Crimes and Punishment of the Alien: The Judicial Recommendation Against Deportation

Marisa A. Marinelli
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I. INTRODUCTION

Section 241(a) of the Immigration and Nationality Act of 1952 (INA)\(^1\) provides for the deportation of aliens\(^2\) convicted of specific crimes. In effect, this section renders the alien subject to two forms of sanctions: the criminal sentence and deportation. One way to avoid this seemingly harsh "double punishment"\(^3\) is through the use of a judicial recommendation against deportation. Section 241(b) of the INA permits the court that convicts the alien of the crime to


3. Deportation is technically not punishment. See Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 149 U.S. 698 (1893). The dire consequences of deportation, however, left members of the Supreme Court unconvinced that this action was not punishment. In Fong Yue Ting, the first case to hold that deportation was not punishment but rather an administrative process to rid the country of undesirable aliens, a dissenting justice stated:

"If the banishment of an alien from a country . . . where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for . . . be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

149 U.S. at 740-41 (Brewer, J., dissenting) (quoting President James Madison, 4 Elliot's Debates 555). Since deportation is not punishment, the phrase "double punishment" as used in this Note should not be read in the strictest legal sense. For additional views of deportation vis-a-vis punishment, see infra note 33. See also 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 4.1 (1985) (discussing the development and pattern of deportation statutes).
recommend that the alien not be deported. The section requires that interested parties, including the prosecution authorities and the Immigration and Naturalization Service (the Service), be given notice of the proposed recommendation, and an opportunity to oppose it. In addition, the recommendation must be made within thirty days of the time of sentencing. Once made, the recommendation is binding on the Service, and the criminal conviction may not be used as a basis for deportation.

Despite the statutory language of INA section 241(b), the federal circuit courts of appeals disagree on the scope and manner of application of the judicial recommendation against deportation. It is clear that the judicial recommendation, once made, means that an alien's criminal conviction may not be used as the basis for deportation. The circuits differ, however, over whether the Service may consider that conviction when ruling upon an alien's application for discretionary relief from deportation, such as an adjustment of sta-

4. INA § 241(b), 8 U.S.C. § 1251(b) (1982). The full text of the statute reads:

The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this chapter.

The last sentence, referring to subsection (a)(11), renders the recommendation inapplicable to aliens convicted of narcotics offenses. INA § 241(a)(11), 8 U.S.C. § 1251(a)(11) (1982). See Rehman v. INS, 544 F.2d 71 (2d Cir. 1976); Kolios v. INS, 532 F.2d 786 (1st Cir. 1976); Yuen v. INS, 406 F.2d 499 (9th Cir. 1969) (all holding that judicial recommendation is inapplicable to narcotics offenses described in § 1251(a)(11)).

5. INA § 241(b), 8 U.S.C. § 1251(b) (1982). See Judicial Recommendations Against Deportation, 8 C.F.R. § 241.1 (1986) (notice must be received at least five days prior to court hearing on recommendation against deportation).


7. Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968) ("sentencing court's recommendation, if made in accordance with the statute, must be followed").

8. Id.

9. Compare Gimbanco v. INS, 531 F.2d 141 (3d Cir. 1976) (Service may not use prior conviction when ruling upon adjustment of status, a discretionary measure) with Delgado-Chavez v. INS 765 F.2d 868 (9th Cir. 1985) (Service may consider a prior conviction for which a recommendation has been obtained in ruling upon discretionary matter). "Discretion" is not defined by the INA, but see In re Marin, 16 I. & N. Dec. 581 (BIA 1978), stating that
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Because compliance with statutory requirements is not enough to warrant a grant of discretionary relief, the alien must also prove, both through the presence of favorable factors and the absence of adverse factors, that administrative discretion should be exercised on his or her behalf. A prior criminal conviction would necessarily constitute an adverse factor to be considered, if the Service were allowed to consider it in spite of the judicial recommendation. A prior conviction for which a recommendation against deportation has been obtained, however, would not mandate a denial of discretionary relief.

Another area of disagreement among the circuits involves the statutory requirements that the judicial recommendation be made within thirty days of sentencing, and that the Service be given notice of the proposed recommendation. Although most courts have discretionary relief necessitates a balancing of "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf." Id. at 584.

10. INA § 245, 8 U.S.C. § 1255 (1982) provides for the adjustment of status of an alien to that of an alien lawfully admitted for permanent residence if: (1) the alien applies for the adjustment; (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (3) an immigrant visa is immediately available to him at the time his application is filed. The Attorney General may adjust status in his discretion. Id. (emphasis added).

11. For an explanation of voluntary departure, see infra note 57 and accompanying text.

12. In re Seda, 17 I. & N. Dec. 550, 554 (BIA 1980) (stating that alien must not only establish that he is statutorily eligible but also is worthy of discretionary relief); In re Marin, 16 I. & N. Dec. 581, 584 (BIA 1978) (demonstrating statutory eligibility for discretionary relief not sufficient for grant of such relief); In re Bias, 15 I. & N. Dec. 626, 629-30, 640-43 (BIA 1974) (meeting objective prerequisites for discretionary relief is not sufficient for grant of such relief).


