Notre Dame Law Review

Volume 56 | Issue 4 Article 7

4-1-1981

Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reentry under Section 276 of the Immigration and Nationality Act of 1952

Shawn C. Conway

Collaterally Attacking Deportation Orders in Criminal Prosecutions for Illegal Reentry Under Section 276 of the Immigration and Nationality Act of 1952

In recent years, the Immigration and Naturalization Service (INS) has reported sharp increases in the number of deportable aliens apprehended.[1] Among these aliens is a subgroup of illegal reentrants who are subject not only to redeportation,[2] but also to criminal sanctions. Section 276 of the Immigration and Nationality Act of 1952 (INA)[3] makes it a felony for an alien who has been arrested and deported to reenter the United States without the express written consent of the Attorney General.[4] The defendant in a section 276 criminal prosecution may wish to collaterally challenge the underlying deportation order's validity on the ground that it was issued without due process of law.[5]

Because section 276 is silent regarding the permissibility of this collateral attack defense, the courts have been left to decide whether the defense is available. In 1952 the Supreme Court of the United States, in *United States v. Spector*,[6] expressly reserved decision on whether the validity of an underlying order of deportation may be questioned in criminal prosecutions in which the prior deportation is an element.[7] The Court suggested, however, that denial of such review might infringe the defendant's constitutional rights. In a forceful dissent, Justices Jackson and Frankfurter asserted that the sixth amendment requires a judicial trial *de novo* to establish the deportability of the defendant.[8]

Despite this strong dissent, the federal courts of appeals have been reluctant to allow collateral attacks and the Supreme Court has declined to hear the issue since *Spector*. Recently, a number of courts of appeals have examined the questions *Spector* left unanswered. This examination has resulted in a growing trend in certain circuits to allow limited collateral review. The divergent analyses and conclusions of these courts have inevitably made the law in this area disparate and confusing.

This note addresses the permissibility, basis, and standards of such collateral attacks. Part I of this note discusses the case law concerning section 276 collateral attacks. Part II analyzes the statute to determine congressional intent regarding the collateral attack and concludes that Congress intended to allow a

1 CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION LAW AND POLICY: 1952-1979 71 (1979).

2 Immigration and Nationality Act of 1952 [hereinafter cited as INA], § 242(f), 8 U.S.C. § 1252(f) (1976).

3 *Id.* § 276, 8 U.S.C. § 1326 (1976).

4 This offense is punishable by imprisonment for up to two years, or by fine of up to one thousand dollars, or both. *Id.*

5 In fact, this may be his only viable defense. One federal court of appeals has recently recognized a defense based on the statute of limitations. In United States v. DiSantillo, 615 F.2d 128 (3d Cir. 1980), the court held that a section 276 offense is complete when Immigration and Naturalization Service authorities have record of the defendant's presence. When an alien is so "found," the five year statute of limitations begins to run. *Id. But cf.* United States v. Bruno, 328 F. Supp. 815 (W.D. Mo. 1971) (rejecting a statute of limitations defense as "not only immaterial, but also without merit").

6 343 U.S. 169 (1952).

7 *Id.* at 172.

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

limited collateral attack. Part III examines the type of review which should be afforded and standards which should be used in that review.

I. Case Law Addressing Collateral Attacks Under Section 276

Since the Supreme Court declined in *Spector* to decide whether to allow collateral review of the underlying deportation order, seven courts of appeals have addressed the issue in section 276 prosecutions for illegal reentry.[9] Among those seven circuits, the approaches and analyses have varied greatly. The dissension among the circuits goes far beyond the permissibility of such collateral review, extending as well to the type and standard of review to be afforded. Before exploring these questions it is helpful to examine the divergent stances the several circuits have taken, beginning with the most restrictive view (that of the Tenth Circuit) and ending with the most permissive view (that of the Ninth Circuit).

A. *Tenth Circuit*

In *Arriaga-Ramirez v. United States*,[10] the first appellate court case to decide the issue after *Spector*, the United States Court of Appeals for the Tenth Circuit held that a defendant could not collaterally attack a deportation in a section 276 prosecution.[11] In so holding the court relied on two earlier cases, *United States* ex rel. *Rubio v. Jordan*[12] and *United States* ex rel. *Bartsch v. Watkins*.[13] These two cases were not, however, section 276 criminal prosecutions but rather involved civil redeportation proceedings. The cases held that in civil deportation proceedings the illegality of an earlier deportation is no defense to redeportation since under any circumstances the alien had no right to reenter.

