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INFORMATION GATHERING METHODS IN IMMIGRATION AND NATURALIZATION SERVICE PROCEEDINGS

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The rules and regulations by which the Immigration and Naturalization Service (hereinafter referred to as INS) operates can produce a bewildering experience for lawyers familiar with current state and federal procedure and schooled in the Anglo-American fact finding process. This is especially true, and particularly frustrating, where the practitioner attempts to utilize in immigration proceedings the well-honed and time-tested techniques for discovery and information gathering available as a matter of right in almost every kind of case tried in the United States. From the onset, the practitioner is confronted with an inconsistent set of conditions: In spite of the Draconian power of the INS to exile someone from the United States, the rights developed for the criminal defendant do not apply.¹ The judicial justification for this inapplicability is that the matter is "civil" in nature.²

Proceeding on the premise that the matter is civil, the practitioner may attempt to unravel the client's problem in the context of the rights and duties as codified in the Federal Rules of Civil Procedure.³ However, these rules cannot be applied automatically to administrative proceedings:⁴ since the turn of the century administrative adjudication has been held to be a specialized type of proceeding.⁵ Notwithstanding this, it is a well established general rule that an alien sought to be deported must be given a fair hearing.⁶

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1. Abel v. United States, 362 U.S. 217 (1960); Heikkila v. Barber, 345 U.S. 229 (1953); Zakonaite v. Wolf, 226 U.S. 272 (1912).

2. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Carlson v. Landon, 342 U.S. 524 (1952); Bridges v. Wixon, 326 U.S. 135 (1945). United States v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972); United States v. Ramirez-Aguilar, 455 F.2d 486 (9th Cir. 1972); Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955).

3. 28 U.S.C. §§ 1651-2101 (1970).

4. Pang v. INS, 368 F.2d 637 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1037 (1967). However, in depositions taken pursuant to the authority of 8 C.F.R. § 242.14(e) (1974), "[t]he Federal Rules of Civil Procedure shall be used as a guide to the extent practicable."

5. See Zakonaite v. Wolf, 226 U.S. 272 (1912).

6. Bridges v. Wixon, 326 U.S. 135 (1945). However, a hearing in a depor-

Nor may the practitioner refer to the Administrative Procedure Act (APA), the body of statutory law setting forth uniform rules of procedure for federal administrative agencies.⁷ The INS is exempted from compliance with many of the provisions of the APA.⁸ However, even if the APA were to apply completely to the INS, many of the unfamiliar discovery and information gathering techniques would still remain, as these features are intrinsic aspects of administrative law.⁹

This apparent anomaly can best be understood by recognizing that the origin of administrative law is not the Anglo-American common law: it developed out of and has more in common with the European civil law system.¹⁰ This fact is most evident in the separate and distinct fact finding processes distinguishing one system from the other. The Anglo-American common law form of resolving disputes is theoretically based on an adversary premise. Under this system, the fact finding process relies heavily on testimonial examination, with the trier of fact making determinations based not only on the evidence, but on the credibility and demeanor of the witness as well. European civil law, on the other hand, is prone to view the fact finding process as the singular function of the adjudicator. As a result, most civil law countries do not permit a litigant to be examined as a witness.¹¹ The practitioner, schooled in the Anglo-American common law form of resolving disputes is thus faced with a fundamental, historically

tation proceeding is not rendered unfair because the rules of evidence and procedure applicable in judicial proceedings have not been strictly followed. See 3 AM. JUR. 2d *Aliens and Citizens* § 82 (1962).

7. 5 U.S.C. § 551 *et seq.* For an overview of the provisions of the Administrative Procedure Act, see 2 WEST'S FEDERAL PRACTICE MANUAL 2d ed., ch. 2.

8. Specifically, deportation hearings are exempted. See *Marcello v. Bonds*, 349 U.S. 302 (1955). The Immigration and Nationality Act (hereinafter cited as I.N.A.) § 242(b), 8 U.S.C. § 1252(b) (1970), and the regulations promulgated pursuant thereto, constitute the sole and exclusive procedure for deportation of an alien. The provisions of sections 5, 7, & 8 of the APA were at one time held to apply to deportation hearings. See *Wong Yan Sung v. McGrath*, 339 U.S. 33 (1950). Immediately after the *Sung* decision, Congress exempted deportation proceedings from the APA hearing requirements in a rider to a Supplemental Appropriations Bill, 64 Stat. 1048, Pt. I (Sept. 27, 1950). Thereafter, the present procedures contained in I.N.A. § 242(b) were enacted as part of that Act in 1952. See *Marcello v. Ahrens*, 212 F.2d 830, 836 (5th Cir. 1955), and *Galvan v. Press*, 347 U.S. 522 (1954). It appears that the *Bonds* case above does not dispose of the question of whether APA sections 5, 7, & 8 apply to the conduct of other types of hearings before the Board of Immigration Appeals in visa and bond forfeiture proceedings; and applications before the district director for stay of deportation and naturalization proceedings; and appeals before the Regional Manpower Administration of the Department of Labor. None of the proceedings above mentioned are covered by 8 U.S.C. § 1252(b) (1970).