14. See In re Seda, 17 I. & N. Dec. 550 (BIA 1980). The alien in Seda pled guilty to the crime of forgery, and in deportation proceedings applied for discretionary relief from deportation. Id. at 554. The Board of Immigration Appeals stated that although the guilty plea did not render the alien ineligible for discretionary relief, it was a significant adverse factor to be considered. Id.

15. See In re Gonzalez, 16 I. & N. Dec. 134, 136 (BIA 1977). Under § 101(f)(3) of the INA, a person is precluded from establishing good moral character if he has been convicted of, or admits the commission of, a crime involving moral turpitude during the statutory period in which he is required to be a person of good moral character. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3) (1982). The Board of Immigration Appeals in Gonzalez stated, however, that an alien who has a conviction for which a recommendation against deportation has been made should not be precluded by INA § 101(f)(3) from establishing good moral character. In re Gonzalez, 16 I. & N. Dec. 134, 136 (BIA 1977).

strictly applied these requirements, one circuit has proposed that the requirements should be disregarded in certain situations, and a dissenting opinion has persuasively argued that the requirements should not be strictly construed.

In an attempt to resolve the disputes surrounding the judicial recommendation against deportation, this Note will first examine the history and language of the INA provision at issue. Second, the tendency of some courts to expand the applicability of the provision will be analyzed. This Note concludes that interpreting the judicial recommendation as binding in an alien's request for discretionary relief is contrary to both the language and purpose of the statute. In addition, this Note concludes that the recommendation's thirty-day time limit and notice requirement may be relaxed in certain circumstances and still comport with the legislative purpose of the statute and with principles of statutory construction.

II. BACKGROUND AND HISTORY OF THE JUDICIAL RECOMMENDATION AGAINST DEPORTATION

Deportation is a matter of legislative policy. Although an alien

17. Velez-Lozana v. INS, 463 F.2d 1305 (D.C. Cir. 1972); Marin v. INS, 438 F.2d 932 (9th Cir. 1971), cert. denied, 403 U.S. 923 (1971); United States ex rel. Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959); United States ex rel. Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926); Ex parte Eng, 77 F. Supp. 74 (N.D. Cal. 1948); In re Plata, 14 I. & N. Dec. 462 (BIA 1973); In re I., 6 I. & N. Dec. 426 (BIA 1954).
18. Cerujo v. INS, 570 F.2d 1323 (7th Cir. 1978). See infra notes 121-27 and accompanying text. An earlier Second Circuit case had previously disregarded the notice requirement, but limited its holding to the facts of that case. Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968).
20. The circumstances upon which the 30-day time limit and requirement of notice may be relaxed are discussed at infra text accompanying notes 125-27.
21. Kleindienst v. Mandel, 408 U.S. 753 (1972). In Kleindienst, the Court stated:

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Id. at 766-67 (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)). The government's power to deport was challenged in the case of Fong Yue Ting v. United States, 149 U.S. 698 (1893). In that case, the Supreme Court held that the Nation's sovereign power allowed the federal government to establish conditions and procedures regulating the entrance or deportation of aliens. Id. at 713, 731. See also Ng Fung Ho v. White, 259 U.S. 276 (1922) and Wong Wing v. United States, 163 U.S. 228 (1895) (both upholding the federal government's power to deport); United States ex rel. Zapp v. District Director of Immigration and Naturalization, 120 F.2d 762, 764 (2d Cir. 1941) ("expulsion of aliens is a sovereign power
who acquires resident status in this country is "entitled to the same protection of life, liberty, and property as a citizen, he acquires no vested right to remain," and the government has the power to deport him if public interests so require. The Immigration and Nationality Act recognizes nineteen grounds upon which an alien may be deported. One such ground includes any alien convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement, or confined in a prison or corrective institution, for a year or more. Various crimes, such as those that involve evil or predatory intent or the element of fraud, have been held to be crimes involving moral turpitude.

necessary to the safety of the country, to be regulated by the legislative department"). For a comprehensive discussion on the history of deportation, see U.S. Comm'n on Civil Rights, The Tarnished Golden Door 96-101 (1980) [hereinafter TARNISHED DOOR].


23. Id. For a summary of the rights of aliens and restrictions thereon, see I C. Gordon & H. Rosenfield, supra note 3, § 1.34a-.46.

24. INA § 241(a)(1)-(19), 8 U.S.C. § 1251(a)(1)-(19) (1982). In actuality, it is deceptive to say that there are only 19 grounds upon which an alien may be deported. Many of the 19 grounds encompass multiple groups. For example, INA § 241(a)(1) provides for the deportation of any alien who was excludable at the time of entry. INA § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1982). There are 33 grounds upon which an alien is excludable at the time of entry. INA § 212, 8 U.S.C. § 1182 (1982). This also includes aliens who were excludable under the law that was in effect at the time of their entry. See 1A C. Gordon & H. Rosenfield, supra note 3, § 4.1b. It has been estimated that there are now 700 grounds for deportation. Id.

25. INA § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1982). The full text states that any alien shall be deported who is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme or criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial.

