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## COMMENT: *United States v. Lopez-Vasquez: How Much Process is Due? Mass Deportation Hearings and Silence as a Waiver of the Right to Appeal*

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# **UNITED STATES v. LOPEZ-VASQUEZ: HOW MUCH PROCESS IS DUE? MASS DEPORTATION HEARINGS AND SILENCE AS A WAIVER OF THE RIGHT TO APPEAL**

## **I. INTRODUCTION**

Immigration has been a heated issue in this nation for nearly its entire history. While the gates were once wide open for the hungry, tired, poor masses of the rest of the world, America's need for fewer industrial laborers has slowed the flow and even modified its composition; today, many immigrants are skilled, educated workers rather than disadvantaged peasants. Even so, the disadvantaged still come in great numbers, seeking the promise of our shores that our own ancestors themselves sought generations ago. Strangely enough, despite the historical fact that the ancestors of most Americans came to this country poor and disadvantaged, strong feelings exist for excluding more and more aliens and immigrants from the United States. This anti-foreigner sentiment can be traced to a struggling economy, higher unemployment, and the fear of losing jobs to strangers "who will work for nothing."

It is the responsibility of the United States government to balance America's current capacity to support new citizens with its tradition of being a bastion for immigration. The high demand for legitimate immigration slots mandates that we strictly enforce the provisions of the Immigration and Nationality Act (INA)<sup>1</sup> pertaining to deportable aliens.<sup>2</sup> Under the INA, "any alien . . . in the United States in violation of [the INA] or any other law" may be deported.<sup>3</sup>

On May 3, 1991, Arturo Lopez-Vasquez was deported from the United States following a mass deportation hearing where

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1. 8 U.S.C. §§ 1101-1525 (1970 & Supp. 1993).

2. The INA contains 20 provisions relating to deportation. *See id.*; *see also* Denyse Sabagh et al, *Deportation, Exclusion, Discretionary Relief, and Waivers*, in IMMIGRATION LAW 337, 344-358 (ALI-ABA Course of Study, 1990) (explaining the deportation process under the INA).

3. 8 U.S.C. § 1251(a)(1)(B) (1970 & Supp. 1993).

the Immigration Law Judge (ILJ) accepted group silence and failure to stand as a waiver of the right to appeal the deportation order.<sup>4</sup> Lopez-Vasquez was arrested on August 28, 1991 when he re-entered the United States in violation of 8 U.S.C. § 1326.<sup>5</sup> After Lopez-Vasquez entered a conditional plea of guilty in district court, the Court of Appeals for the Ninth Circuit held that his earlier deportation hearing was violative of due process since the mass, silent waiver of his right to appeal was not knowing and intelligent.<sup>6</sup>

This Comment will discuss *United States v. Lopez-Vasquez*, where the Ninth Circuit held that any mass, silent waiver of the right to appeal a deportation order impermissibly presumes acquiescence in the loss of the right to appeal and fails to overcome the presumption against waiver of that right, thus violating the alien's due process rights. This Comment will argue that the Ninth Circuit has unpersuasively and unnecessarily expanded sound precedent to ban an administrative practice it does not agree with, because the court is uneasy with the practice of conducting mass deportation hearings, although it continues to allow them under certain circumstances. This Comment will conclude that a better—and fairer—solution would have been to adhere to the standard enunciated by the Supreme Court in traditional cases involving waiver: judging each case on the totality of the circumstances, rather than creating a per se rule against a particular procedure.

## II. BACKGROUND

### A. Deportation Law

Deportation is the removal of an alien from the United States pursuant to an "Order to Show Cause."<sup>7</sup> Although the

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4. *United States v. Lopez-Vasquez*, 1 F.3d 751, 753 (9th Cir. 1993). (The Immigration Law Judge (ILJ) asked all of the at least 11 aliens present to stand up if anyone wished to appeal or to reserve the right to appeal, and none of the aliens stood up.).

5. *Id.* at 752.

6. *Id.* at 755.

7. Lynne Mallya, *Deportation and Due Process: Does the Immigration and Naturalization Act or the Fifth Amendment Provide for Full Interpretation of Deportation and Exclusion Hearings?*, 11 LAW & INEQ. J. 181, 184 (1992); see also BLACK'S LAW DICTIONARY 1379-80 (6th ed. 1990) (An order to show cause is a

alien is removed, no punishment is contemplated or imposed. Any alien is subject to deportation at any time, and the only way to avoid the possibility of deportation is to naturalize. The vast majority of deportation proceedings are brought against aliens who have entered the country illegally or who have overstayed a nonimmigrant visa.<sup>8</sup>

The INA, enacted in 1952, governs entry to and expulsion from the United States, as well as the rights and duties of aliens who are in the country.<sup>9</sup> The primary responsibility for administration and enforcement of U.S. immigration laws, including the INA, belongs to the Attorney General of the United States.<sup>10</sup> In turn, the Attorney General delegates most of his immigration duties to the Immigration and Naturalization Service (INS)<sup>11</sup> and the Executive Office for Immigration Review (EOIR).<sup>12</sup>

The INA contains specific requirements for the holding of immigration hearings, including deportation hearings.<sup>13</sup> Because a deportation hearing is a purely civil action, the rules applicable to civil proceedings apply, and the government's burden of proof is lighter than in criminal proceedings.<sup>14</sup> In *United States ex rel. Bilokumsky v. Tod*,<sup>15</sup> the Supreme Court

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court order to appear and present the court with evidence why the Order should not be executed.).