Arriaga not only barred relitigating the issue of original deportability; it also refused to allow pretrial judicial review of the record of the deportation hearing. The court agreed that it was "sufficient to introduce the Warrant of Departation and to prove its execution."[14] The court based its conclusions on its literal interpretation of section 276's language "requir[ing] that it only be shown there was a previous deportation."

Arriaga is the only Tenth Circuit case on point. Its heavy reliance on *Jordan* and *Watkins* is unwarranted. The distinction between redeportation and felony imprisonment for up to two years under section 276 indicates the inapplicability of these two cases as binding precedent. Although *Arriaga* unequivocally forecloses all forms of collateral review, its authoritativeness is weakened by its age and its questionable analysis.

B. *Fifth Circuit*

Unlike the *Arriaga* court, the Fifth Circuit engaged in a detailed analysis of section 276 in *United States v. Gonzalez-Parra*.[15] In this case, the Fifth Circuit held

9 The First, Fourth, Sixth, and District of Columbia Circuits have not dealt with this question.
10 325 F.2d 857 (10th Cir. 1963).
11 *Id.* at 859.
12 190 F.2d 573 (7th Cir. 1951).
13 175 F.2d 245 (2d Cir. 1949).
14 *Id.*
15 438 F.2d 694 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971). This statutory analysis is discussed fully in the text accompanying notes 49-53 *infra*.

that Congress intended to bar collateral attacks on deportation orders in section 276 prosecutions.[16] The defendant was therefore not accorded a trial *de novo* to relitigate his original deportability. The *Gonzalez-Parra* court recognized by way of dictum, however, that in some other circumstances the difference between civil judicial review[17] immediately following an administrative deportation order and a pretrial review in a later criminal prosecution may take on constitutional dimensions. The court intimated that had the defendant not failed to invoke administrative review on the merits of his deportation such constitutional dimensions may have been presented and pretrial review by the judge required.[18]

C. *Eighth Circuit*

The Eighth Circuit addressed the issue for the first time in *Hernandez-Uribe v. United States*.[19] The court refused to allow the defendant to relitigate the issue of his alienage, which had been established by his voluntary plea of guilty in two prior convictions under section 276. Although the defendant was denied a trial *de novo* on the alienage element of the offense, the appellate court held he was nevertheless entitled to have the prior proceedings carefully examined in order to determine whether a full and adequate hearing had been provided.[20] Thus the Eighth Circuit appears to recognize that some limited pretrial judicial review is permissible.

D. *Second Circuit*

The Second Circuit left the issue of collateral attacks an open question in *United States v. Pereira*.[21] The defendant, Pereira, had been convicted of three counts of burglary, two counts of theft, and one count of escape from imprisonment. He was ordered deported on five separate occasions, and had previously been convicted of a section 276 violation. The court found that the defendant's continuing and flagrant disregard of United States immigration laws, combined with his failure to question the validity of his previously ordered deportations, was overwhelming reason to affirm his conviction. The court confined its decision to these facts, expressly reserving decision on whether defendants in other

16 438 F.2d at 697.

17 *See* INA § 106, 8 U.S.C. § 1105a (1976).

18 438 F.2d at 699.

19 515 F.2d 20 (8th Cir. 1971), *cert. denied*, 423 U.S. 1057 (1976). Four years earlier, a district court within the Eighth Circuit had taken a very restrictive view of the collateral attack issue. United States v. Bruno, 328 F. Supp. 815 (W.D. Mo. 1971). In *Bruno*, the defendant attempted to challenge the voluntariness of a guilty plea to a narcotics conviction on which the deportation underlying his present § 276 prosecution was based. The district court held that the validity of the conviction underlying order of deportation did not constitute a reviewable question in a § 276 prosecution and that the criminal trial court "could not award a '*de novo* hearing on the merits underlying his deportation'." 328 F. Supp. at 824 (quoting United States v. Heikkinen, 221 F.2d 890, 893 (7th Cir. 1955)).

In support of this holding, the *Bruno* court analogized the situation to escape from imprisonment under a sentence which is later invalidated. The court asserted that in both instances the federal statutes criminalized the conduct involved regardless of the propriety of the prior adjudications involved. The crucial distinction that both *Bruno* and *Arriaga* ignore is the important differences between criminal and civil prosecutions. An escaping convict has previously been afforded all the safeguards accompanying a criminal prosecution, such as trial by jury, appointment of counsel if necessary, and the requirement of proof beyond a reasonable doubt as to all elements of his offense. The § 276 defendant is guaranteed none of these safeguards in his deportation hearing.