9. See 1 AM. JUR. *Administrative Law* § 9 (1962) for a comparison of American administrative law with the French system of *droit administratif*.

10. *Id.* at §§ 11-16.

11. For discussion of these differences as they affect discovery in foreign countries see Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, 1959 ABA PROCEEDINGS, SECTION OF INTERNATIONAL AND COMPARATIVE LAW 37 (hereinafter cited as *Doyle*).

based difference between his training and the distinct administrative law form of adjudication.¹² Moreover, the problem is compounded by the unique status of the INS among administrative agencies in being exempt from the rules and regulations most agencies are subject to.¹³

With this understanding, the present state of authority allowing for information gathering in INS proceedings—and its attendant problems—will be discussed in this article.

I. INS PROCEEDINGS

Throughout INS proceedings more concern is accorded to information gathering than to discovery. Discovery in the traditional sense is separate and apart from a trial and differs from information gathering in that it is designed to lead to a finding of admissible evidence.¹⁴ No such evidentiary problems are encountered in INS proceedings because little is held inadmissible.¹⁵ INS proceedings are also less formal. It is only in the deportation phase of a hearing, for example, that anything similar to a common law adversary proceeding takes place. And it is only at this phase that a distinction between pre-trial and trial activity is recognized.¹⁶

At the beginning of a hearing the Immigration Judge has possession of a record file containing the pleadings in the case. The Government's attorney has an administrative file on the alien's activities; he has discretion to select from it any investigative reports and previous statements for submission as evidence. The objec-

12. Much of the current literature on administrative law advocates expanded application of the FEDERAL RULES OF CIVIL PROCEDURE-type of discovery to all administrative practices. See Tomlinson, *Discovery in Agency Adjudication*, DUKE L.J. 89 (1971). See also the appendix attached to this article at 143 (Recommendation 21) as approved by the Administrative Conference held pursuant to 5 U.S.C. §§ 571-76 (1970), at its Plenary Session, June 3, 1970. This recommendation adopts minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7, & 8 of the APA, codified as 5 U.S.C. §§ 554, 556, & 557 (1970). None of the recommendations address themselves to the problem of obtaining pre-trial or trial materials from foreign countries. See also Kintner, *Discovery in Administrative Proceedings*, 16 AD. L. REV. 233 (1964); Berger, *Discovery in Administrative Proceedings*, 12 AD. L. BULL. 28 (1959); 46 A.B.A.J. 74 (1960) (hereinafter cited as *Berger*). Implicit in these articles is the premise that pre-trial discovery is a separate and distinct activity from the actual trial itself.

13. See text accompanying notes 3-8 *supra*.

14. See *Berger*, *supra* note 12. Berger's suggestion that subpoenas be used for discovery purposes does not seem so novel when one realizes that civil law countries do not make distinctions between information gathered in preparation for trial and information presented at trial.

15. All material and relevant prior statements, written or oral, by the alien or by any other person are admissible, 8 C.F.R. § 242.14(c) (1974). *Ex parte* statements may, under certain circumstances, be reviewed also. See *Navarette-Navarette v. Landon*, 223 F.2d 234, 237 (9th Cir. 1955), *cert. denied*, 351 U.S. 911 (1956); *Glaros v. INS*, 416 F.2d 441, 443 (5th Cir. 1969).

16. INA § 242(b), 8 U.S.C. § 1252(b) (1970).

tive of the successful advocate is to ascertain the contents of this file before the hearing. Customarily, the INS will not voluntarily disclose most of the materials pertaining to the Government's claim against the alien until he is found deportable and is forced to elect to apply for discretionary relief.¹⁷ This practice obviously results in a practical inability to gather the relevant evidence necessary to rebut the INS's materials and places an unfortunate premium on the practitioner's ability to prognosticate what the INS's position may or may not be. The standard rationale for non-disclosure is that disclosure of INS evidence will encourage the fabrication of defenses.

It is therefore essential for the practitioner to make effective use of the available information gathering techniques if the alien's highly circumscribed rights are to be protected. Unfortunately, this excludes placing reliance upon the sworn testimonial statements of aliens due to the INS's bias against such statements.¹⁸ Thus, the objective in immigration proceedings is to develop corroborating independent evidence.¹⁹ Some of the more important evidentiary items that may have to be produced in any number of different cases include the following:

1. Official records of vital statistics located in foreign countries;
2. Verified and legally admissible declarations of foreign law relative to adoption, divorce, marriage, criminal status and other such documents;
3. Statements from residents of foreign countries supporting the alien's claim to status involving work experience, civil status and other such statements;
4. Statements of witnesses who have been deported from the United States and who are therefore unable to return;
5. Statements from persons in the United States whose official duties make it impossible for them to appear in person at the place of the alien's hearing.

Without the availability of such information, the alien is in a position of gross inequality relative to the greater investigative

17. There is no pre-adjudication responsibility to disclose derogatory material unless the INS intends to base the denial of a claim or application for relief on such information, 8 C.F.R. § 103.2(b)(2) (1974). It appears to be the INS's position that the only record of proceedings which the alien can inspect as a matter of right is the "record file."