Id. According to this statute, "sentenced to confinement" includes a suspended sentence. See, e.g., Velez-Lozano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (stating that essential element is imposition of sentence rather than actual serving of sentence); United States ex rel. Fells v. Garfinkel, 158 F. Supp. 524, 525 (W.D. Pa. 1957) (stating that by distinguishing between "sentenced to confinement" and "confined therefore," § 241(a)(4) includes sentences where there is no actual imprisonment). A prerequisite for deportation under INA § 241(a)(4) is that the alien must actually be convicted of the crime or crimes. A guilty plea, or nolo contendere plea, will suffice as a conviction. Boykin v. Alabama, 395 U.S. 238, 242 (1969) (stating that plea of guilty is a conviction); In re Fortis, 14 I. & N. Dec. 576, 577 (BIA 1974) (stating that nolo contendere plea, when accepted by the court, is the equivalent of a plea of guilty). For a comprehensive discussion of deportation for crimes involving moral turpitude, see Wexler & Neet, The Alien Criminal Defendant: An Examination Of Immigration Law Principles For Criminal Law Practice, 10 Crim. L. Bull. 289, 294-313 (1974).

26. See 1A C. Gordon & H. Rosenfield, supra note 3, § 4.14(d) (discussing crimes
In addition to specifying the grounds for deportation of aliens, the INA includes provisions for granting relief from deportation,\(^{27}\) including the judicial recommendation against deportation. Although there is no legislative history regarding the judicial recommendation provision of the INA, a Senate Report was prepared in connection with a similar provision of the Immigration Act of 1917,\(^{28}\) a predecessor act of the INA. According to that report, the purpose of the judicial recommendation was to prevent a resident alien from being deported after he or she had already served a sentence for a crime.\(^{29}\)

Several courts have expounded upon Congress' motivations for adopting the judicial recommendation as a mode of granting relief from deportation. In *Kolios v. Immigration and Naturalization Service*,\(^{30}\) a federal court of appeals stated that the judicial recommendation is “motivated as much by mercy as by rehabilitation.”\(^{31}\) Similarly, another court proposed that by enacting this provision, Congress recognized that mitigating circumstances might exist that would make the imposition of deportation a harsh penalty.\(^{32}\) Thus, the legislative purpose of the judicial recommendation, as interpreted by the courts, reflects a desire to prevent the alien’s “double punish-

\(^{27}\) In addition to adjustment of status and voluntary departure as means of relief from deportation, the INA provides for suspension of deportation (INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1982)) and political asylum (INA § 208, 8 U.S.C. § 1158 (1982)) (both discretionary measures), and withholding of deportation (INA § 243(h), 8 U.S.C. § 1253(h) (1982)) (mandatory if statutory prerequisites are established).

\(^{28}\) In addition to specifying the grounds for deportation of aliens, the INA includes provisions for granting relief from deportation, involving moral turpitude, such as blackmail, forgery, robbery, and embezzlement). *See also* Aberson, *Deportation of Aliens for Criminal Conviction*, 2 PEPPERDINE L. REV. 52, 59-66 (1974) and Wexler & Neet, supra note 25, at 294-304 (both discussing moral turpitude as it pertains to deportation statutes).

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\(^{30}\) Immigration Act of February 5, 1917, ch. 29, § 19, 39 Stat. 889 (current version at INA § 241(b), 8 U.S.C. § 1251(b) (1982)), which states that in the case of an alien committing a crime of moral turpitude,

> deportation [shall not be made or directed if the court, or judge thereof, sentencing such alien for such crime shall [at the time of sentencing or within thirty days], due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act[.]


\(^{30}\) 532 F.2d 786 (1st Cir. 1976).

\(^{31}\) Id. at 789.

\(^{32}\) Tutrone v. Shaughnessy, 160 F. Supp. 433, 437 (S.D.N.Y. 1958). The court in *Tutrone* stated that “it is plain that Congress did not believe that public policy required a rigid and inflexible application of technical definitions.” *Id.* The mitigating factors in *Tutrone* included the fact that the alien had spent 59 of his 61 years in the United States, his orientation was toward the United States, and he had no ties with Italy (the country to which he would be deported). *Id.* at 438.
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ment" of serving a criminal sentence and then being deported.33

Section 241(b)(2) of the INA requires that the judicial recommendation against deportation be made within thirty days of the resident alien's sentencing.34 This provision was also carried over from the Immigration Act of 1917.35 The legislative history of the earlier Act reveals that the thirty-day time limit was included to assure that the trial judge makes a well-informed recommendation on the basis of facts and considerations which are fresh in his or her mind.36 The House debates also reveal a concern that absent a time limit, a situation might arise where the sentencing judge would no longer be available, and a different judge who had not presided over the original trial and was unfamiliar with the facts would make a recommendation.37 An additional concern was that pressure might be exerted on a judge if he were free to recommend against deportation a long time after sentencing.38 Thus, although one Representative proposed an amendment that a recommendation could be made at any time after sentencing,39 the time limit was included in the 1917 Act. Courts have not elaborated on the legislative intent for either the thirty-day limit or the notice requirement, but they have strictly enforced these requirements, even when deportation under the circum-

33. Although deportation is not punishment, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893), it has been described as a "draastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty." Jordan v. DeGeorge, 341 U.S. 223, 231 (1951) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). See also Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("That deportation is a penalty — at times a most serious one — cannot be doubted."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation is equivalent to the loss of property and life, or all that makes life worth living). For an analysis of deportation as not being violative of constitutional rights, see Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (holding that deportation does not violate due process or first amendment rights and is not punishment).


