judgment in the first place.").

142. *El Rescate II*, 941 F.2d at 954.

143. *Id.* at 955.

144. *Id.* (quoting 8 U.S.C. § 1252(b)) (1992).

145. *Id.* (quoting 8 U.S.C. § 1252(b)) (1992).

146. *Id.* (citing 8 U.S.C. § 1252(b)(3) (1988)).

147. *El Rescate II*, 941 F.2d at 955.

148. *Id.*

opportunity to be present.[149] The court extended this rationale to the other rights granted by the Immigration and Nationality Act.[150]

The Due Process Issue on Remand

After finding that the Immigration and Nationality Act does not require full interpretation of immigration court proceedings, the court of appeals remanded the matter to the district court to determine the disposition of the plaintiffs' due process claims.[151] Plaintiffs' claim alleged that the EOIR policy against full interpretation violates the Fifth Amendment's due process and equal protection guarantees.[152] In light of the aforementioned cases, the district court on remand should determine that these guarantees are violated by the EOIR policy of partial or, for many parts of the proceeding, no translation. The court should require full translation of the proceeding in order to ensure due process for aliens in immigration court proceedings.

The Supreme Court has noted that, while not a criminal proceeding, deportation often results in a most serious penalty by depriving an individual of the opportunity to stay, live and work in the United States.[153] They state "[m]eticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."[154]

Statutorily, essential standards of fairness include the right to counsel, the right to present evidence, and the right to cross examine witnesses.[155] For federal and criminal proceedings the Court Interpreters Act provides for full translation and requires the use of a certified and otherwise qualified interpreter.[156] The fact that translation is a statutory requirement in these types of cases implies that translation is an element of essential fairness.

If an interpreter would be required by the federal court ultimately hearing the alien's appeal, then logically, an interpreter should be required at every step of the process. This would meet the requirement of essential fairness, and might lead to greater judicial efficiency in these types of matters because fewer cases

149. *Id.* at 955-56.
150. *Id.* at 955.
151. *Id.* at 956.
152. *Id.*
153. Bridges v. Wixon, 326 U.S. 135, 154 (1945).
154. *Id.*
155. *See supra* notes 40-41 and accompanying text.
156. Court Interpreters Act, 28 U.S.C. § 1827(k) (Supp. 1989).

would be appealed based on a claim of incomplete understanding of the proceedings.

The Board of Immigration Appeals has also acknowledged that due process entitles an alien to a fair hearing.[157] Cases that examine the question of interpretation and due process rights agree that interpretation is an element of fundamental fairness.[158] The question to be answered then, is whether *full translation* is essential to fundamental fairness.

The Arguments

The EOIR employed faulty reasoning in justifying its policy of not requiring full translation of immigration court proceedings. The district court convincingly refuted each argument.[159]

The first of the EOIR's arguments was that if counsel represents the alien, the need for translation is mitigated, especially if counsel speaks the alien's language.[160] The district court noted that counsel for an alien who happens to speak the alien's language should not have to, and indeed, cannot effectively address the court and simultaneously translate his statements to the alien.[161] Any attempt to do so would severely disadvantage that alien who cannot provide a separate interpreter.

There may be many reasons why an alien hires an attorney who speaks his language, but it is unlikely that one of those reasons is that he expects counsel to wear two hats and translate everything in addition to advocating zealously for the alien.[162] There is no guarantee that the alien has hired counsel who speaks his language or dialect fluently.[163] The alien may wish to be represented by an attorney who has a high success rate with this type of proceeding, for example, but who coincidentally does not speak the alien's language. He should not be prevented from hiring such counsel simply because it has been left to him to provide his own interpreter and he cannot afford to pay.

"Fundamental" is defined as having innate or ingrained characteristics and relating to essential structure, function or facts.[164]

157. *See supra* notes 52-62 and accompanying text.
158. *See id.*
159. *El Rescate I*, 727 F. Supp. at 563.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* In this case, three out of the five class representatives had counsel who spoke Spanish. *Id.* Even here, then, 40% were represented by counsel who did not speak their language.
164. WEBSTER'S NEW COLLEGIATE DICTIONARY 465 (1973).