18. In most common law courts the unrefuted testimony of a party would be accepted unless it was inherently unbelievable. The civilian law bias against accepting the testimony of a party is most evident in the informal hearing process where the author has had many of his client's claims for relief denied. Reason: "The applicant presents no documentary evidence in support of his claim for relief; his request is based solely on his self serving affidavit."

19. *Id.*

resources and procedurally superior position of the INS. Before discussing how a practitioner can effectively gather such information, a short discourse into INS hearing practices will be presented.

II. DISCRETION IN INS PROCEEDINGS: ITS USE AND ABUSE

A recognition of the peculiar need for effective information gathering in preparation for INS proceedings may pale without a concomitant understanding of how the INS operates under the rules and regulations it is subject to.

Anyone practicing before the INS cannot rely, as his sole guide, on the Immigration and Naturalization Act,²⁰ the relevant Federal Regulations,²¹ the updated material published in the Federal Register, and the case material interpreting these statutes and regulations. In relevant parts, these materials reveal that strict reliance to their letter and seeming intent is often impossible because of the INS's wide discretion in their implementation. In fact, so much latitude exists that the INS has applied the statutory provisions of the Immigration and Naturalization Act in a manner totally contrary to its plain meaning.²²

Another vexing feature of INS proceedings is the imposition of informal rules which act like shifting sand under the alien's feet and by their very nature fall outside the mainstream of sources usually consulted by practitioners. A prime example is the so-called "equity" program.²³ It resulted from an exchange of agreements between the then Sub-Committee Chairman, Peter Rodino and the then Commissioner of the INS, James F. Greene.²⁴ Specific knowledge of this action was required in order for individuals outside of an official capacity within the INS to learn of the program's criteria. And once knowledge of the program was made more accessible through an operative instruction,²⁵ the memorandum guidelines as to its application were excluded.²⁶

20. 8 U.S.C. § 1101-1503 (1970).

21. 8 C.F.R. (1974), 22 C.F.R. (1974), and 29 C.F.R. (1973).

22. See Fragomen, *The Role of the Legislature in Immigration and Nationality Law*, 50 INTERPRETER RELEASES 99, 101 (1973). The aforementioned article documents several instances in which the plain meaning of the INA and the regulations thereunder were, and continue to be, interpreted in a manner contrary to their statutory mandate.

23. *Id.* at 101. The "equity" program involves the granting of deferred departure status to Western Hemisphere natives in certain relative relations to resident aliens.

24. *Id.*

25. Operations Instructions § 242.10, 2864 (1973). The Operations Instructions are available for inspection at the public reading rooms of the INS.

26. The original memorandum (April 16, 1973) contained guidelines for granting or denying participation in the program, for example: that the person was able to support his family; was not a "recent" uninspected entrant; was not a consistent violator of immigration laws. However, when the program's benefits were incorporated into the Operations Instructions only formal eligibility for the

Such an exclusion underscores another problem in pursuing claims before the INS. While access to part of the Operations Instructions²⁷ is given, the same privilege is denied as to most of the all important interpretation guidelines on the Instructions.²⁸ The guidelines give specific examples illustrating the extent of an INS officer's discretion in approving or denying certain types of claims; thus if the practitioner is to present the alien's claim before the INS effectively, he will need access to these guidelines. Of the sections to the Operations Instructions available to the public, almost no interpretative material is provided on visa proceedings, discretionary relief, deportation, and bond forfeiture proceedings.²⁹ Consequently, the Operations Instructions alone are of no use in determining the official policy of the INS in the mainstay of claims brought before it.³⁰

Administrative case precedent decided by the INS complicates the formidable task already faced by the practitioner in dealing with the rules and regulations just discussed. The Board of Immigration Appeals, as the interim appellate arm of the INS, reports selected opinions which are regarded as precedent.³¹ However, the INS is not bound to rely on these precedent decisions only. Immigration officers, regional commissioners, and inspectors may base their opinions upon citation to unpublished decisions. These unpromulgated opinions are not systematically in-

program was defined, together with the time increments for which deferred voluntary departure would be granted. The criteria of application, if it is still currently applicable, is buried from public view.

27. See note 25 *supra*.

28. See Note, *Secret Law of the Immigration and Naturalization Service*, 56 IOWA L. REV. 240 (1970). In this article the author discusses how INS officials use the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(2) (1970), to base their refusal to disclose the interpretative material on the Operations Instructions. This section exempts from disclosure matter "related solely to the internal personnel rules and practices of an agency." However, 8 C.F.R. § 103.9(d) (1974), promulgated pursuant to the FOIA requires that, "[s]tatements of policy, interpretations, and those staff manuals and instructions to staff (or portions thereof), affecting the public," be made available to the public. In contrasting the preceding two sections, it should become apparent that the INS is over-reaching its authority and violating its own regulations by not disclosing the interpretative material on the Operations Instructions. Thus, where 8 C.F.R. § 103.9(d) (1974), is clearly in accord with the manifest purpose of the FIOA in requiring agency disclosure—especially if it involves, as it does here, disclosure of policies and interpretations that have the effect of substantive law—the "internal personnel rules and practices" exemption, if read as expansively as the INS currently does, nullifies the spirit of the FOIA as codified in 8 C.F.R. § 103.9(d) (1974).