35. See supra note 28.

36. 53 CONG. REC. 5171 (1916).

37. Id. at 5170 (statement of Rep. Howard).

38. 53 CONG. REC. 5170 (1916) (statements of Rep. Hayes). Although the House debates do not reveal who would exert this pressure, it could be assumed that family or friends might try to persuade a judge to issue a recommendation long after the alien's sentencing. In addition, a judge might be persuaded by political or humanitarian concerns to issue a recommendation against deportation after the alien had served his sentence. One representative, however, expressly discounted the notion that a judge might succumb to such pressure. 53 CONG. REC. 5170 (1916) (statements of Rep. Bennet) (stating that "if a man has not strong enough moral fiber to resist that sort of pressure, he ought not to be a judge," and that judges "are not improperly swayed by pressure").

stances constituted a harsh penalty.\textsuperscript{40}

III. THE MODERN CASE LAW TREND TOWARD BROADENING THE SCOPE OF THE RECOMMENDATION AGAINST DEPORTATION

Once a recommendation against deportation is made, it is binding on the Service, and a resident alien's criminal conviction cannot be used as a basis for deportation.\textsuperscript{41} The Third Circuit has decided that a recommendation is also binding in discretionary matters, and that the Service may not use a criminal conviction, for which a recommendation has been obtained, to support denial of discretionary relief.\textsuperscript{42} The Third Circuit's broad interpretation of the scope of the judicial recommendation is directly opposed by the Board of Immigration Appeals and the holdings of the Ninth Circuit.\textsuperscript{43}

A. Case Law Analysis of the Scope of the Judicial Recommendation

In Giambanco v. Immigration and Naturalization Service,\textsuperscript{44} the Third Circuit held that where a judicial recommendation against deportation is made, the alien's prior conviction cannot be used by the Service to deny discretionary relief.\textsuperscript{45} The alien in Giambanco was originally convicted of conspiracy to defraud the United States Government by entering into a fraudulent marriage in order to stay in the United States.\textsuperscript{46} The judge recommended that the conviction not be a basis for deportation.\textsuperscript{47} After that marriage was terminated, the alien married another United States citizen (the daughter of one of his co-conspirators in the fraud), and petitioned to adjust his status to that of permanent resident alien.\textsuperscript{48} The Service denied the alien's adjustment of status petition on the basis of the prior fraud

\textsuperscript{40} See, e.g., Velez-Lozano v. INS, 463 F.2d 1305, 1308 (D.C. Cir. 1972) ("[D]eportation . . . will now occur because of failings in the trial judge and petitioner's trial counsel . . . . Deportation here would be harsh and unjustifiable.").

\textsuperscript{41} See supra text accompanying note 7.

\textsuperscript{42} Giambanco v. INS, 531 F.2d 141, 145-47 (3d Cir. 1976).

\textsuperscript{43} Delgado-Chavez v. INS, 765 F.2d 868 (9th Cir. 1985); Jew Ten v. INS, 307 F.2d 832 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963); In re Gonzalez, 16 I. & N. Dec. 134 (BIA 1977).

\textsuperscript{44} 531 F.2d 141 (3rd Cir. 1976).

\textsuperscript{45} Id. at 149.

\textsuperscript{46} Id. at 146 n.8.

\textsuperscript{47} Id. at 142-43.

\textsuperscript{48} Id. at 143. See supra note 10 and accompanying text (discussing adjustment of status). For a definition of permanent resident, see supra note 2.
recommendation. 49

In holding that the recommendation is binding in discretionary measures, such as an adjustment of status, the Third Circuit reasoned that to hold otherwise would obviate the statutory requirement that the Service be given notice and an opportunity to oppose the trial court's proposed recommendation. 50 According to this reasoning, the Service could simply allow the trial court to make its recommendation, and then in effect overturn this recommendation as a matter of discretion at a later proceeding, by denying discretionary relief. 51 Furthermore, because the legislative history did not address the issue of whether a recommendation against deportation is binding in discretionary measures, the court resolved the doubts in favor of the alien because deportation is such a drastic and possibly unjust penalty. 52

In In re Gonzalez, 53 a case arising in the Third Circuit after the Giambanco decision, the alien was convicted of conspiring to pose as a Service employee and to obtain money from other aliens fraudulently, 54 but he received a recommendation against deportation. 55 Subsequently, the Service ruled that Gonzalez was deportable for overstaying his visa under INA section 241(a)(2). 56 Gonzalez then applied for voluntary departure in order to circumvent the deportation order, 57 but the Service denied this application because of his

49. 531 F.2d at 145-46. See id. at 146 n.8 (“Considering the entire record . . . we do not find such outstanding equities such great merit in this case as to warrant the favorable exercise of discretion . . . .”).

50. Id. at 147.

51. Id.

52. Id. at 148 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). But cf. id. at 146 n.8 (trial court pointed out that the alien and his wife were married for a short time, wife knew of his legal problems when she married him, and alien also had full knowledge that he was in the U.S. illegally and had a prior fraud conviction).