20 515 F.2d at 22.

21 574 F.2d 103 (2d Cir. 1978).

situations could collaterally attack a conviction underlying the deportation on which a section 276 prosecution is based.[22]

E. *Seventh Circuit*

Although the cases in the Seventh Circuit have indicated a willingness to allow collateral attacks in section 276 prosecutions, the question has not been squarely presented.[23] *United States* ex rel. *Rubio v. Jordan*[24] involved an alien, whom the government sought to redeport, seeking habeus corpus review of a prior deportation. The court held that in this proceeding a collateral attack against the prior deportation order would be permissible only if the court found that a "gross miscarriage of justice"[25] would otherwise result.

In *United States v. Heikkinen*,[26] the Seventh Circuit held that the "validity of the underlying deportation order is an inescable ingredient" of the offense of willful failure to deport following an order of deportation.[27] Consequently, the court found that the defendant was entitled "to have the trial judge ascertain whether [the defendant] was accorded due process before the INS authority; whether the rules were adhered to and pertinent statutory provisions followed."[28] The court ruled, however, that he was not entitled to a trial *de novo*. Neither *Jordan* nor *Heikkinen* was a section 276 prosecution, but the greater similarity of illegal reentry[29] to willful failure to depart[30] than to "redeportation" suggests that *Heikkinen*, rather than *Jordan*, would be followed in a section 276 prosecution. Both section 276 (illegal reentry) and section 242(e) (failure to depart) involve criminal prosecutions based on elements of previously ordered deportation and subsequent physical presence in the United States. The principal distinction between the two situations is merely having departed for section 276 and not having departed for section 242(e).

F. *Third Circuit*

The Third Circuit was the first to allow collateral attack on underlying deportation orders in section 276 prosecutions. In *United States v. Bowles*,[31] the court found that "[w]hen Congress made use of the word 'deported' in [section 276], it

22 Like *Hernandez-Uribe*, *Pereira* established a less restrictive view of the collateral attack question than previous lower courts had taken. Prior to *Pereira*, in United States v. Mohammed, 372 F. Supp. 1048 (S.D.N.Y. 1973), the United States District Court for the Southern District of New York found that the defendant was not entitled to have his section 276 prosecution stayed while he sought administrative relief. The *Mohammed* court held that the section 276 defendant was absolutely foreclosed from collaterally attacking the original deportation order. *Id.* at 1049. Thus, the *Pereira* decision marks the present trend within the circuits toward allowing collateral attacks.

23 Although technically the Seventh Circuit has not ruled on the collateral attack question in a § 276 prosecution, other circuits have interpreted the 7th Circuit case law as answering it affirmatively. *See, e.g.*, United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974) (the Ninth Circuit, still refusing to rule on the issue, viewed the Seventh as well as the Third Circuit as already allowing the collateral attack).

24 190 F.2d 573 (7th Cir. 1951).

25 *Id.* at 576.

26 240 F.2d 94 (7th Cir. 1957), *rev'd on other grounds*, 355 U.S. 273 (1958); United States v. Heikkinen, 221 F.2d 890 (7th Cir. 1955).

27 221 F.2d at 892.

28 *Id.* at 893.

29 INA § 276, 8 U.S.C. § 1326 (1976).

30 *Id.* § 242(e), 8 U.S.C. § 1152(e) (1976).

31 331 F.2d 742 (3d Cir. 1964).

meant 'deported according to law'."[32] The legality of the deportation is to be decided by the court and may be attacked "on at least two fundamental and limited grounds": (1) no basis in fact, and (2) no warrant in law.[33]

In *United States v. Floulis*,[34] the United States District Court for the Western District of Pennsylvania followed the "Third Circuit rule that the defendant in a prosecution under [section 276] may collaterally attack the validity of a prior deportation to show that he was not deported 'according to law'."[35] *Floulis* also indicated that mere violation of an INS regulation is not per se a violation of due process rendering the deportation unlawful.[36]

G. *Ninth Circuit*

The greatest number of collateral attacks to deportation orders has occurred in the Ninth Circuit.[37] The Ninth Circuit first allowed the collateral attack in *United States v. Gasca-Kraft*,[38] in which it held that because "[a] material element of the offense defined by [section 276] is a *lawful* deportation," the defendant "was entitled to put in issue the legality of his [prior] deportation . . ." on due process grounds.[39] Subsequently, in *United States v. Calderon-Medina*,[40] the Ninth Circuit expanded the grounds for attack and set forth standards of review based on violations of INS regulations. These standards require the defendant to demonstrate that the government violated an INS regulation which protects the defendant's interests and that the violation prejudiced those interests.[41] Thus the Ninth Circuit has adopted an approach under which collateral attacks are widely permitted.[42]