8. Joseph Minsky, *Introductory Overview of Immigration Law and Practice*, in IMMIGRATION LAW 1, 21 (ALI-ABA Course of Study, 1989).

9. *Id.* at 14.

10. *Id.* at 11.

11. Mallya, *supra* note 7, at 183. The INS Commissioner is appointed by the President and has authority over all matters delegated to him by the Attorney General. "The four regional offices of the INS are further subdivided into district offices. The district offices institute exclusion and deportation hearings." The members of the legal staff at each district office are known as general attorneys or trial attorneys and serve as prosecutors in the immigration court proceedings. Mallya, *supra* note 7, at 183.

12. Mallya, *supra* note 7, at 183. The EOIR is comprised of the ILJs and the Board of Immigration Appeals. The ILJs hear deportation and exclusion cases. The Board of Immigration Appeals acts as the appellate authority in deportation and exclusion hearings and in certain other cases. The Board of Immigration Appeals has five members who form panels of three to decide appeals. Mallya, *supra* note 7, at 183.

13. See 8 U.S.C. § 1252(b) (1970 & Supp. 1993); see also Irene Scharf & Christine Hess, *What Process Is Due? Unaccompanied Minor's Right to Deportation Hearings*, 1988 DUKE L.J. 114, 116.

14. *United States v. Meza-Soria*, 935 F.2d 166, 169 (9th Cir. 1991).

15. 263 U.S. 149 (1923).

held that a defendant in a civil deportation hearing was not entitled to the same protections as a criminal defendant, and allowed negative inferences to be drawn from an alien's silence.<sup>16</sup> Moreover, holding a mass deportation hearing, in itself, is not a violation of an alien's right to due process.<sup>17</sup> For example, the Ninth Circuit has upheld a mass deportation hearing involving thirty-three aliens.<sup>18</sup> Further, although an alien's waiver of the right to appeal must be knowing and intelligent, the waiver does not have to be verbal, nor must it be discussed with the court. For example, the Ninth Circuit has upheld a nonverbal waiver conceded in an alien's brief.<sup>19</sup>

Although deportation proceedings do not require a full panoply of constitutional safeguards, they must conform to due process. Under the INA, deportability must be established at a full and fair hearing for which the alien has had reasonable opportunity to be present and notice of the charges.<sup>20</sup> At the hearing, the alien is entitled to be represented by counsel, present evidence, cross examine witnesses, and examine evidence offered by the attorney representing the Justice Department.<sup>21</sup> In addition, federal regulations require the ILJ to advise an alien of:

his right to representation, at no expense to the government, . . . and require him to state then and there whether he desires representation; advise the respondent of the availability of free legal services programs . . . ; [and to] ascertain that the respondent has received . . . a copy of Form I-618, Written Notice of Appeal Rights; . . .<sup>22</sup>

Not all aliens who are brought to a deportation hearing are deported, however. The Attorney General has the discretion to permit an alien to voluntarily depart from the United States at the alien's own expense in lieu of deportation.<sup>23</sup> Moreover, suspension of deportation is available where (1) the

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16. *Id.* at 153-54.

17. *United States v. Nicholas-Armenta*, 763 F.2d 1089, 1091 (9th Cir. 1985).

18. *Id.*

19. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965).

20. *See* 8 U.S.C. § 1252(b)(1) (1970 & Supp. 1993); *see also Nicholas-Armenta*, 763 F.2d at 1090; Scharf & Hess, *supra* note 13, at 116.

21. *See* 8 U.S.C. § 1252(b)(2)-(3) (1970 and Supp. 1993).

22. 8 C.F.R. § 242.16 (1994).

23. 8 U.S.C. § 1254(e)(1) (1970 & Supp. 1993).

deportable alien has been physically present in the United States for at least seven years, during which time he or she was a person of good moral character, and (2) in the opinion of the Attorney General, deportation would result in extreme hardship to the alien, or to the alien's spouse, parent or child who is a citizen of the United States or an alien lawfully admitted for permanent residence.<sup>24</sup> Suspension of deportation provides not only relief from deportation, but also enables the alien to adjust his or her status to that of an alien lawfully admitted for permanent residence.<sup>25</sup>

An alien may appeal any ILJ order to the Board of Immigration Appeals (BIA), and from there to the United States Court of Appeals.<sup>26</sup> An alien has ten days from the date of the deportation hearing to appeal to the BIA, and will not be deported during the pendency of the appeal. However, the Attorney General may have the alien taken into custody, or may release the alien under bond or conditional parole.<sup>27</sup> An alien may waive the right to appeal, but any such waiver must be considered and intelligent.<sup>28</sup> If the alien's waiver of the right to appeal is not the result of intelligent and considered judgment, the alien is deprived of his right to judicial review in violation of due process.<sup>29</sup>

If an alien who has been deported returns to the United States without the express permission of the Attorney General, the alien is subject to prosecution for illegal re-entry in violation of 8 U.S.C. § 1326.<sup>30</sup> This is a criminal statute with crim-

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24. 8 U.S.C. § 1254(a) (1970 and Supp. 1993).

25. *Id.*

26. Noel A. Ferris, *Fundamentals of Judicial Review of Deportation and Exclusion Orders*, in BASIC IMMIGRATION LAW 1993, at 229 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5176, 1993).