54. Id. at 136.

55. Id. at 135.

56. Id. at 134-35.

57. Id. at 135. See also INA § 244(e), 8 U.S.C. § 1254(e) (1982), which states:

The Attorney General may, in his discretion, permit any alien under deportation proceedings . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure . . . .

Id. Voluntary departure, like INA § 245 adjustment of status, supra note 10, is a discretionary measure and is permitted only in meritorious cases. Muigai v. INS, 682 F.2d 334, 336-37 (2d Cir. 1982). The purpose and effect of voluntary departure is that it: (1) avoids the stigma of deportation; (2) enables the alien to select his own destination; and (3) facilitates the possibil-
prior conviction. On appeal, the Board of Immigration Appeals (BIA) reversed the Service's decision on the basis of Giambanco. Although the BIA considered itself bound to apply the Giambanco holding because Gonzalez had arisen in the Third Circuit, it expressed its strong disagreement with Giambanco. In disagreeing with the broadening of INA section 241(b), the BIA emphasized that the Immigration Act nowhere prohibits criminal activity, and the resulting conviction, from being considered in an application for discretionary relief. In addition, the BIA pointed out that in order to qualify for a grant of voluntary departure under INA Section 244(e), an alien must establish good moral character. Although the BIA conceded that a prior conviction for which a recommendation against deportation has been obtained does not preclude the alien from establishing good moral character, it stated that the Service should be allowed to examine all evidence — including criminal convictions — in determining how to exercise its discretion. By not allowing immigration judges to analyze all competing factors in deciding a discretionary matter, the BIA reasoned, Giambanco's broadening of section 241(b) denies immigration judges the flexibility they need to weigh the merits of a case sensitively.

Fourteen years prior to Giambanco, the Ninth Circuit held that INA section 241(b), on its face, applies only to deportation proceedings and, therefore, is not binding in applications for discretionary relief. In a more recent case, Delgado-Chavez v. Immigration and

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58. 16 I. & N. Dec. at 135.
59. Id. at 136.
60. Id.
61. Id.
62. Id.
63. Id. See INA § 244(e), 8 U.S.C. § 1254(e) (1982); supra note 57 and accompanying text.
64. 16 I. & N. Dec. at 136-37.
65. Id. at 136.
66. See id.
67. Jew Ten v. INS, 307 F.2d 832 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963). The court in Jew Ten stated that "[a]s we read § 241(b), taking cognizance of its history, it can only mean that the sentencing court is limited to making recommendations in § 241(a)(4) convictions." Id. at 834. Accord United States v. George, 534 F. Supp. 570, 571 (S.D.N.Y. 1982) (court held it lacked jurisdiction to hear a § 241(b) application where convicted alien was deportable for overstaying his visa under INA § 241(a)(2)).
Naturalization Service, the Ninth Circuit disagreed with Giambanco and reaffirmed its earlier holding.

In Delgado-Chavez, the alien had been convicted of embezzlement, but the state court judge issued a recommendation against deportation. When Delgado-Chavez subsequently overstayed his visa, he conceded deportability under INA section 241(a)(2). At the deportation hearing, however, he requested voluntary departure in lieu of deportation. The Service denied the request for voluntary departure, citing the alien’s prior conviction. In holding that consideration of the embezzlement conviction was not erroneous, the Ninth Circuit Court of Appeals mirrored the BIA’s position in Gonzalez; it found the conviction to be relevant to a determination of the alien’s good moral character, a necessary element for the grant of voluntary departure. Furthermore, the court rejected the Third Circuit’s Giambanco reasoning, based on the plain language of section 241(b), although it found that reasoning to be “not without appeal.”

B. Should the Judicial Recommendation Against Deportation Be Binding in Discretionary Matters?

Congress’ purpose of preventing the double punishment of an alien who serves a criminal sentence and is then deported seems to bolster Delgado-Chavez’s plain language reasoning that the recommendation pertains only to deportation proceedings brought against an alien convicted of a crime involving moral turpitude. The Su-
The Supreme Court has stated, however, that deportation, "while it may be burdensome and severe for the alien, is not a punishment."

Rather, a finding of deportability is a decision based on the desire to rid the country of persons whose presence here is not conducive to the safety or welfare of society. Denial of a discretionary remedy is based on the same considerations.

It could be argued, then, that when a criminal court convicts an alien but then recommends against deportation, it has, in effect, determined that the alien would not jeopardize the safety and welfare of society; thus, an immigration judge in a subsequent discretionary hearing should not be allowed to reconsider the issue. This argument, however, fails to consider the distinction between a deportation hearing and an application for discretionary relief.

Although the objective of deportation and denial of discretionary relief is the same — ridding the country of undesirable aliens — a finding of deportability by the Service does not entail the use of discretion; if an alien belongs to one of the nineteen classes enumerated in INA section 241(a), he is deportable. For example, if an alien is convicted of a crime involving moral turpitude and the sentence is for one year or more, he is deportable under INA section 241(a)(4), regardless of his family ties, history of employment, business or property ties, or other mitigating factors.

On the other

835 (9th Cir. 1962), cert. denied, 371 U.S. 968 (1963).