29. Naturalization proceedings are an exception to this penchant for secrecy. The Operations Instructions contain much useful information and guidelines in this area.

30. See also Fried, *Immigration and Nationalities Law*, 35 N.Y.U.L. REV. 188 (1960), and Dietz, *Deportation in the United States, Great Britain and International Law*, 7 INT'L LAW. 326 (1973).

31. These opinions are published in bound volumes as United States Department of Justice ADMINISTRATIVE DECISIONS UNDER IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES. Advance sheets to these volumes are issued as INTERIM DECISION[s], sequentially numbered.

dexed; thus the practitioner's ability to cite opposing unpublished authority is blatantly limited and a claim cannot be pursued with reasonable expectations as to its outcome.

The INS has, on occasion, attempted to avoid the rule-making provisions of the Administrative Procedure Act³² by claiming that changes in certain regulations were immediately effective because they pertained to matters involving foreign affairs of the United States.³³ This allegation has recently been rejected in a case involving the withdrawal of one of the exemptions to the requirement of labor certification pursuant to § 212(a)(14) of the Immigration and Nationality Act.³⁴

One further issue should be touched upon: the ominous implication of these INS practices for both the alien and the practitioner. When an agency can ignore the literal directive of its statutory mandate,³⁵ refuse to divulge information on how it disposes of claims before it,³⁶ and use case authority that is not readily accessible³⁷ to reach decisions, the alien's rights are subject to severe compromise. When these rights are violated, the practitioner is equally compromised in his ability to challenge, at this level, improper exercises of power. Thus with respect to the alien and his rights, the existence of what is tantamount to secret laws creates a great potential for abuse; in the case of a practitioner, the tendency is to produce a limited and subservient bar and a mode of practice inconsistent with a notion of law by promulgated rules and regulations.

32. 5 U.S.C. § 553(a)-(e) (1970).

33. Such matters are exempted from the rule making provisions by 5 U.S.C. § 553(a) (1970). See *INS in Yiakoumis v. Hall*, 83 F. Supp. 469 (E.D. Va. 1949).

34. *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288 (D.D.C. 1973). The court in *Chow* declared that the attempt by the INS to withdraw the student exemption, which exempted certain students from having to obtain a labor certification was invalid. 8 C.F.R. § 212.8(b)(5) (1972). The court held that such regulations had the full force and effect of law and as such, were the type of regulation for which Congress intended notice and opportunity to comment as provided in the rule making provisions of the APA.

On August 28, 1973, the INS properly published in the Federal Register (38 Fed. Reg. 22964) a notice of proposed rule making which invited comment for 90 days on the proposed elimination of the student exemption provided by 8 C.F.R. § 212.8(b)(5) (1972). On November 12, 1973, it was announced (38 Fed. Reg. 31166) that after consideration of all comment, it had been decided that the elimination of the exemption was justified and would take effect on December 12, 1973.

It is interesting to note that the 4 page *Chow* decision, decided July 6, 1973, did not appear in the Federal Supplement Advance Sheets until November 7, 1973, some three months after the case had been decided and it was four months after the decision that the change in the student exemption was officially authorized. In the meantime, it was unknown to many that the INS's position held prior to *Chow* with regard to student exemption was invalid and that the exemption could still have been taken advantage of.

35. See text accompanying note 22 *supra*.

36. See text accompanying note 28 *supra*.

37. See text accompanying note 31 *supra*.

III. LETTERS ROGATORY: AN EFFECTIVE METHOD OF OBTAINING INFORMATION

The information gathering devices available in INS proceedings appear to give the practitioner effective powers of discovery.³⁸ This is substantially correct insofar as these methods are applicable within the United States; however, the authority purporting to have extra-territorial effect³⁹ is misleading. This fact is important given the amount of evidence that may be required from foreign sources.⁴⁰ It provides for the taking of depositions both within and outside the country, but with respect to a deponent outside the country, unless he appears voluntarily, this power is unavailing because a subpoena has no power to compel his attendance there.⁴¹

Except for letters rogatory,⁴² the analogous authority⁴³ in federal court proceedings for the taking of depositions abroad suffers from the same lack of power to compel testimony. Indeed, letters rogatory provides the only truly effective means of tapping these sources. The efficacy of this method relies on the ability of a court in one country to enlist the aid of a court in another. The ostensible purpose is to gain assistance in the administration of justice in the court making the request by compelling a witness to appear for deposition according to the methods and procedures