27. 8 U.S.C. § 1252(a)(1) (1970 & Supp. 1993).

28. *United States v. Mendoza-Lopez*, 481 U.S. 828, 840 (1987).

29. *Id.*

30. the relevant portions of the statute state the following:

(a) [A]ny alien who—

(1) has been arrested and deported or excluded and deported, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

inal penalties, including imprisonment of up to fifteen years.<sup>31</sup>

## B. Case Analysis

### 1. The *Mendoza-Lopez* Standard

The validity of an underlying deportation hearing is critical to a successful prosecution for illegal re-entry after deportation under 8 U.S.C. § 1326. In *United States v. Mendoza-Lopez*,<sup>32</sup> the Supreme Court held that where a deportation hearing effectively eliminates the right of an alien to obtain judicial review, a collateral challenge to the validity of the underlying deportation must be permitted if the deportation is to be used to establish an element of a criminal offense.<sup>33</sup> Accordingly, an alien who does not make an intelligent and considered waiver of the right to appeal—and thereby is deprived judicial review—may mount a collateral attack on the prior deportation hearing when charged under 8 U.S.C. § 1326.

The Ninth Circuit requires that an alien demonstrate prejudice from a deprivation of the right to judicial review in order to succeed on the collateral attack.<sup>34</sup> In *United States v. Proa-Tovar*,<sup>35</sup> the Ninth Circuit, sitting en banc, clarified the holding in *Mendoza-Lopez*.<sup>36</sup> In *Proa-Tovar*, the government conceded that the alien's waiver of the right to appeal was not knowing and intelligent. The court held that the alien must be permitted to mount a collateral attack on his earlier deportation hearing since he was effectively denied judicial review. More importantly, the court concluded that the alien must

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shall be fined under Title 18, or imprisoned not more than 2 years, or both.

8 U.S.C. § 1326(a) (1970 and Supp. 1993).

31. *Id.*; 8 U.S.C. § 1326(b) (1970 and Supp. 1993) (fifteen year imprisonment results from illegal re-entry by alien after alien had been convicted of aggravated felony prior to previous deportation). The statute was enacted in 1952 as part of the INA. The Attorney General is responsible for its administration and enforcement; the Attorney General, however, delegates most of these responsibilities to the INS and EOIR.

32. 481 U.S. at 828.

33. *Id.* at 829; see also BLACK'S LAW DICTIONARY 261 (6th ed. 1990) (A collateral challenge is an attempt to defeat a judicial proceeding, or to deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it.).

34. See *infra* notes 36-37 and accompanying text.

35. 975 F.2d 592 (9th Cir. 1992).

36. *Id.* at 595.

prove he was prejudiced by this deprivation in order to succeed on the collateral attack and exclude evidence of his earlier deportation from his prosecution for illegal re-entry.<sup>37</sup> In short, while deprivation of judicial review entitles an alien to make a collateral attack, the alien bears the burden of proving that he was prejudiced by this deprivation in order to succeed on the attack.

## 2. Other Cases of Waiver

Courts have upheld waivers of the right to appeal requiring less procedure than the Ninth Circuit required for the waiver of that right in *Lopez-Vasquez*. In *United States v. DeSantiago-Martinez*,<sup>38</sup> a criminal prosecution, the Ninth Circuit upheld a waiver of the right to appeal even though the court never engaged the defendant in a colloquy over it. In *United States v. Holland*,<sup>39</sup> the Eleventh Circuit upheld a waiver where the transcript of the deportation hearing did not include any discussion of the alien's rights at the hearing or of the right to appeal or apply for suspension of deportation.<sup>40</sup> In *United States v. Palacios-Martinez*,<sup>41</sup> the Fifth Circuit held that a deportation hearing was not fundamentally unfair even if the court failed to ensure that the alien knew and fully understood each and every one of his rights under INS regulations.<sup>42</sup>

### C. *United States v. Lopez-Vasquez*

#### 1. The Facts

On May 3, 1991, Arturo Lopez-Vasquez was given a group deportation hearing with at least eleven other aliens.<sup>43</sup> Each alien was given Spanish language form I-648A, which explained the right to appeal the decision of the ILJ.<sup>44</sup> In addi-

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37. *Id.* ("We are therefore satisfied that the Court has not eliminated prejudice from the equation.")

38. 980 F.2d 582 (9th Cir. 1992).

39. 876 F.2d 1533 (11th Cir. 1989).

40. *Id.* at 1535.

41. 845 F.2d 89 (5th Cir. 1988).

42. *Id.* at 92.

43. *United States v. Lopez-Vasquez*, 1 F.3d 751, 752 (9th Cir. 1993).

44. *Id.* at 753.



tion, the ILJ addressed the aliens through an interpreter<sup>45</sup> and spoke directly with Lopez-Vasquez concerning the charges against him.<sup>46</sup> However, the ILJ did not personally ask Lopez-Vasquez or any other alien, individually, whether he wanted to appeal his deportation. Instead, when the subject of the right to appeal arose, the ILJ addressed the aliens as a group.<sup>47</sup>

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45. *Id.* at 752.

46. The total exchange between Lopez-Vasquez and the ILJ follows:

Q: Mr. Lopez, do you want to get the free lawyer?

A: No . . . .