As this brief examination of the case law demonstrates, the status of collateral attacks on deportation orders in section 276 prosecutions differs significantly among the federal appellate courts. The courts disagree on the basic question of permissibility and those courts which do allow collateral attacks engage in different types of review, recognize different grounds for attack, and apply different standards. The sections to follow consider these differences and suggest a solution to the problem.

---

32 *Id.* at 749.

33 *Id.* at 750.

34 457 F. Supp. 1350 (W.D. Pa. 1978).

35 *Id.* at 1354 (citing *Bowles*, 331 F.2d 742).

36 457 F. Supp. at 1354-55.

37 *See, e.g.*, United States v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975); United States v. Barraza-Leon, 575 F.2d 218 (9th Cir. 1978); United States v. Calderon-Medina, 591 F.2d 529 (9th Cir. 1979); United States v. Guerra de Aguilera, 600 F.2d 753 (9th Cir. 1979); United States v. Vega-Mejia, 611 F.2d 751 (9th Cir. 1979); United States v. Lagarda-Aguilar, 617 F.2d 527 (9th Cir. 1980); United States v. Rangel-Gonzales, 617 F.2d 529 (9th Cir. 1980); United States v. Bejar-Matrecios, 618 F.2d 81 (9th Cir. 1980); United States v. Calles-Pineda, 627 F.2d 976 (9th Cir. 1980).

38 522 F.2d 149 (9th Cir. 1975). Prior to this case, the Ninth Circuit had found it unnecessary under the circumstances of earlier cases to resolve the collateral attack issue. *See* United States v. Dekermenjian, 508 F.2d 812 (9th Cir. 1974).

39 522 F.2d at 152-53 (italics in original). *See also* United States v. Barraza-Leon, 575 F.2d 218 (9th Cir. 1979).

40 591 F.2d 529 (9th Cir. 1979).

41 These standards, however, were based at least in part on a case which was later reversed. United States v. Caceres, 545 F.2d 1182 (9th Cir. 1976), *rev'd*, 440 U.S. 741 (1979).

42 For a detailed discussion of the Ninth Circuit's standards of review, see text accompanying notes 92-95 *supra*.

II. Statutory Interpretation

The permissibility of collateral attacks essentially depends upon the view a court takes of the statutory requirement of having "been arrested and deported."[43] The courts have interpreted this requirement in three ways: (1) as requiring that the defendant's deportability be reestablished to the jury in the section 276 prosecution; (2) as requiring that the trial judge determine the legality of the deportation before trial; or (3) as merely requiring that an executed deportation order be introduced into evidence and prohibiting any attack on the order. These views are represented by the opinions in the *Spector* dissent,[44] *Gasca-Kraft*[45] and *Arriaga-Ramirez*,[46] respectively. These three views will hereinafter be referred to by these case names.

The first inquiry in interpreting section 276 is whether section 276 purports to punish the unauthorized reentry of anyone previously deported or only the reentry of those "lawfully" deported. At first glance, it would seem Congress intended to bar collateral review in section 276 prosecutions. Section 276 makes no mention of collateral attacks. Its language indicates only that the defendant must have been arrested and deported. No express reference to the validity of the deportation or of the arrest is made. If any contrary intention is to be found it must come from other sections of the INA. The *Gonzalez-Parra* court looked to INA section 106,[47] which provides for judicial review of deportations ordered under INA section 242.[48] The *Gonzalez-Parra* court's analysis of section 106 led it to conclude that courts may review an order of deportation only if the alien has exhausted the administrative remedies available to him under the immigration laws and has not yet departed from the United States.[49] This situation arises in three ways: (1) if still in custody, the alien may obtain judicial review of the order by habeus corpus;[50] (2) whether in custody or not, he is entitled to civil judicial review in the federal courts of appeals if he files for review within six months of the order;[51] and (3) in criminal prosecutions under section 242 for willful failure to depart or for violation of supervisory regulations, the defendant may obtain pretrial judicial review.[52] Apparently applying the maxim that the expression of one thing is the exclusion of another, the *Gonzalez-Parra* court inferred "that Congress intended to bar collateral attacks on deportation orders in prosecutions under [section 276]."[53]