79. Mahler v. Eby, 264 U.S. 32, 39 (1924) (citing Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913)). See also TARNISHED DOOR, supra note 21, at 96-101 (discussing Supreme Court's refusal to consider deportation as punishment).

80. Mahler v. Eby, 264 U.S. 32 (1924). The Court in Mahler stated:

Congress . . . was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society.

Id. at 39.

81. In re Marin, 16 I. & N. Dec. 581, 584 (BIA 1978) ("The immigration judge must balance the adverse factors evidencing an alien's undesirability . . . with the social and humane considerations presented in his behalf to determine whether the granting of [discretionary] relief appears in the best interests of this country.").

82. If the Service considers the prior conviction when deciding whether discretionary relief is merited, the issue of whether the alien is undesirable, based in part on his prior conviction, is again being examined.


84. See, e.g., DeFigueroa v. INS, 501 F.2d 191 (7th Cir. 1974) (marriage to a U.S. citizen does not exempt from deportation). Rather, it is the decision to cancel or terminate a deportation order that may involve the use of discretion. 8 C.F.R. § 242.7 (1986). See also IA
hand, courts have generally declared that immigration judges are bound to consider and weigh all factors, favorable or adverse, in deciding matters of discretionary relief such as adjustment of status and voluntary departure.

In addition to the distinction between deportation proceedings and discretionary matters, interpreting the recommendation as binding in discretionary matters leads to disturbing inequities which Congress could not have intended. As the BIA pointed out in Gonzalez, if no criminal action has been brought against an alien, his involvement in the criminal activity can be considered in an application for discretionary relief.\(^{87}\) To prohibit an immigration judge from considering an actual conviction for which a recommendation has been obtained in deciding a discretionary measure tips the balance in favor of the convicted alien. The Giambanco ruling places an alien with a conviction and a recommendation in a better position than an alien who has not been tried and convicted of his crime, but rather has been subjected only to deportation proceedings.\(^{88}\)

Strictly applying Delgado-Chavez's plain language reasoning that the judicial recommendation is not binding in matters of discretionary relief may at times seem harsh, since denial of a discretion-
ary remedy might result in deportation. The Supreme Court has stated, however, that considerations such as adjustment of status and voluntary departure are "matter[s] of discretion and of administrative grace," in which mere compliance with statutory requirements does not automatically entitle an alien to relief.

The Ninth Circuit's position is correct precisely because it recognizes the importance of discretion, while the Third Circuit's reasoning in Giambanco disregards the distinction between discretionary and nondiscretionary proceedings, and unfairly benefits the convicted alien in that circuit.

IV. THE THIRTY-DAY TIME LIMIT AND REQUIREMENT OF NOTICE — MANDATORY OR DIRECTORY?

The procedural aspects of INA section 241(b)—the thirty-day time limit and the requirement of prior notice to the Service—have been the second basis of attack on the statute. As early as 1926, a court held that the time limit must be strictly enforced, and recommendations issued after thirty days cannot be given a nunc pro tunc (retroactive) effect. Although later cases were similarly decided, one dissenting opinion in the D.C. Circuit strenuously argued against strictly enforcing this requirement. The dissenting judge's position has been buttressed by decisions in the other circuits. The Second

89. Once an alien is found deportable, he may apply for any and all forms of relief from deportation. 8 C.F.R. § 242.17 (1986). The alien may also appeal a finding of deportability to the BIA. Id. § 242.21. If all appeals and applications for discretionary relief are denied, the original finding of deportability would necessarily still stand. In Delgado-Chavez, the alien was found deportable, but he applied for discretionary relief from deportation. 765 F.2d at 868-69. The immigration judge denied relief, citing the alien's prior conviction for which a recommendation against deportation had been obtained. Id. at 869. The Court of Appeals for the Ninth Circuit, in holding that a recommendation is not binding in matters of discretionary relief, affirmed the finding of deportability and denial of discretionary relief. Id. at 868, 870. Thus, the recommendation prevented the alien's deportation on the basis of his first crime, but this prior conviction was an adverse factor to be considered when he subsequently violated the immigration laws by overstaying his visa. See id. at 869. In the Third Circuit, discretionary relief cannot be denied based on a prior conviction for which a recommendation has been obtained because of the Giambanco ruling. If Delgado-Chavez had arisen in the Third Circuit, the application for discretionary relief probably would not have been denied, based on Giambanco, and the alien could have voluntarily departed the country instead of being deported.


91. Id.

92. United States ex rel Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926).

93. See cases cited supra note 17.

Circuit has held that the notice requirement, if defective, should not bar an otherwise good recommendation, and the Seventh Circuit has agreed.

A. Case Law Analysis of Section 241(b) Procedure

In *Velez-Lozano v. Immigration and Naturalization Service*, the D.C. Circuit strictly enforced the thirty-day time limit for making a recommendation against deportation, but reached that decision reluctantly. In this case, the alien was convicted of consensual sodomy, a crime of moral turpitude, on August 8, 1969, and received a three-year suspended sentence. On December 11, 1969, deportation proceedings were initiated by the Service against the alien under INA section 241(a)(4) (committing a crime of moral turpitude). The state sentencing judge, by letter dated January 28, 1970, stated that he would have recommended against deportation within the thirty-day limit had he been aware of the statutory time limit at the time of sentencing. On appeal from the BIA decision, which refused to give a belated recommendation retroactive effect, the D.C. Circuit affirmed on the basis of stare decisis. However, the majority added that "deportation here would be harsh and unjustifiable. While the Service has the legal power and authority this court hopes that they take a moment to examine the equities of this case before proceeding further." A dissenting opinion would have granted a belated recommendation retroactive effect and, further, concluded that a delayed recommendation would satisfy the notice requirement.