Q: Mr. Lopez, did you enter without inspection January 9 of this year? [no answer indicated]

Q: Sir, you are charged with entering the country without inspection, do you understand the charge? [no answer indicated]

Q: Is this charge true in your case? [no answer indicated]

Q: The second charge of deportability is this drug charge. I want to ask you on October 2, 1989, were you convicted in Superior Court in Los Angeles for possession of heroin?

A: Yes.

Q: Well, they have a technical error on this drug charge of deportability. This is going to cause great trouble for me until the Immigration Service can become comfortable with it. But I'm going to sustain only the entry inspection charge in your case. Tell me, sir, have you anything for your defense? [no answer indicated]

Q: What was your first year here?

A: '71.

Q: What family have you here?

A: All of them.

Q: Well, who?

A: My mother, my wife and my kids.

Q: Your mother, and your wife, are they legal? Immigrants? [no answer indicated]

Q: Why aren't you an immigrant through them?

A: I never arranged to file the papers [inaudible]

Q: Well, did you apply for immigrant status in 1971? [no answer indicated]

Q: What happened? You just filed the papers and forgot about them? [no answer indicated] Thank you sir, sit down.

*Id.* at 752.

47. The exchange over the right to appeal follows:

THE COURT: Please answer together gentlemen, do you all understand the decision in your case?

ANSWER: Yeah!

THE COURT: [If] you accept the decision now, it is final and you will be deported to Mexico tonight. But you do not have to accept deportation. If you think it is wrong or unjust in your case for any reason, you can appeal the case to a higher court. Appeal is the legal way of saying to send the case to the higher court for study and review. Now all of you have Spanish language form I-648A. Regardless of the [inaudible] If you do not have a form please stand now. Let the record show

The ILJ asked anyone who had questions regarding the right to appeal to stand up. None of the aliens rose. The ILJ then asked anyone who wished to make an appeal or reserve his right to appeal to stand up. Once again, none of the aliens rose. The ILJ accepted the aliens' failure to stand as a waiver of the right to appeal, and Lopez-Vasquez was deported that night.<sup>48</sup>

On August 28, 1991, Lopez-Vasquez was arrested and subsequently indicted for re-entry after deportation in violation of 8 U.S.C. § 1326.<sup>49</sup> In a pretrial motion to dismiss, Lopez-Vasquez asserted that his May 3, 1991 deportation could not serve as the basis for conviction under the statute, since his waiver of the right to appeal the deportation was not knowing and intelligent.<sup>50</sup> The United States District Court for the Southern District of California denied the motion, and Lopez-Vasquez entered a conditional plea of guilty, preserving his right to appeal the denial of his pretrial motion.<sup>51</sup> Lopez-Vasquez subsequently appealed the denial of the motion to the

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that no one is standing. Gentlemen, this appeal [form] explains about appeal like I am doing. And [inaudible] to make an appeal that cost [sic] money, but forget about that if you have no money; you can file the appeal free of charge. I [will] give you help with the paperwork. Even if you do not know at this time if you want to appeal, the law says you can reserve your right to appeal for the next 10 days and think about it. Gentlemen, if any of you do not now understand about appeal, or if you have any questions about appeal, please stand now so that I can talk to you. Let the record show that no one is standing. If any of you want to appeal your case to a higher court, or if you want to reserve your right to appeal for 10 days and think about it, please stand so that I can talk to you about that. Again, let the record reflect that no one is standing . . . . There's no appeal and so the decision [inaudible] is final. I am going to give you and the immigration service attorney a copy of the decision. And I do wish all of you good luck for the future. The hearing for you is finished.

*Id.* at 753.

48. *Id.* at 753.

49. *Id.* at 752. On August 28, 1991, Lopez-Vasquez approached the operational Border Patrol checkpoint on Highway 86. He orally declared in English that he was a citizen of the United States, but was unable to produce any documentation. He told border patrol agents that his wallet had been stolen in Mexico the day before. Lopez-Vasquez consented to a search of his bag, and agents found a card with his name on it. A computer search under his name revealed an extensive criminal history and prior deportations, including the deportation of May 3, 1991. *Id.*

50. *Id.*

51. *Id.*

United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit held that Lopez-Vasquez could mount a collateral attack on his earlier deportation hearing because his waiver of the right to appeal was not considered or intelligent, effectively denying him judicial review in violation of due process.<sup>52</sup> To succeed on such an attack, and have evidence of his earlier deportation excluded from a prosecution under section 1326, Lopez-Vasquez had to demonstrate prejudice from the failure to appeal.<sup>53</sup> The court remanded the case for consideration of the prejudice issue. Upon an order denying rehearing en banc, seven justices dissented.<sup>54</sup>

## 2. Procedural History

On November 25, 1991, Lopez-Vasquez moved to dismiss the indictment against him or to grant his motion *in limine* to preclude the admission at his trial of evidence of the prior deportation hearing held on May 3, 1991.<sup>55</sup> Lopez-Vasquez argued that the indictment should have been dismissed because the underlying deportation was fundamentally unfair and therefore could not be used to prove a necessary element<sup>56</sup> of the illegal re-entry after deportation.<sup>57</sup> The government argued that Lopez-Vasquez's deportation hearing comported with due process of law and that no prejudice resulted from any procedural error. The motion was denied. Lopez-Vasquez then pled guilty, and preserved his right to appeal the denial of the motion.<sup>58</sup> He was sentenced to twenty-four months in prison and three years of supervised release, and was ordered to pay a special assessment of fifty dollars.<sup>59</sup> On April 27, 1992, Lopez-Vasquez gave notice that he intended to appeal the denial of his motion to dismiss to the United States

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52. *Id.* at 754-55.