Fundamental fairness therefore, should be inherent in the procedural aspects of the hearing. In an immigration court proceeding, the burden is on the government to prove the alien should be deported from the United States.[165] Asking the alien to provide his own interpreter essentially gives the alien, rather than the government, the responsibility to ensure the fundamental fairness of his own hearing. This policy does nothing toward ensuring fundamental fairness and, in fact, may hinder the system by encouraging aliens to provide incompetent translators in order to preserve an issue for appeal. It would seem almost essential to have some mechanism for certifying each aliens' translator prior to a hearing. Certification may help avoid an increase in the number of appeals due to an alien's lack of understanding of proceedings because of self-provided "incompetent" translators. Even those aliens who sincerely attempt to provide an adequate translator may find that person less competent than they, or the court, anticipated.[166] Certification of an "outsider," however, seems redundant when a previously certified interpreter is already present in the courtroom to translate for the record. This translator could just as easily be required to translate for the alien's benefit.[167]

Defendants also claimed that providing interpreters would result in a substantial cost increase for the INS.[168] The district court dismissed this argument, noting that it was unable to discern how requiring an interpreter, already present and paid to do a job, to also translate for the alien, would increase the costs of the proceeding.[169] The court noted that defendants seemed overly concerned about administrative convenience and bureaucratic guidelines and showed an appalling "lack of concern" for the rights of the alien and the fundamental fairness of the proceeding.[170]

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165. *See supra* note 30 and accompanying text.

166. *See In re* Thomas, 19 I. & N. Dec. at 464. The alien's daughter, who spoke Spanish and Kanjobal was nevertheless unable to adequately translate the proceeding. *Id.* The court held that the proceeding thus lacked the fundamental fairness required by due process. *Id.* at 465.

167. Some may feel that the alien should then be responsible for the costs associated with the official translator. As many aliens are unable to afford legal assistance, it would also seem likely that many would be unable to defray translation expenses.

168. *El Rescate I*, 727 F. Supp. at 563.

169. *Id.*

170. *Id.*

Analysis of the Court of Appeals' Statutory Interpretation of the Immigration and Nationality Act

The court of appeals stated that because plaintiffs did not demonstrate that they were prevented from providing their own translators, they were not denied a reasonable opportunity to exercise their statutory rights.[171] They supported this statement with excerpts from two cases. In the first case, the court indicated that "[a]n immigration judge simply cannot be responsible for ensuring the presence of an alien or his counsel . . . when the alien has reasonable opportunity to be present."[172] The second case allegedly supported the proposition that plaintiffs were not denied a reasonable opportunity to exercise their statutory rights.[173] The court of appeals indicated that the cases stood for the proposition that "[w]hen one voluntarily chooses not to attend a deportation hearing which may affect him adversely, he is hardly in a position to complain that an Order made pursuant to the hearing is invalid because of his absence."[174]

These cases discussed whether an alien had a reasonable opportunity to be present at his hearing. The court failed to explain how these cases relate to the proposition that failure to translate immigration court proceedings is not a denial of a reasonable opportunity for an alien to exercise his statutory rights to be present, to examine the evidence against him, to cross examine witnesses, to be represented by retained counsel, and to present evidence in his own behalf. The cases interpreted the notice requirement of the Immigration and Nationality Act[175] but bear no relation to the provision in question.[176]

The Fifth Amendment's Due Process Clause "applies in deportation [hearings] and requires that [the] alien be granted a full and fair hearing."[177] The alien does not receive the due process protection to which he is entitled if the statutory prerequisites are

171. *El Rescate II*, 941 F.2d at 956.

172. *Id.* (quoting Maldonado-Perez v. INS, 865 F.2d 328, 335 (D.C. Cir. 1989)). *See also* 8 U.S.C. § 1252(b) (1992).

173. *El Rescate II*, 941 F.2d at 956. *See also* 8 U.S.C. § 1252(b) (1992).

174. *El Rescate II*, 941 F.2d at 956 (quoting United States v. Dekermenjian, 508 F.2d 812, 814 (9th Cir. 1974)).

175. 8 U.S.C. § 1252(b)(1) (1992). *See* Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974).

176. 8 U.S.C. § 1252(b)(3) (1992). *See* Maldonado-Perez v. INS, 865 F.2d 328 (D.C. Cir. 1989); United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974).

177. Tejeda-Mata v. INS, 626 F.2d 721, 727 (9th Cir. 1980) (Ferguson, J., dissenting) (citing Raminez v. INS, 550 F.2d 560, 563 (9th cir. 1977)), *reh'g denied*, 665 F.2d 269 (9th cir. 1981), *cert. denied*, 465 U.S. 994 (1982)).

not met.[178] While the alien has a statutory right to be present, if he has been given a reasonable opportunity to be present and chooses not to exercise that right, the hearing may be held in his absence.[179] The Supreme Court has ruled that the hearing may be conducted, even if the alien and his counsel are both in absentia.[180]

The alien's absence does not mean that the rest of the hearing may proceed without regard for the fundamental fairness of the hearing. In *Maldonado-Perez*, the court notes that minimal procedural due process still requires a "meaningful or fair evidentiary hearing."[181] With respect to the issue in this case, if the alien is not present, there is obviously no need for an interpreter unless non-English speaking witnesses appear and interpretation is thus needed solely for the benefit of preserving the record. The court in *Negron* indicated that "considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial unless by his conduct he waives that right."[182] By not appearing, the alien waives his statutory rights to cross examine witnesses, present evidence on his own behalf, be represented by retained counsel and examine the evidence against him.