In his dissent, Judge Fahy argued that construing the time limit as mandatory, i.e., essential to the validity of the recommendation

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95. Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968).
96. Cerujo v. INS, 570 F.2d 1323 (7th Cir. 1978).
98. Id. at 1308.
99. Id. The court was troubled because "a deportation . . . will now occur because of failings in the trial judge and petitioner's trial counsel" to procure a timely recommendation. Id. at 1308.
100. Id. at 1307.
101. Id. at 1306.
102. Id.
103. Id.
104. Id. See id. at 1309 for exact contents of the sentencing judge's letter.
105. Id. at 1308 (emphasis in original).
106. Id. at 1308, 1310, The majority never discussed the issue of whether the notice requirement would be met by a delayed recommendation. See id. at 1305-08.
against deportation, would be inconsistent with a long established principle of statutory construction:107 "where the time, or manner of performing the action directed by the statute is not essential to the purpose of the statute," the time or matter provision would generally be interpreted as directory only,108 and strict compliance with the provision would not be essential to the validity of the action. The dissent further emphasized that a mandatory construction of the thirty-day limit would also be inconsistent with Supreme Court decisions which have construed statutes involving the possible deportation of an alien in a lenient manner, especially when the language of the statute is ambiguous.109

Reasoning that legislative intent should be controlling,110 Judge Fahy also concluded that neither Congress' desire to facilitate informed judicial decisionmaking, nor its concern with avoiding the possibility of pressure being exerted on a judge, would be served by a mandatory construction of the time provision.111 To Judge Fahy, it was clear from the letter of January 28, 1970, that the time lapse did not affect the freshness of the facts in the sentencing judge's mind.112 In addition, at the time of sentencing, the trial judge's disposition against deportation was apparent;113 thus, concerns about pressure being exerted on the judge were irrelevant.114 Finally, Judge Fahy concluded that under a mandatory construction of the time provision, the basic purpose behind the statute—to make the trial judge's recommendation available to the alien and the authori-

107. Id. at 1311.
108. Id. (quoting 2 J. SUTHERLAND, STAT. CONST. § 2804 (1943)). Sutherland further states, “Although directory provisions are not intended by the legislature to be disregarded, the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply.” 1A J. SUTHERLAND, STAT. CONST., § 25.03 (4th ed. 1985). Furthermore, the statute “should be construed according to its subject matter and the purpose for which it was enacted.” Id.
109. 463 F.2d at 1311. In Fong Haw Tan v. Phelan, 333 U.S. 6 (1948), the Court stated, “We resolve the doubts in favor of the [lenient] construction because deportation is a drastic measure and at times the equivalent of banishment or exile . . . .” Id. at 10. See also Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (stating that “[t]he hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme”).
110. 463 F.2d at 1311.
111. Id. at 1312.
112. See supra note 104 and accompanying text.
113. 463 F.2d at 1309 (trial judge's letter stating that “defendant's violation of the law was an unfortunate response to an exceptional situation rather than evidence of an antisocial pattern of behavior”).
114. Id. at 1312.
ties—would be defeated.\textsuperscript{115}

In ascertaining that the notice requirement would be met by a delayed recommendation, Judge Fahy relied both upon principles of statutory construction and on the Second Circuit's reasoning in \textit{Haller v. Esperdy}.\textsuperscript{116} In \textit{Haller}, a timely recommendation was made but no notice was given to the Service.\textsuperscript{117} The court held that the judge's recommendation itself provided sufficient notice to the Service.\textsuperscript{118} The court required, however, that the Service have an opportunity to urge the judge to reconsider his recommendation.\textsuperscript{119} Thus, according to \textit{Haller}, if a sentencing judge was willing to reconsider his recommendation and allow the Service to argue against it, the notice requirement would be satisfied.\textsuperscript{120}

The Seventh Circuit has also considered the situation in which a recommendation against deportation was made but no presentencing notice was given to the Service. In \textit{Cerujo v. Immigration and Naturalization Service},\textsuperscript{121} the alien argued that the judicial recommendation against deportation precluded the use of his prior conviction as a basis for deportation,\textsuperscript{122} even though the Service was not represented when the recommendation was made.\textsuperscript{123} To strengthen his argument, the alien submitted an affidavit stating that the sentencing judge was still willing to hear the views of the Service to reconsider or reaffirm