53. *Id.* at 755.

54. The seven dissenters were conservative Reagan and Bush appointees. Steve Albert, *Ninth Circuit Conservatives Furious About En Banc Denial*, THE RECORDER, Aug. 11, 1993, at 3.

55. Appellant's Excerpt of Record at 4, *United States v. Lopez-Vasquez*, 1 F.3d 751 (9th Cir. 1993) (No. 92-50271).

56. An underlying deportation is necessary for a conviction under 8 U.S.C. § 1326.

57. Appellant's Excerpt of Record at 5.

58. *Lopez-Vasquez*, 1 F.3d at 752.

59. Appellant's Excerpt of Record at 49-52.

Court of Appeals for the Ninth Circuit.<sup>60</sup>

### 3. The Court's Reasoning

A three judge panel of the Ninth Circuit entertained Lopez-Vasquez's appeal from the denial of his pretrial motion to dismiss. After establishing that mixed questions of law and fact required it to review the claims de novo,<sup>61</sup> the court recounted the exchange between the ILJ and Lopez-Vasquez (discussing the charge against Lopez-Vasquez),<sup>62</sup> and the exchange between the ILJ and the group (discussing appeal).<sup>63</sup>

The Ninth Circuit panel concluded that Lopez-Vasquez's due process rights had been violated. Relying on *Mendoza-Lopez* as precedent, the court noted that due process requires that "where the defects in an administrative hearing foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before an administrative hearing may be used to establish conclusively an element of a criminal offense."<sup>64</sup> The court also noted that *Mendoza-Lopez* requires that an alien's waiver of the right to appeal his deportation be intelligent and considered.<sup>65</sup> The panel analyzed the circumstances surrounding the waiver of the right to appeal and determined that, although Lopez-Vasquez was provided with a Spanish language form explaining the right to appeal, it did not prove that his waiver was considered and intelligent. The most it proved was that Lopez-Vasquez understood what the right to appeal was.<sup>66</sup>

The *Lopez-Vasquez* court concluded that a "mass silent waiver impermissibly 'presumes acquiescence' in the loss of the right to appeal and fails to overcome the 'presumption against

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60. *Id.* at 54.

61. *Lopez-Vasquez*, 1 F.3d at 752. The panel relied on *United States v. Proa-Tovar*, 975 F.2d 592, 594 (9th Cir. 1992) (en banc), which in turn cited *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1982). *Id.* *McConney* established that where a court applies the law to facts, it should choose the de novo standard when the concerns of judicial administration favor the appellate court. If the concerns of judicial review favor the district court, the clearly erroneous standard of review should be applied. *McConney*, 728 F.2d at 1202.

62. *Lopez-Vasquez*, 1 F.3d at 752.

63. *Id.* at 753.

64. *Id.* (citing *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987)).

65. *Id.*

66. *Id.* at 754.

waiver."<sup>67</sup> The court relied on cases in which courts have established a presumption against waiver and have placed the burden of proving waiver on the government and concluded that the government failed to live up to its heavy burden of proof when trying to show that an alien surrendered a fundamental right.

The dissenters from the denial of rehearing en banc interpreted the *Mendoza-Lopez* holding differently than the per curiam panel did.<sup>68</sup> The dissenters concluded that to launch a successful collateral attack, an alien was required to prove that he or she was effectively deprived of the right to direct appeal and that the administrative proceedings were unfair in some respect that would have entitled the alien to relief on appeal.<sup>69</sup> The dissent agreed with the panel that an alien must show prejudice to succeed on the collateral attack.<sup>70</sup>

The dissent distinguished the cases upon which the per curiam panel relied to establish the propositions that the government had the burden of proving waiver and that courts should indulge every reasonable presumption against waiver. The dissent noted that the right to appeal is a statutory right not protected by the Constitution,<sup>71</sup> and reasoned that the cases cited by the per curiam panel concerned fundamental constitutional rights, which are entitled to more protection and more procedure than statutory rights.<sup>72</sup>

The dissent charged that the majority used non-controlling precedent to create a rigid per se rule that all mass silent waivers violate due process,<sup>73</sup> when it should have analyzed the facts of the case under the "intelligent and considered" standard. The dissent disagreed with the court's conclusion, by implication, that an alien must be asked directly and individually whether or not he wishes to waive his right to appeal a deportation order. The dissent recognized that "it is not always (or even usually) impossible for us to judge the character of a decision not to appeal just because the discussion is expressed

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67. *Id.* at 754-55.

68. *Id.* at 756.

69. *Id.* at 757.

70. *Id.* at 756.

71. *Id.*

72. *Id.* at 758.