The alien who does appear, however, should be able to reap fully all of the benefits conferred upon him by these rights. The district court examined the effect that lack of interpretation has on each of these rights and concluded that "failure to require full interpretation of immigration court proceedings seriously undermines the plaintiffs' statutory right[s]. . . ."[183]

Failure to fully interpret the proceedings deprives the non-English speaking aliens of their statutory right to be present.[184] The district court cited *Negron*, which held that a proceeding conducted without an interpreter results in a "babble of voices" for the alien.[185] If the alien cannot understand what is being said, then his right to be present is meaningless. Likewise, the dissent in *Tejeda-Mata* made the point that "[p]resence can have no mean-

178. *Tejeda-Mata*, 626 F.2d at 727 (Ferguson, J., dissenting). *See also* Bridges v. Wixon, 326 U.S. 135 (1945); Hirsch v. INS, 308 F.2d 562 (9th Cir. 1992).

179. *Dekermenjian*, 508 F.2d at 813. *See also* 8 U.S.C. § 1252(b) (1992).

180. INS v. Lopez-Mendoze, 468 U.S. 1032, 1038-39 (1984).

181. Maldonado-Perez v. INS, 865 F.2d at 333.

182. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (E.D.N.Y. 1970) (citations omitted).

183. *El Rescate I*, 727 F. Supp. at 560.

184. *Id.*

185. *Id.* (citing United States *ex rel.* Negron v. New York, 434 F.2d at 388).

ing absent comprehension."[186] In *Chung Young Chew v. Boyd*, the Ninth Circuit held that the alien was deprived of his statutory rights because the immigration judge failed to inform petitioner that he was entitled to counsel.[187] The court had also failed to "ascertain [petitioner's] ability to understand English, no interpreter being present."[188]

Failure to interpret also jeopardizes the alien's statutory right to retained counsel. If the alien cannot comprehend the proceeding, his ability to interact effectively with counsel and assist in his own defense is seriously limited.[189] Counsel should not be required to both translate and to advocate zealously. Yet, unless the alien fully understands the proceeding, he cannot point out problems such as errors in witnesses' testimony; he cannot readily provide counsel with information relevant to the case nor indicate errors counsel may have made. The right to retained counsel interacts significantly with the alien's rights to cross-examine witnesses, to present evidence and to examine evidence against him. If failure to interpret renders the right to counsel illusory, these other rights also are seriously eroded. If the alien cannot understand what is being said, he cannot provide meaningful assistance in the cross-examination of witnesses, nor can he fully exercise any of his other statutory rights.

Conclusion

Immigration court proceedings are civil rather than criminal in nature. The due process protections afforded defendants in criminal proceedings do not apply.[190] The Immigration and Nationality Act gives aliens in these proceedings certain statutory rights. Courts and the Board of Immigration Appeals have recognized that the Fifth Amendment's Due Process Clause applies to deportation hearings, requiring a full and fair hearing.[191]

In this case, plaintiffs alleged that their due process and statutory rights were violated by the EOIR policy of refusing to fully translate immigration court proceedings for non-English speaking

186. Tejeda-Mata v. INS, 626 F.2d 721, 728 (9th Cir. 1980) (Ferguson, J., dissenting). Justice Ferguson felt that the denial of an interpreter should not be subject to review under the harmless error standard. *Id.* (citing Chapman v. California, 386 U.S. 18, 87 (1967)).

187. 309 F.2d 857, 862 n.12 (9th Cir. 1962).

188. *Id.*

189. *El Rescate I*, 727 F. Supp. at 561.

190. *Tejeda-Mata*, 626 F.2d at 726.