Although section 106(a) provides that the foregoing procedures "shall be the sole and exclusive procedures for . . . the judicial review of all final orders of deportation . . . ,"[54] a legislative intent to prohibit collateral review of deporta-

43 INA § 276, 8 U.S.C. § 1326 (1976).
44 343 U.S. at 174 (Jackson, J., dissenting). See text accompanying notes 63-64 *infra*.
45 522 F.2d 149 (9th Cir. 1975). See text accompanying notes 37-42 *supra*.
46 325 F.2d 694 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971). See text accompanying notes 10-14 *supra*.
47 INA § 106, 8 U.S.C. § 1105a (1976).
48 *Id.* § 242, 8 U.S.C. § 1252 (1976).
49 *Id.* § 106(c), 8 U.S.C. § 1105a(c) (1976).
50 *Id.* § 106(a)(9), 8 U.S.C. § 1105a(a)(9) (1976).
51 *Id.* § 106(a), 8 U.S.C. § 1105a(a) (1976).
52 *Id.* § 106(a)(6), 8 U.S.C. § 1105a(a)(6) (1976).
53 United States v. Gonzalez-Parra, 438 F.2d 694, 697 (5th Cir.), *cert. denied*, 402 U.S. 1010 (1971).
54 INA § 106(a), 8 U.S.C. § 1105a(a) (1976). The legislative history of § 106 similarly states its purpose "is to create a single, separate statutory form of judicial review of administrative orders of deportation. . . ." [1961] U.S. CODE CONG. & AD. NEWS 2966.

tions underlying section 276 prosecutions is less than clear. There is no indication in section 106 or its legislative history that Congress ever considered its applicability to section 276 prosecutions. The author of section 106 clearly stated that that section's purpose was "to put an end to the mockery of our judicial process and to the perversion of the constitutional right of 'due process' through which the worst alien element, the subversive, the gangsters, and the racketeers are able to prolong their stay in this country."[55] Permitting collateral review of deportations in prosecutions for illegal reentry would not hinder this stated purpose. Stopping "protracted litigations obviously conducted for the sole purpose of delaying deportation,"[56] the problem addressed by section 106, is far different from the problem of providing judicial review of a deportation which comprises an essential element of a criminal prosecution. "[A]n amendment must be interpreted in terms of the mischief it was intended to rectify."[57]

The pretrial judicial review provided in section 106 may well have been simply a legislative response to the view of the dissenting justices in *Spector* that there might be a constitutional right to judicial review, and to the prior holding of *United States v. Heikkinen* expressly providing for pretrial judicial review in prosecutions for willful failure to depart. Section 106's language may have only mentioned expressly those two criminal offenses because they appear within section 242, the section to which the section 106 amendment was directed. The failure of section 106 to expressly encompass section 276 prosecutions may have resulted from a failure to look beyond section 242. There is no apparent reason why Congress would consciously prohibit collateral review in section 276. The offense prohibited by Section 276 is essentially the same offense which is prohibited by section 242(e)—failure to depart—which is expressly provided with pretrial judicial review. Both statutes punish aliens for being found in the United States after having been ordered deported. The only essential distinction is that the section 276 violator crosses the border and then returns to the United States, while the section 242(e) violator fails to cross the border at all. The substantial similarity between the two offenses indicates that had Congress considered the sections together it would have intended defendants in section 276 prosecutions to be accorded the same pretrial judicial review procedure it expressly provided defendants charged with section 242 criminal offenses.

Finally, and most importantly, "[i]t is elementary law that every statute is to be read in light of the Constitution."[58] When a statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the statute must be interpreted so as to avoid constitutional infirmities.[59] Because an assumption that Congress intended to bar all collateral judicial review in section 276 cases raises constitutional concerns, every effort should be made to interpret the section as allowing collateral review.