73. *Id.* at 759.

non-verbally.”<sup>74</sup> Under the facts of the case, the dissent believed that Lopez-Vasquez, who had been convicted six times in the past, knew he would not qualify for relief from deportation, and that he made a knowing and considered decision to forego appeal, to avoid further detention and wasted time, and to return home.<sup>75</sup>

### III. ANALYSIS

In *Lopez-Vasquez*, the United States Court of Appeals for the Ninth Circuit has taken sound Supreme Court precedent and embellished it with out-of-context authority to arrive at the conclusion that mass silent waiver of the right to appeal in a deportation hearing is a per se violation of due process entitling an alien to make a collateral attack on the underlying deportation hearing when it is to be used to establish an element of a criminal offense. The decision in *Lopez-Vasquez* is supported neither by precedent nor common sense. A far better solution in this case would have been for the court to rely on the Ninth Circuit’s interpretation of the controlling *Mendoza-Lopez* precedent,<sup>76</sup> as clarified by *Proa-Tovar*,<sup>77</sup> and apply it individually in each case. The authorities cited by the per curiam panel for the propositions that the government has the burden of proving waiver and that every reasonable presumption against waiver should be indulged were inapplicable as they relate to fundamental, not statutory, rights. Determining whether a waiver of the right to appeal was knowing and considered is an inherently fact sensitive analysis which calls for reviewing the totality of the circumstances, not for a rigid per se rule. Thus, the Ninth Circuit should have adopted the Fifth Circuit’s practice of reviewing such waivers under the totality

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74. *Id.* at 761.

75. *Id.* at 762.

76. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987). Specifically, the court stated:

[W]here the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before an administrative order may be used to establish conclusively an element of a criminal offense . . . [waiver of the right to appeal must be “considered and intelligent].”

*Id.*

77. *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir. 1992) (prejudice is not eliminated from the equation).

of the circumstances of each particular case.

Courts should review each waiver of the right to appeal in a deportation hearing on its own facts, rather than expand the carefully deliberated decision in *Mendoza-Lopez* to identify certain procedures as per se unconsidered and unintelligent. In *Mendoza-Lopez* itself, the Supreme Court stated, "[w]e decline at this stage to enumerate which procedural errors are so fundamental that they may functionally deprive the alien of judicial review . . . ."<sup>78</sup> Nevertheless, the Ninth Circuit, by declaring that all mass, silent waivers of the right to appeal are not considered and intelligent has done what the highest court in the land refrained from doing: it has started naming specific procedures which violate an alien's due process rights. Under the totality of the circumstances approach, a per se rule is not required because any alien whose waiver of the right to appeal was not knowing and considered will have the situation analyzed on its own facts. The end result for an alien who has a meritorious claim will be the same.

Additionally, there is no reason why electing not to stand—when specifically asked to stand in response to a question—is not an acceptable means for answering that question. The Supreme Court has permitted inferences to be drawn from an alien's silence when called upon to speak in a deportation hearing in contexts not involving waiver of the right to appeal. In *United States ex rel. Bilokumsky v. Tod*,<sup>79</sup> the Supreme Court noted:

Silence is often evidence of the most persuasive character . . . . Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation hearings are civil in their nature.<sup>80</sup>

Drawing inferences from the failure to stand when called upon to do so is not materially different from drawing inferences from the failure to speak when called upon to do so. Both remaining silent and remaining stationary are passive forms of

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78. *Mendoza-Lopez*, 481 U.S. at 839 n.17.

79. 263 U.S. 149, 153-54 (1923).

80. *Id.* at 154.

conduct.

Moreover, because deportation hearings are purely civil, streamlined proceedings for determining eligibility to remain in the country,<sup>81</sup> aliens are not entitled to the same protections applicable in criminal proceedings. For that reason, the Supreme Court has held that an alien may be deprived of his liberty based on choosing not to speak.<sup>82</sup> The Court required the alien to assert his rights or potentially forfeit them. If an alien may forfeit his liberty by remaining silent, it follows that he may forfeit his liberty by remaining seated. It is not unreasonable to expect someone who wishes to challenge the results of an administrative hearing to express that he wishes to do so when questioned, and it should make no difference whether the expression is made by speaking or standing. Admittedly, this does nothing to prove whether such a waiver was considered and intelligent. Nonetheless, this line of reasoning demonstrates that the process of mass silent waiver can be a valid way of waiving rights.

In addition, clear precedent to the contrary has not stopped the Ninth Circuit from raising the right to appeal to the constitutional level. The right to appeal is a statutory right, not a constitutional right.<sup>83</sup> Indeed, for nearly a century after the Supreme Court was established, no appeal as of right existed in criminal cases. Appeals as of right in criminal cases were only permitted as of 1899 when Congress enacted a statute allowing such appeals in capital cases; a general right of appeal in criminal cases was not created until 1911.<sup>84</sup> Any such attempt to raise the right of appeal to the constitutional level in civil cases must fail in the absence of statutory authority. Certainly, the right to appeal is a right which cannot be taken away without due process of law; however, less process is due than if it were a constitutional right.

The only justification for the Ninth Circuit's reliance on the *Brewer* and *Barker* cases is that the court equated the right to appeal with a fundamental constitutional right. How-

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81. For example, the exclusionary rule does not apply in a deportation hearing. *Id.*

82. *Id.* at 149, 154-55.

83. *Abney v. United States*, 431 U.S. 651, 656 (1977) (citing *McKane v. Durston*, 153 U.S. 684 (1894)).

84. *Id.* at 656 n.3.



ever, the *Brewer* and *Barker* cases specifically apply to the waiver of constitutional rights and should not govern waiver of the statutory right to appeal. The per curiam panel cites to these cases without filling in the logical gaps. Perhaps what is most troubling is the fact that the Supreme Court chose not to rely on these cases in *Mendoza-Lopez*, which specifically addressed waiver of the statutory right to appeal. This directly indicates that the cases are inapposite.