38. In INS proceedings the existing authority is as follows: (1) in Deportation Proceedings a subpoena may be issued requiring the attendance of witnesses or the production of documentary evidence. Before a subpoena may be issued the alien must show that he is unable to voluntarily obtain the attendance of the witness or documents in question and the Immigration Judge must find that the proposed testimony or evidence is essential to the case. 8 C.F.R. § 2827.4(b) (1974). Similarly, the authority for the taking of depositions requires that the witness not be reasonably available at the place of the hearing and that the testimony be essential. This authority also provides for the taking of depositions outside the country. 8 C.F.R. § 242.14(e) (1974); (2) in Naturalization Proceedings, subpoenas may be issued on a showing of relevance, materiality and scope of the evidence sought. A showing must also be made that the testimony or evidence cannot otherwise be obtained. There is no requirement that the evidence or testimony be essential to the determination of the case. 8 C.F.R. § 335.11(e) (1974). Depositions may also be taken if done before any employee of the United States designated for that purpose by the Commissioner of Immigration. 8 C.F.R. § 335b.3(b) (1974); (3) proof of official American records may be evidenced by an official publication or a copy attested-to by an officer or his deputy having legal custody of the records. If the record is from a foreign country the copy must be attested-to in the appropriate chain of certificates of genuineness of signature and official position pertaining to attestation of documents. 8 C.F.R. § 287.6 (1974); (4) in compliance with the Freedom of Information Act certain INS records are available upon request. 8 C.F.R. § 103.10 (1974); (5) A copy of any signed statement taken by the INS is available upon request (The INS circumvents the spirit of this regulation by not asking aliens to sign the summary of any statement he may give). 8 C.F.R. § 103.2(b)(1) (1974).

39. 8 C.F.R. § 242.14(e) (1974).

40. See text immediately following note 19 *supra*.

41. See Note, *Foreign Depositions Practice in American Civil Suits—A Judicial Stepchild*, 96 U. PA. L. REV. 241, 248 (1947).

42. FED. R. CIV. P. 28(b)(3).

43. See e.g., FED. R. CIV. P. 28(b)(1) (on notice); FED. R. CIV. P. 28(b)(2) (by commission); FED. R. CIV. P. 29 (by written stipulation).

of the reciprocating court. The use of this method has been held to rest on comity and to be an inherent power of the court.⁴⁴

Comity is not a problem when the matter is before a federal court.⁴⁵ In matters before the INS, a federal court can acquire jurisdiction by granting an application for equitable relief through a petition for a writ of prohibition. This prevents a deportation hearing from continuing until the court can issue a letter rogatory.

Letters rogatory issued by American courts are not universally honored, however.⁴⁶ Where letters rogatory are not honored, there is no way to compel an unwilling witness to testify.⁴⁷ In those cases where a witness is willing to testify, letters rogatory may be the only means to obtain that testimony because many countries do not permit testimony to be taken before United States consular officials⁴⁸ or before their own nationals⁴⁹ commissioned by a foreign court.⁵⁰

One Board of Immigration Appeals decision indicates that an Immigration Court can adopt any of the methods for taking depositions in foreign countries as provided by Rule 28,⁵¹ including the issuance of letters rogatory.⁵² As with any other court making a similar request, the honoring of a letter rogatory issued by an Immigration Judge depends upon the reciprocating court's notion

44. The reciprocal cooperation necessary for the use of this method is most inadequate when the request for letters rogatory is directed from a common law country to a civil law country. See Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 516 (1953) (hereinafter cited as *Jones*). While the United States is signatory to the convention on taking of evidence abroad in civil matter, 23 U.S.T. 2555, T.I.A.S. No. 7444 (October 7, 1972), only Denmark and Norway also subscribe to the convention.

45. 28 U.S.C. § 1782 (1970).

46. For current information regarding the existence, signatory or accession status of any treaty, inquiries should be directed to the Assistant Legal Advisor for Treaty Affairs, United States Department of State, 2201 "C" Street, N.W., Washington, D.C. 20520.

47. Doyle, *supra* note 11, at 39; See also 4 MOORE, *FEDERAL PRACTICE* (2d ed., 1963): *Notice Procedure* § 28.03, *Commission* § 28.04, *Letter Rogatory* § 28.05, *Practical Consideration* § 28.08; Heilpern, *Procuring Evidence Abroad*, 14 TUL. L. REV. 29 (1939); Jones, *supra* note 44, at 526-29; Comment, *Revitalization of the International Judicial Assistance Procedures of the United States: Service of Documents and Taking of Testimony*, 62 MICH. L. REV. 1375 (1964); Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015 (1965).

48. As provided by 8 C.F.R. § 242.14(e) (1974).

49. As provided by FED. R. CIV. P. 28(b)(2).

50. See Jones, *supra* note 44, at 524-525.

51. FED. R. CIV. P.

52. *In re Vardjan*, 10 I. & N. Dec. 567 (1964); same case *aff'd on other grounds*, Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), *aff'd*, 303 F.2d 279 (2d Cir. 1962). No suggestion was made as to how the court could offer the requisite comity to the responding court. The basic issue was whether or not it was feasible to depose a Yugoslav official. Requests to appear before an American consul to answer interrogatories issued by way of notice or commission were rejected. The suggestion was made that deposition or letters rogatory would be a proper method to obtain production of official government records relying on *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953).