If Congress intended to bar section 276 collateral review, the constitutional-

55 197 CONG. REC. 12175 (1961).
56 [1961] U.S. CODE CONG. & AD. NEWS 2967.
57 *In re* Letters Rogatory, 385 F.2d 1017, 1020 (2d Cir. 1067) (construing amendment to federal statute).
58 McCullough v. Virginia, 172 U.S. 102, 112 (1898).
59 American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

ity of the section is questionable. The constitutionality of prohibiting collateral review has been addressed by two Supreme Court cases, *Wong Wing v. United States*[60] and *Yakus v. United States*,[61] which deal with sixth amendment and due process considerations respectively.[62]

A. *Sixth Amendment Considerations*

The Supreme Court in *Spector* recognized the possible constitutional infirmity in a statute which affords the criminal defendant no opportunity to have the trial court pass on the validity of his deportation, but declined to address the issue since it was neither raised nor necessary for decision of the case.[63] A vigorous dissent by Justices Jackson and Frankfurter, relying on *Wong Wing*, took up the issue and concluded that a criminal immigration statute punishing illegal presence violated the sixth amendment "unless provision were made that the fact of [the defendant's] guilt should first be established by a judicial trial."[64] This dissent emphasized the distinction between a civil administrative deportation and a subsequent criminal prosecution that relies upon the deportation as an element of the offense. Aspects of the administrative hearing procedure which produces the deportation order raise serious doubt as to the efficacy of the constitutional safeguards protecting the future defendant.[65] The first and most obvious discrepancy is that elements of criminal offenses must be proven beyond a reasonable doubt, while the preponderance of the evidence standard prevails in civil deportation hearings.[66] A second difference is that although the indigent defendant is entitled to representation by appointed counsel at the criminal hearing, he has no such right in a civil deportation hearing.[67] A third and shocking difference between a deportation hearing and a criminal proceeding is that in the former, administrative officers may act as prosecutor and judge and sometimes, in effect, even as defense counsel.[68] The crucial distinction, however, relied upon by Justice Jackson in his dissent in *Spector*, is that a statute which affords the

60 163 U.S. 228 (1896).

61 321 U.S. 414 (1944).

62 These two cases were separately raised and relied upon by the *Spector* dissent and by *Gonzalez-Parra* with different results.

63 . 343 U.S. at 172.

64 343 U.S. at 175 (Jackson, J., dissenting) (quoting *Wong Wing*, 163 U.S. at 237).

65 *See* Fragomen, *The "Uncivil" Nature of Deportation: Fourth and Fifth Amendment Rights and the Exclusionary Rule*, 45 BROOKLYN L. REV. 29 (1978), for discussion of the "quasi-criminal aspects of deportation proceedings." The author concludes that full due process safeguards should be accorded aliens in deportation proceedings.

66 Not only is the burden of proof only to a preponderance of the evidence under INA § 291, 8 U.S.C. § 1361 (1976), but the alien also bears the burden of proving the time, place and manner of his other entry. If the alien fails to meet this burden, he or she is presumed to be in the United States illegally.

67 INA § 242(b)(2), 8 U.S.C. § 1252(b)(2) (1976). *See generally* Appleman, *Right to Counsel in Deportation Proceedings*, 14 SAN DIEGO L. REV. 130 (1976). The significance of having been represented by counsel at the hearing which produced the deportation order underlying a § 276 prosecution is examined in Comment, *Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry*, 48 U. CHI. L. REV. 83 (1981).

68 INA § 242(b), 8 U.S.C. § 1252 (1976). This proceeding has been termed a "kangaroo court" by some members of Congress, who note that "[a]s a matter of fact, the entire record is compiled by the hearing officer himself who also supplies certain evidence . . . after the hearing is closed." 107 CONG. REC. 12179 (1961). In the same debate over approval of § 106, a report of the Committee on American Citizenship of the New York County Lawyer's Association was presented which observed that "[i]n a wide range of deportation cases, the decision of the special inquiry officer is by regulation made final . . . . Far from being a quasi-judicial officer, the special inquiry officer is part and parcel of the Immigration and Naturalization Services and is under its control." *Id.* at 12181.

criminal defendant no opportunity to have the trial court pass on the validity of his deportation order "sever[s] the issue of unlawful presence for administrative determination" so as to avoid a jury trial by making the administrative determination conclusive upon the criminal trial court. According to Justice Jackson, this manner of establishing the elements of a criminal offense deprives the alien of his constitutional right to a trial by jury.[69]

The difficulty with applying Justice Jackson's reasoning to section 276[70] lies in treating the "prior deportation" requirement as a subtle severance of the deeper issue of illegal presence. In determining whether a sixth amendment violation exists, the question is whether the gravamen of a section 276 violation is really illegal presence or merely unauthorized reentry following deportation, as the statutory language suggests. Under Justice Jackson's construction, section 276 definitely entails a sixth amendment infirmity. Yet, since *Spector*, the Supreme Court has not spoken to Justice Jackson's position and even the courts advocating the *Gasca-Kraft* view have refused to go so far as to adopt it in full. The courts of appeals seem to agree that Congress intended to criminalize the unauthorized reentry of prevously deported aliens. This is also suggested by the analogy in *United States v. Bruno*[71] likening a section 276 prosecution founded on an unlawful deportation to an escape from imprisonment prosecution based on a sentence later invalidated.[72]