The *Lopez-Vasquez* decision has created a startling inconsistency between civil and criminal cases within the Ninth Circuit, and this inconsistency is further evidence that the underlying reasoning of the decision was flawed. In *Burr v. INS*,<sup>85</sup> waiver of the right to appeal was permitted in a deportation hearing when conceded in the alien's brief.<sup>86</sup> Even though the alien never discussed waiver with the court, the court nonetheless held that the waiver was valid. In *United States v. DeSantiago-Martinez*,<sup>87</sup> although the criminal defendant expressly waived his right to appeal in a negotiated guilty plea, the district court never engaged the defendant in an express discussion over this waiver.<sup>88</sup> Nevertheless, the court held that "colloquy on the waiver of the right to appeal is not a prerequisite to a finding that a waiver is valid; rather, a finding that the waiver is knowing and voluntary is sufficient."<sup>89</sup> Thus, in the Ninth Circuit, criminal defendants—who are entitled to more constitutional due process safeguards—can waive their right to appeal without expressly saying so, while aliens at a civil deportation hearing apparently cannot make a knowing and considered waiver of the right to appeal unless they expressly and affirmatively state so at the hearing.

Furthermore, the argument that "mass waiver by silence made it impossible to determine whether [Lopez-Vasquez] made a voluntary and intelligent decision [to waive the right to appeal]"<sup>90</sup> is disingenuous, for a court can never get into another's mind. Rather, courts draw arbitrary lines and determine how much process will satisfy a finding that a waiver

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85. 350 F.2d 87 (9th Cir. 1965).

86. *Id.* at 91.

87. 980 F.2d 582 (9th Cir. 1992).

88. *Id.* at 582-83.

89. *Id.* at 583.

90. *United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir. 1993).

was intelligent and considered.<sup>91</sup> The Ninth Circuit has decided to draw its own line far to the left of everyone else's—including the Supreme Court's—when mass silent waiver of the right to appeal in a deportation hearing is involved. The only problem with the Ninth Circuit's approach is that there is no authority for such an expansion of deportation law; in fact, all existing precedent points to the use of the more flexible knowing and considered standard.

Other circuits interpreting *Mendoza-Lopez* have upheld more procedurally deficient waivers of the right to appeal than occurred in *Lopez-Vasquez* because an alien must show fundamental unfairness in addition to deprivation of judicial review in order to mount a collateral attack.<sup>92</sup> In *United States v. Holland*, the Eleventh Circuit held that an alien was not denied due process when he waived his right to appeal, even though the hearing transcript did not indicate that there had been any discussion of the alien's right to appeal.<sup>93</sup> In *United States v. Palacios-Martinez*, the Fifth Circuit held that an alien's due process rights were not violated, even though it was unclear from the record whether he knew and fully understood his right to appeal before he waived it.<sup>94</sup> The holdings in both these cases were predicated on a different interpretation of *Mendoza-Lopez*: these circuits also require a showing of fundamental unfairness before allowing the alien to mount a collateral attack. In both cases, the court held that the proceedings were not fundamentally unfair, even though the aliens claimed their waivers of the right to appeal were not knowing and considered, since the hearings indicated that the aliens were at least informed of the right to appeal their deportation orders.

The Ninth Circuit has correctly interpreted *Mendoza-Lopez* to mean that a collateral attack must be permitted where the deportation hearing effectively eliminates the right to judicial review.<sup>95</sup> In contrast, the Fifth and Eleventh Circuits have

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91. See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1329 (1989) (prohibition of waivers of counsel would provide greater assurance than the current practice that any eventual waiver was truly knowing, intelligent, and voluntary).

92. See *United States v. Holland*, 876 F.2d 1533, 1535 (11th Cir. 1989); *United States v. Palacios-Martinez*, 845 F.2d 89, 91 (5th Cir. 1988).

93. *Holland*, 876 F.2d at 1537.

94. *Palacios-Martinez*, 845 F.2d at 92.

95. Noble F. Allen, Note, *Habeas Corpus and Immigration: Important Issues*

made it more difficult for an alien to succeed on a collateral attack by requiring a showing of fundamental unfairness in addition to showings that the waiver was not intelligent and considered, and that the alien was prejudiced by the denial of the right to appeal.<sup>96</sup> This test is stricter than the one enunciated in *Mendoza-Lopez* and has the practical effect of creating a presumption in favor of the government, since the courts almost never find that a deportation hearing was fundamentally unfair. As a result, the Fifth and Eleventh Circuits seldom reach beyond fundamental unfairness to determine whether the waiver was knowing and considered or whether the alien was prejudiced by denial of the right to appeal. The Ninth Circuit's interpretation of *Mendoza-Lopez* is clearly better, since a collateral attack should be allowed when the defects in an administrative hearing foreclose judicial review of that hearing.

Arguably, a mass silent waiver of the right to appeal approaches the outer limits on the question of whether a waiver of the right to appeal is knowing and intelligent. There may certainly be situations where such a silent waiver is not knowing and considered. For example, an alien may not comprehend the proceedings, or an alien may be too scared, frightened, or traumatized by the entire process to respond. Permitting mass silent waivers does create some risk that such inaction could be confused with a valid waiver. However, the risk of such a result does not necessitate the Ninth Circuit's conclusion that anything short of an express statement waiving the right to appeal is violative of due process. Logically, all it requires is that courts examine each case—and its specific set of facts—individually.<sup>97</sup>

While, on the surface, *Lopez-Vasquez* concerns the INS's

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and *Developments*, 4 GEO. IMMIGR. L.J. 503 (1990).