of judicial comity. This suggests that conceptually a foreign court may have greater trouble in honoring a request from an administrative agency, as opposed to another court.⁵³ Moreover, there are no treaty provisions which might resolve this question.⁵⁴ This is not altogether a disadvantage because there is also nothing preventing a court in a foreign country from providing assistance.⁵⁵

A major problem in securing judicial assistance by means of letters rogatory is that the procedures for executing them are not uniform. The issuing court has no control over the procedures for compelling the appearance and examination of the witness to be deposed. In some foreign countries courts do appoint United States consular officials to execute letters rogatory and will issue subpoenas compelling attendance of witnesses.⁵⁶ This is the preferred practice if the consular officer follows American procedure. However, few consular officials are familiar with the Federal Rules of Civil Procedure (FRCP). Finally, foreign courts sometimes honor procedural requests based on the FRCP.⁵⁷

Despite these difficulties, and others, letters rogatory remain the most effective method for obtaining testimony and official records from governmental employees in foreign countries.⁵⁸

IV. INFORMATION GATHERING FROM GOVERNMENTAL AGENCIES: THE FREEDOM OF INFORMATION ACT AND ITS APPLICATION

The Freedom of Information Act (FOIA)⁵⁹ represents a fundamental change in the public policy regarding disclosure of agency records. It permits disclosure of identifiable records upon request.⁶⁰ It also provides for a *de novo* judicial hearing when

53. Decisions such as *In re Letters Rogatory Issued By The Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967), denying the execution of letters rogatory to an Indian taxing administrative body because they were not a "court," do not help expand foreign countries' expectation of future aid in administrative court comity. But see *In re Letters of Request To Examine Witnesses From the Court of Queen's Bench for Manitoba, Canada*, 59 F.R.D. 625 (N.D. Cal. 1973), *aff'd*, 488 F.2d 511 (9th Cir. 1973), interpreting 28 U.S.C. § 1782 (1970), and indicating that the term "tribunal" used therein was intended to include administrative bodies, so long as said bodies exercised judicial or quasi-judicial adjudicative functions.

54. 23 U.S.T. 2555, T.I.A.S. No. 7444 (1972). The United States has subscribed to only one minor international agreement on judicial assistance.

55. See *Potter v. Ochs*, 97 O.G. Pat. Off. 1835 (1901) (U.S. Patent Office letters rogatory honored by a German Court, even though no proof that reciprocity was possible from the United States).

56. *Doyle*, *supra* note 11, at 40.

57. *Id.*

58. A serious limitation is the great length of time involved in the process of issuing, transmitting and executing letters rogatory.

59. 81 Stat. 54 (1967).

60. 5 U.S.C. § 552(a)(3) (1970). See also *Hawkes v. Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972). There is a negative side to this provision in that the burden of enforcement is placed on the individual; he often does not

an individual believes that information has been improperly withheld by an agency.⁶¹ Finally, under the FOIA, the agency has the burden of justifying its failure to disclose the information requested.⁶² Prior to its enactment in 1966, however, it was almost as difficult to obtain information in the files of American government agencies as it was from foreign governments. Access to government records was limited by section 3 of the Administrative Procedure Act of 1946.⁶³ The restrictions imposed by that Act were vague and "extensively abused as a justification for withholding information."⁶⁴

The FOIA represents a step towards greater accessibility to information in government hands. However, it is inadequate either as a public information act or as a method of information gathering for INS proceedings. For example, the FOIA discarded the vague limitations of access to agency records and replaced them with a list of nine categories of information which are exempted from disclosure.⁶⁵ The categories relevant to INS proceedings are: (1) category one which exempts information that by Executive Order must "be kept secret in the interest of national defense or foreign policy;"⁶⁶ (2) category two which exempts matters "related solely to the internal personnel rules and practices of an agency;"⁶⁷ (3) category five which exempts information contained in certain kinds of "inter-agency or intra-agency memoranda or letters;"⁶⁸ and (4) category seven which exempts information "contained in investigatory files compiled for law enforcement purposes."⁶⁹ Before discussing category one, five and seven will be discussed. Category two has been previously covered.⁷⁰

have the financial resources to undertake the almost inevitable litigation required to pry loose information that the agency wants to keep from the public. There is also the problem raised by the requirement that the individual be able to identify the information, but recent cases have tended to place some of the burden of this responsibility on the agencies themselves. See *National Cable Television Association, Inc. v. F.C.C.*, 479 F.2d 183 (D.C. Cir. 1973); *Bristol-Myers v. F.T.C.* 424 F.2d 935, 138 U.S. App. D.C. 22 (1970), *cert. denied*, 400 U.S. 824 (1970).

61. 5 U.S.C. § 552(a)(3) (1970).

62. *Id.* See also *Tax Analysis and Advocates v. Internal Revenue Service*, 362 F. Supp. 1298 (D.D.C. 1973).

63. 60 Stat. 237 § 3. See also 1 DAVIS, ADMINISTRATIVE LAW, Ch. 8.