Like statutes criminalizing escapes from imprisonment, section 276 may be intended to penalize the conduct it prohibits regardless of the validity of the prior proceeding. This analogy supports the conclusion that section 276 punishes unauthorized reentry rather than illegal presence. Although it avoids the sixth amendment issue raised by Justice Jackson, this construction of section 276 gives rise to a different constitutional question: whether use of an administrative determination in a criminal prosecution, without opportunity for judicial review at the criminal prosecution as to its legality, violates the defendant's due process rights.

B. *Due Process Considerations*

A due process question was raised in a procedurally similar case, *Yakus v. United States*,[73] upon which the *Gonzalez-Parra* court relied. *Yakus* involved the Emergency Price Control Act of 1942[74] which administratively prescribed maximum prices of certain goods sold in the United States. This Act, like INA section 106, provided an exclusive mode of review culminating in judicial review by the Supreme Court. The Supreme Court held defendants statutorily barred from

69 343 U.S. at 177 (Jackson, J., dissenting).

70 *Spector* involved criminal prosecution for willful failure to depart following an order of deportation. After the *Spector* decision and possibly as a consequence of it, Congress enacted § 106 of the Act, 8 U.S.C. § 1105a, which provides for judicial review of deportation orders in such criminal prosecutions.

71 *See* note 19 *supra*.

72 "The [section 276] situation is analogous to escape from imprisonment under a sentence which is later invalidated. In those cases, it is held that the later invalidation of the sentence and underlying conviction is of 'no legal consequence' because '[a]t the time of his escape, the defendant was a federal prisoner in custody by virtue of process issued under the laws of the United States . . . '." 328 F. Supp. at 825 (citatons omitted).

73 321 U.S. 414 (1944).

74 Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (omitted from 1976 codification at 50 U.S.C. §§ 901-46).

collaterally attacking the administrative price determinations in their subsequent criminal prosecutions for violating the prescribed price controls. The Court concluded that "[s]uch a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process."[75]

Although *Yakus* was deemed dispositive by the *Gonzalez-Parra* court, it is distinguishable on several grounds from cases involving section 276 prosecutions. First, *Yakus* was decided in a time of war, and the Court recognized the Price Control Act was a "war-time emergency measure" needed to protect our national security from the danger of inflation.[76] More importantly, however, the nature of the administrative determinations involved in *Yakus* renders the principle enunciated in that case inapposite to section 276 collateral review. As noted by Justice Jackson in his dissent in *Spector*, "[i]t must be remembered that the deportation proceeding is an exercise of adjudicative, not rule-making power."[77] The scope of review mandated by the due process clause is different where the administrative agency is exercising an adjudicative as opposed to a rule-making function. In *Provost v. Betit*,[78] the court recognized that

> [t]he distinction is important. As the terms imply, exercise of the rule-making function of an agency is akin to legislative enactment, albeit delegated. Exercise of the adjudicative function is analogous to a judicial proceeding in which particular facts are measured against legislative standards of uniform applicability. The scope of judicial review mandated by the due process clause is of necessity different in the two cases.[79]

Yakus involved a rule-making determination tantamount to legislation. In a due process challenge to this type of administrative determination, the court is required to examine only its constitutionality, not its wisdom.[80] In section 276 prosecutions, however, the administrative determination is judicial in nature and therefore "due process requires some or all of the procedural safeguards (depending upon the nature of the proceeding) which have been found essential to the fair and equitable treatment of individuals."[81] Thus, in cases where administrative determinations are judicial in nature, due process requirements assume greater significance.[82] When these civil determinations take on a criminal char-

---

75 Yakus v. United States, 321 U.S. 414, 433 (1944).

76 The Court stated:

> In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application of a war-time emergency measure. The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act that there was grave danger of war-time inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by war.

Id. at 431-32.

77 United States v. Spector, 343 U.S. 169, 179 (1952) (Jackson, J., dissenting).

78 326 F. Supp. 920 (D. Vt. 1971).

79 *Id.* at 923.

80 *Id.* (citing Ferguson v. Skrupa, 372 U.S. 726, 730 (1963); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).