96. See *Holland*, 876 F.2d at 1536, 1537; *United States v. Encarnacion-Galvez*, 964 F.2d 402 (5th Cir. 1992), *cert denied*, 113 S. Ct. 391 (1992).

97. In fact, at *Lopez-Vasquez*'s mass hearing, the ILJ developed a rapport with the aliens such that one of them presented information which might lead to his not being deportable; another presented evidence resulting in two-thirds of the allegations against him being dismissed; and five of them presented enough evidence concerning relatives living in the United States that the ILJ felt constrained to inquire whether any of those five might have a legal right to remain in the United States. Consolidated Petitions for Rehearing with Suggestion for Rehearing En Banc at 12, *United States v. Lopez-Vasquez*, 1 F.3d 751 (9th Cir. 1993) (No. 92-50271).

need for efficiency, perhaps the hidden message of the decision relates to the Ninth Circuit's desire for judicial economy. Apparently, the Ninth Circuit does not agree with the totality of the circumstances approach, nor does it want to be bothered with (or have time for) scrutinizing each case of mass silent waiver on its own facts. However, a court should not sacrifice justice in favor of per se rules for efficiency's sake.

Additionally, policy considerations do not warrant a per se rule against mass, silent waiver of the right to appeal in a deportation hearing. Certainly, there is a risk of coercion in group deportation hearings, especially when all the aliens present remain silent when asked if they wish to assert their right to appeal. The situation is a difficult one for aliens who may be unfamiliar with the American legal system, poor, away from home, and frightened. Furthermore, the *Lopez-Vasquez* decision may motivate the INS to be more careful in seeing that aliens receive due process. However, the court has offered no support for its theory that aliens will be coerced into not standing up when asked to assert their rights in a mass deportation hearing. The court merely speculated about the beliefs aliens have during a mass deportation hearing, but such speculation cannot serve as the basis for such a change in the law.<sup>98</sup>

Just as aliens may be deprived of due process through mass silent waiver of the right to appeal, aliens may eagerly and intelligently take advantage of mass silent waiver of the right to appeal. Sometimes, an alien who knows he or she is ineligible for relief from deportation and does not wish to remain in custody may desire to return home without delay. This may be accomplished through either an express oral waiver of the right to appeal or a silent waiver of that right. The fact that it may be preferable that an alien expressly waive the right to appeal does not necessitate the conclusion that a mass silent waiver of the right is per se unconstitutional. The requirement is that a waiver must be considered and intelligent, and each waiver should be judged on its facts.

As a practical matter, the INS is playing with fire by using the process of mass silent waiver of right to appeal in deportation hearings. Even when the waivers are legitimately valid,

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98. See *id.* at 11.

the INS will often face litigation on this fact-sensitive issue. For the sake of efficiency, the INS should stop relying on mass silent waivers and instead should individually question each alien as to whether he or she wishes to exercise his or her right to appeal. The reduction in litigation and uncertainty will easily outweigh the extra effort expended.

Nevertheless, the decision of whether to use mass silent waivers at deportation hearings is an administrative one for the Attorney General and the INS to make. The fact that a more desirable and sensible procedure exists does not render the less desirable procedure a violation of due process. Despite its inefficiencies, mass silent waiver of the right to appeal in a deportation hearing should be valid as long as it is knowing and considered, and review of such a waiver is not foreclosed.

#### IV. CONCLUSION

Because our limited resources are focused on admitting those immigrants who qualify for admission to the United States, it necessarily entails rejecting those who do not measure up to the standards set by Congress. Although deportable aliens are entitled to due process, favoring them under notions of fairness only serves to hurt truly qualified and deserving immigrants.

The *Lopez-Vasquez* court should have relied on the *Mendoza-Lopez* standard, which requires that a waiver of the right to appeal must be intelligent and considered, and that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before that proceeding may be used to conclusively establish an element of a criminal offense.<sup>99</sup> The court also should have followed the Fifth Circuit's lead and analyzed the waiver of the right to appeal under the totality of the circumstances approach. The right to appeal is a statutory right and deportation hearings are civil in nature, so this standard ensures adequate protection of this right.

The Ninth Circuit relied on the proper interpretation of *Mendoza-Lopez*, but it unnecessarily and unjustifiably expand-

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99. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987).

ed the precedent. It cited constitutional law to justify the imposition of a *per se* rule against mass silent waiver of the right to appeal. However, the cases upon which the court relied were not authoritative in the case of waiver of the non-fundamental, statutory right to appeal. By contrast, combining the Ninth Circuit's interpretation of *Mendoza-Lopez* with the Fifth Circuit's totality of the circumstances approach is the most accurate way of applying *Mendoza-Lopez* in light of the Supreme Court's disinclination to name specific offenses which *per se* violate due process. It does not make a presumption in favor of the alien, as the Ninth Circuit has done in *Lopez-Vasquez*, nor does it make a presumption in favor of the government, as the Fifth and Eleventh Circuits have done.<sup>100</sup> The standard proposed by this Comment puts each side to its proof, as the Supreme Court clearly intended. Anything less, whether in the name of administrative or judicial economy, is unwarranted.

*Frederic J. Giordano*

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100. The Fifth and Eleventh Circuits read *Mendoza-Lopez* to require a showing of fundamental unfairness to the alien in addition to the Ninth Circuit's requirements. See *supra* notes 92-94 and accompanying text.