191. *See* Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977); *In re* Exilus, 18 I. & N. Dec. at 278.

aliens.[192] The court of appeals addressed the statutory due process issue and overruled the district court's holding that statutory due process requires full translation.[193] They held that statutory due process requirements were satisfied by simply *not preventing* the alien from providing his own interpreter.[194]

Only certain parts of immigration court proceedings are translated for non-English speaking aliens.[195] The parts translated, however, are not translated for the alien's benefit, but solely for the benefit of the record, despite immigration judges' discretion to require interpretation of various parts of the proceeding for the alien's benefit.[196] The EOIR has determined that the only portions of a proceeding that require translation include 1) the immigration judge's statements to the alien; 2) the examination of the alien by counsel, the attorney for the INS, and the immigration judge; and 3) the alien's responses to their questions.[197] The immigration judge, at his own discretion, may decide that it is necessary that the alien to understand other dialogue so that he may assist in the presentation of the case.[198]

The only elements of the proceeding that EOIR requires to be translated *into* the alien's language are the statements to the alien by the judge or questions put to him by counsel for either side. This policy appears unrelated to fundamental fairness or to providing the alien with a reasonable opportunity to assist in his defense. Indeed, this policy seems purely for administrative convenience, since without this translation the alien would not be able to testify at all and the record would be incomplete on appeal. The policy unfairly leaves a large portion of the proceeding incomprehensible to the non-English speaking alien.

Numerous decisions have discussed the importance of translating the proceeding to safeguard due process rights;[199] some have held that it is not necessary to interpret the entire proceeding,[200] and some have found harmless error in the failure to interpret certain parts of the hearing.[201] This note has reached the opposite conclusion and has attempted to show that, by definition, funda-

192. *El Rescate II*, 941 F.2d at 952.
193. *Id.* at 956.
194. *Id.* at 955-56.
195. *El Rescate I*, 727 F. Supp. at 559-60.
196. *Id.*
197. *See Id.*
198. *See Id.*
199. *See* discussion *supra* parts IV, V.A-D.
200. *See supra* notes 53-59 and accompanying text.
201. *See* Tejeda-Mata v. INS, 626 F.2d 721, 727 (9th Cir. 1980), *cert. denied*, 456 U.S. 994 (1982).

mental fairness calls for full translation.[202] Anything less than full translation results in an unfair disadvantage to the alien. Additionally, it makes no sense to require that the proceeding be translated at the district court level and yet not require it in immigration courts. A hearing cannot be "full and fair" if the person affected by it cannot understand the proceeding. The district court stated, and this author agrees, that aliens' Fifth Amendment due process rights should not be a matter for discretion and that "[o]nly when the entire hearing is translated will those rights be secure."[203]

The EOIR's current policy of discretionary (selective) translation, cannot fully protect an alien's rights. Judges are unlikely to recognize all of the portions of a proceeding for which translation would benefit the alien. Unequal translation demands, coming from different judges, provide inconsistent treatment and raise the question of which aliens, if any, receive hearings which are "full and fair." Any U.S. citizen subjected to an incomprehensible proceeding conducted in a foreign language would be justifiably outraged; yet this is exactly how many aliens are treated by our immigration courts.[204]

When the alien exercises the statutory right to be present, only full interpretation of the proceedings guarantees that his other statutory rights will be recognized. If the witnesses' testimony is not translated, the alien does not have a reasonable opportunity to cross-examine them or to examine the evidence against him; if the alien cannot confer with counsel, he is denied the right to retained counsel and the right to present evidence in his own behalf; if he cannot understand what the judge, counsel, and witnesses are saying at all stages of the proceeding, he is denied the right to be present. The court of appeals felt that no denial of rights occurs if the alien is not prevented from bringing his own interpreter to the hearing. Unless an interpreter's competence is certified in some way, however, there is still no preservation of the alien's statutory rights; and if any or all of the above rights have

202. *See* discussion *supra* text accompanying notes 171-189.

203. *El Rescate I*, 727 F. Supp. at 563-64.

204. A footnote in the *El Rescate I* decision best shows the attitude that INS has towards the aliens, English or non-English speaking, that appear before them. Counsel for the defense made the following statement:

> [E]ven if assuming that everything would be interpreted, it's unclear whether the aliens would—and most of them are from poor communities—that they would really understand the meaning of what is happening in the immigration hearing.

727 F. Supp. at 561, n.5. The court responded, "This court finds counsel's inference condescending and indicative of the defendant's lack of respect for the plaintiffs' class." *Id.*

been denied to the alien, he has not had a *reasonable* opportunity to be heard.

In conclusion, statutory due process and the Fifth Amendment both necessitate full translation of immigration court proceedings to ensure that the hearing is full and fair and that the alien has a reasonable opportunity to exercise his rights. On remand, the district court should find that due process necessitates full translation of immigration court proceedings. As the court in *Negron* indicated, the non-English speaking alien's "incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, [the alien] deserves more than to sit in total incomprehension. . . ."[205]

205. United States *ex rel.* Negron v. New York, 434 F.2d at 390 (E.D.N.Y. 1970).