64. See Note, *The Freedom of Information Act and the Exemption for Intra-Agency Memorandum*, 86 HARV. L. REV. 1047 n.2 (1973) (hereinafter cited as *Freedom*). See also Note, *Administrative Law-Freedom of Information Act-Letter of Warning and Detention are Identifiable Records Not Within Investigatory Files Exemption, and Their Disclosure is Not a Violation of Due Process*, 40 FORDHAM L. REV. 921, 923 (1971-72) (hereinafter cited as *Administrative Law*).

65. See Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9) (1970).

66. 5 U.S.C. § 552(b)(1) (1970).

67. 5 U.S.C. § 552(b)(2) (1970).

68. 5 U.S.C. § 552(b)(5) (1970).

69. 5 U.S.C. § 552(b)(7) (1970).

70. See note 28 *supra*.

With respect to the fifth category on inter-agency or intra-agency memoranda or letter, case law has established that "essentially factual" material in the possession of an agency is not exempted from the disclosure provisions of the FOIA.⁷¹ This would include material containing purported matters of fact that bear upon an alien's qualifications as evaluated by the INS in his claim before that agency. The courts have also held that

documents containing statements of policy or interpretations of law actually adopted by an agency and documents containing the basis and rationale for its disposition of particular cases are outside the scope of the exemption.⁷²

This limitation helps to mitigate the problem of secret law discussed earlier.⁷³ Its most important aspect is that it gives the practitioner access to INS documents containing the basis and rationale for the disposition of particular sorts of cases. Under this limitation, therefore, a means—although not far reaching enough—is present to determine whether INS decisions are consistent, thus helping to narrow the range of arbitrariness.

With respect to the scope of seventh category exemptions, case law has established that some investigatory material is not exempted from the disclosure provisions of the FOIA.⁷⁴ This limitation applies to investigatory files to which a party litigant might be accorded access without reliance upon the Act.

Unlike the two categories just discussed, judicial interpretation on the scope of the first category exemption on national security has not tended to ease access to agency records.⁷⁵ For exam-

71. See *Freedom*, *supra* note 64, at 1049. See also *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 482 F.2d 710 (D.C. Cir. 1973), in which the court held that Congress in enacting exemptions from disclosure did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy. See also *Ethyl Corp. v. Environmental Protection Agency*, 478 F.2d 47 (4th Cir. 1973); and *Stokes v. Brennan*, 476 F.2d 699 (5th Cir. 1973).

72. See *Freedom*, *supra* note 64, at 1057-58.

73. See generally Section II *supra*.

74. *Hodgson v. General Motors Acceptance Corp.*, 54 F.R.D. 445 (D.C. Fla. 1972). . . . Note: The FOIA was amended effective Feb. 19, 1975, substantially changing the language of exemption 7. The term "records" is substituted for "files" and provides that the withholding of such records must be based upon one or more of six specified types of harm. The revised exemption now reads:

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, or (F) endanger the life or physical safety of law enforcement personnel.

For a discussion of this amendment and its effect on the FOIA see the A.G.'s 1974 FOI Amdts. Mem.

75. See *Administrative Law—Freedom of Information Act—Classification of*

ple, an INS special inquiry officer may deny an application for waiver of inadmissibility⁷⁶ on information not contained in the record and not made available to the alien. Under the applicable federal regulation such denial need only be based upon the officer's determination that the information, "is relevant to the disposition of the case and . . . would be prejudicial to the national security and safety."⁷⁷

However, a comparison between the Executive Order⁷⁸ and the regulation promulgated pursuant thereto (as permitted by the first category exemption) reveals a disparity between the two measures. The Order expresses a social policy of the undesirability of governmental secrecy;⁷⁹ it does not establish a category of "classified" material defined as such that its "disclosure would be prejudicial to the national security and safety."⁸⁰ Rather, it establishes security classification categories which require "damage" to the national security before information may be withheld.⁸¹ Thus, the regulation standard of "prejudicial to the national security" has a much wider sweep than the "damage" standard enunciated in the Order. The INS regulation, therefore, has defeated the purpose of the FOIA in this regard.

Given the underlying conflict between the public's right to have access to agency files and the agency's responsibility to carry out its mission effectively,⁸² an acceptance of the traditional perspective of Anglo-American law would seem to strike the balance between the public's right, and the agency's need, on the side of the public's right.⁸³

Files Pursuant to Executive Order Is Not Subject to Judicial Review Under the Freedom of Information Act, 42 U. CIN. L. REV. 529 (1973). . . . Note: The scope of this category of exemption has been restricted by legislative amendments effective Feb. 19, 1975. As amended, exemption 1 will permit the withholding of matters that are:

(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.

For a discussion of this amendment and its effect on the FOIA see the A.G.'s 1974 FOIA Amdts. Mem.

76. 8 U.S.C. § 1182(a) (1970), lists the grounds of inadmissibility.

77. 8 C.F.R. § 242.17(a) (1974).

78. 37 Fed. Reg. 5209 (1972).

79. *Id.* The Executive Order states: "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch."

80. *Id.*

81. *Id.* at 5209-5210.