81 *Id.*

82 *Id.*

acter or suggest criminal implications,[83] fundamental fairness requires some form of collateral review. Prohibiting collateral attacks of rule-making administrative determinations, as in *Yakus*, poses much less of a due process problem than prohibiting collateral attacks on judicial administrative determinations such as the deportation order relied upon in section 276 prosecutions. Prohibiting the latter should be considered violative of the broader procedural safeguards due process requires in such situations.

III. Type and Standard of Review

In view of the lack of any clear expression of congressional intent, the courts should interpret INA sections 276 and 106 as allowing sufficient collateral review to avoid any constitutional infirmity.[84] This requires two steps. First, the section 106 amendment must be interpreted as not having been intended to cover section 276 collateral review. Second, section 276 must be construed in accordance with the construction applied by the Third and Ninth Circuits. These courts, apparently realizing the constitutional implications of a contrary interpretation,[85] have construed section 276 as implicitly requiring lawful deportation.

Under this statutory interpretation due process requires, at a minimum, pretrial review of the deportation hearing record by the trial judge. Such a review would leave the statute intact and avoid any due process infirmities. Pretrial review is also minimally disruptive to the trial process, especially as compared to a trial *de novo* on the validity of the defendant's prior deportation. This is the type of review afforded by courts following the *Gasca-Kraft* view and is very similar to the scheme of review section 106 provides for section 242 criminal prosecutions. Even the relatively restrictive Eighth Circuit, while prohibiting a trial *de novo* on the issue of deportability, indicated in *Hernandez-Uribe* that the defendant was entitled to have the prior proceedings carefully examined to assure that a full and adequate hearing was provided.[86]

The basic issue on review, of course, is whether the substantive and procedural requirements of due process were satisfied. The Third Circuit has divided this into two grounds for collateral attack: (1) whether there was a basis in fact for the deportation,[87] and (2) whether there was a warrant in law for the deportation.[88] Other courts have spoken generally of a "full and adequate hearing."[89] Section 106 has a different standard which could be applicable by implication in view of the similarity of the offense of illegal reentry to the offense of failure to depart.[90] The validity of a deportation order challenged under section 106(a)(6) turns on whether the deportation record considered as a whole is "supported by

83 For a discussion of criminal implications of deportation hearings in section 276 prosecutions, see the text accompanying notes 54-57 *supra*.

84 *See* note 59 *supra*.

85 *See* United States v. Bowles, 331 F.2d 742, 749 (3d Cir. 1974) ("A serious constitutional issue might be presented under certain circumstances but insofar as we can see none is present nor do any lurk in the case at bar at least under the interpretation which we have put upon the statute. . . .").

86 Hernandez-Uribe v. United States, 515 F.2d 20, 22 (5th Cir. 1975).

87 No basis in fact means that there was no factual basis for deportation in the files of the Immigration Board.

88 No Warrant in Law means that the defendant was not legally deportable.

89 Hernandez-Uribe v. United States, 515 F.2d 20, 22 (5th Cir. 1975).

90 *See* text accompanying notes 57-58 *supra*.

reasonable, substantial, and probative evidence."[91] This standard appears equally adequate.

Based on its requirement of lawful deportation,[92] the Ninth Circuit has recently developed a standard of review even broader than that required by due process considerations. In *United States v. Calderon-Medina*,[93] the court held that violation of an INS administrative regulation may render the deportation invalid.[94] In determining the deportation order's validity, the court established a two-step test requiring that (1) the regulation serve a purpose of benefit to the defendant, and (2) the violation actually prejudice the defendant's interests intended to be protected.[95] This test, although derived from the court's interpretation of a requirement of lawful deportation, is not necessary to satisfy the due process concerns towards which that interpretation was originally directed.

IV. Conclusion

Although the sixth amendment objections to section 276 are quieted by interpreting the statute as aimed at reentry rather than presence, the additional constitutional concern of due process remains. In light of the greater scope of review mandated by the due process clause regarding administrative determinations which are adjudicative in function and the minimal disruptiveness of pretrial review, such judicial review should be a constitutional requisite in section 276 prosecutions. To uphold the constitutionality of section 276 a court must recognize that Congress intended to require a lawful deportation. Courts therefore should be not only permitted but required to allow defendants to collaterally attack the deportation order underlying their prosecution for illegal reentry.

Shawn C. Conway

91 INA § 106(a)(6), 8 U.S.C. § 1105a(a)(6) (1976).
92 *See* note 39 *supra*.
93 591 F.2d 529 (9th Cir. 1979).
94 *Id.*
95 *Id.*