82. See *Administrative Law*, *supra* note 64, at 924.

83. As discussed in the present section, case law on this point has been inconsistent. See also *Sterling Drug Inc. v. F.T.C.*, 450 F.2d 698, 146 U.S. App. D.C. 237 (1971); *International Paper Co. v. Federal Power Commission*, 438 F.2d 1349 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971); *Richardson v. U.S.*, 465 F.2d 844 (3d Cir. 1972); *City of Concord v. Ambrose*, 333 F. Supp. 958 (N.D. Cal. 1971); *Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972).

V. APPLICATION OF THE JENCKS RULES TO INS PROCEEDINGS

The INS practice in limiting access to prior statements of witnesses relating to their testimony was comparable to the pre-Jencks practice in criminal proceedings.⁸⁴ The *Jencks* Rule, formulated by the United States Supreme Court as a general rule of evidence, now entitles the defendant in a criminal action to all prior statements of witnesses which concern the same events and activities as their testimony.⁸⁵ It would therefore seem that an application of the Rule in administrative agency proceedings would provide the practitioner with a powerful weapon for effectively presenting an alien's case before the INS. Nearly every application of the Rule to administrative agency proceedings, however, has qualified it.⁸⁶ This trend to restrict the Rule reflects the Congressional attitude towards the original *Jencks* decision.⁸⁷

It remains to be seen whether the INS will invoke privilege on the grounds that the prior statement of a witness contains information which in the interest of national security must not be disclosed.⁸⁸ If the courts should decide that consistency with the principles underlying the *Jencks* Rule⁸⁹ require that the claim of governmental privilege be defeated, practitioners would then have a way of circumventing this limitation of the FOIA.⁹⁰

Also yet unanswered is the question whether refusal by the INS to provide access to prior statements of witnesses relating to their testimony establishes a sufficient basis to dismiss the proceedings against the alien with prejudice. If not, such a disposition would be inconsistent with the *Jencks* Rule as it is now used

84. *Jencks v. United States*, 353 U.S. 657 (1957). Before this case, it was impossible to obtain prior statements of government witnesses relating to their testimony without first laying a foundation of inconsistency. See also Note, *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 326-332 (1959).

85. 353 U.S. 657, 668-9 (1957).

86. See Note, *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 326-332 (1959); and Note, *The Jencks Rules Application to Adversary Adjudication of Administrative Agencies*, 68 YALE L.J. 1409 (1959). But see *Carlisle v. Rogers*, 262 F.2d 19 (D.C. 1958), where a district court's order affirming the INS's deportation of Carlisle on the grounds that he was a communist was overturned. The Special Inquiry Officer had refused to order the production of a pre-hearing statement made in writing to the INS by a witness who testified on the issue of Carlisle's membership in the Communist Party. The court rested its decision on *Communist Party v. Subversive Activities Control Board*, 254 F.2d 314, where the government made no claim of privilege, nor challenged the relevancy or materiality of a pre-hearing statement.

87. Nothing in the *Jencks* rule warranted the furor that it caused in Congress. For a discussion of the *Jencks* statute see Note, *The Aftermath of the Jencks Case*, 11 STAN. L. REV. 308-9 (1959). See also 8 U.S.C. § 3500 (1970) (Federal Criminal Code), which was enacted three months after the *Jencks* case was decided by the Supreme Court.

88. Freedom of Information Act, 5 U.S.C. § 552(b)(1) (1970).

89. See text accompanying note 86 *supra*.

90. See text accompanying notes 76-82 *supra*.

in criminal proceedings.⁹¹ Whatever the eventual outcome, the practitioner should consider all prior statements of witnesses as material potentially available under the *Jencks* Rule as applied to administrative agencies. A broad reading of the Rule would be consistent with a more liberal discovery practice as recommended by Administrative Conference Recommendation 21.⁹²

VI. CONCLUSION

One of the purposes of this article has been to acquaint the practitioner not familiar with immigration law, with the unique status of that area of the law. It is a highly complex area wrought by exception piled upon exception. The practitioner's task is further complicated by the investing of discretionary authority in the INS bordering on the ominous.

Another purpose has been to consolidate in one article the more important substantive information gathering devices. No pretense has been made to touch upon the tactical considerations the practitioner encounters once the information sought is revealed. That issue requires separate and lengthy treatment.

An attempt has also be made to show the extent to which a practitioner must go to gain access to materials necessary to the effective representation of an alien before the INS. The objective was to underscore the conclusion that the present framework of immigration law must be drastically changed: In essence, the shroud of secrecy must be torn from the INS; its proceedings must be brought under the Administrative Procedure Act; and the rights of aliens must be established to encompass the full protections of due process. Nothing short of this needed reform will even begin to provide the alien with the opportunity to establish his right to remain in the United States.

91. See *Brady v. Maryland*, 371 U.S. 812 (1962). See also Note, *The Jencks Rule's Application to Adversary Adjudication of Administrative Agencies*, 68 YALE L.J. 1423 (1959).

92. See Tomlinson, *Discovery in Agency Adjudication*, DUKE L.J. 89 (1971). Recommendation 21 adopts minimum standards for discovery in adjudicatory proceedings subject to sections 5, 7, & 8 of the APA.