\begin{footnotes}
\footnotetext{115}{\textit{Id.} at 1312-13.}
\footnotetext{116}{\textit{Id.} at 1310-13; Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968). In \textit{Haller}, the Second Circuit held that the requirement of notice was, in effect, directory; by giving effect to a recommendation where no prior notice was given to the Service, the court held that this requirement was not essential to the validity of the recommendation. 397 F.2d at 214-15. By analogizing to \textit{Haller}, the majority in Velez-Lozano might have been able to construe the time limit as directory. \textit{See infra} note 131 and accompanying text (\textit{Cerujo} analogizing time limit to notice requirement, both being directory). For a discussion of the principles of statutory construction used in Judge Fahy's analysis, see \textit{infra} note 108 and accompanying text.}
\footnotetext{117}{397 F.2d at 213. The court conceded that the burden of giving notice would presumably be on the alien defendant, but in this case the trial court explicitly assumed the burden. Thus, the alien could not be charged with the default. \textit{Id.}}
\footnotetext{118}{\textit{Id.}}
\footnotetext{119}{\textit{Id.} at 215.}
\footnotetext{120}{\textit{See id.} (holding that the recommendation made without notice to the Service "will prevent use of [the] conviction as a basis for deportation until such time as the Service presents its views in opposition, if any, to the sentencing court, and that Court acts upon them").}
\footnotetext{121}{570 F.2d 1323 (7th Cir. 1978).}
\footnotetext{122}{Deportation proceedings were begun pursuant to \textit{INA} § 241(a)(4), 8 U.S.C. § 1251(a)(4) (1982) (alien is deportable if convicted of two crimes involving moral turpitude). In \textit{Cerujo}, the alien had been convicted of theft, and damage to property and attempted theft. 570 F.2d at 1324. The recommendation was obtained for the second conviction of property damage and attempted theft. \textit{See id.} at 1324-25.}
\footnotetext{123}{570 F.2d at 1325.}
\end{footnotes}
his recommendation.\textsuperscript{124} Citing both Haller and Judge Fahy's dissent in \textit{Velez-Lozano}, the court held that the requirement of notice was directory, not mandatory, but limited its decision to certain circumstances.\textsuperscript{125} These circumstances require that the sentencing judge still be available and willing to reconsider his recommendation, and that there be no evidence that the alien's role in the failure to give the Service notice was intentional.\textsuperscript{126} If these conditions are met and the sentencing judge reaffirms his recommendation, even after hearing arguments from the Service, the recommendation is binding.\textsuperscript{127}

\section*{B. Should a Procedural Defect Nullify a Judicial Recommendation?}

The legislative purpose for imposing the thirty-day limit for making the recommendation against deportation is primarily to assure that the trial judge has all of the relevant facts fresh in his mind when he makes the recommendation.\textsuperscript{128} In situations such as the one presented in \textit{Velez-Lozano}, where a judge learns of the recommendation provision after the thirty-day limit, but still remembers the facts of the case and is willing to make a recommendation, the legislative purpose would not be defeated by disregarding the time limit. On the contrary, construing the limit as mandatory may defeat the statute's intent to prevent the alien's double punishment of serving a sentence and then being deported.\textsuperscript{129} Furthermore, if accepted principles of statutory construction are applied,\textsuperscript{130} the thirty-day time limit and, by analogy, the notice requirement should be read as directory rather than mandatory.\textsuperscript{131}

Several courts have sidestepped the directory-versus-mandatory debate surrounding the procedural requirements of the judicial recommendation provision. Instead, these courts have examined the issue of whether an alien was denied effective assistance of counsel\textsuperscript{132}

\begin{thebibliography}{132}
\bibitem{124} Id.
\bibitem{125} Id. at 1326-27.
\bibitem{126} Id. at 1327. \textit{See also id.} at 1325 (suggesting that an additional factor is that no prejudice to the government be proven).
\bibitem{127} Id. at 1327.
\bibitem{128} \textit{See supra} text accompanying note 36.
\bibitem{129} \textit{See supra} text accompanying notes 29, 33.
\bibitem{130} \textit{See supra} text accompanying notes 107-08.
\bibitem{131} \textit{See Cerujo}, 570 F.2d at 1325 (citing the dissent in \textit{Velez-Lozano} for argument that 30-day time limit and, by analogy, the notice requirement should be read as directory and not mandatory).
\bibitem{132} U.S. CONST. amend. VI (defendant in criminal prosecution has right to effective assistance of counsel at all critical stages of prosecution).
\end{thebibliography}
when not informed of the deportation consequences that may result from a conviction or plea of guilty or nolo contendere.\textsuperscript{133} For example, in \textit{People v. Pozo},\textsuperscript{134} the court vacated the guilty plea and judgment of conviction because defendant's attorney knew that defendant was an alien, failed to research the law regarding the immigration consequences which would result from a guilty plea, and neglected to petition the sentencing court for a recommendation against deportation.\textsuperscript{135}

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133. \textit{See generally Comment, The Right Of The Alien To Be Informed Of Deportation Consequences Before Entering A Plea Of Guilty Or Nolo Contendere, 21 SAN DIEGO L. REV. 195 (1983). Since 1977, several states have enacted laws requiring that, prior to acceptance of a plea of guilty or nolo contendere to a punishable criminal offense, an alien must be advised that conviction for such offense may result in deportation, exclusion from admission to the United States, or denial of naturalization. If an alien is not so advised, on defendant's motion, the court must vacate judgment and permit the alien to withdraw a plea of guilty or nolo contendere and to enter a plea of not guilty. See, \textit{e.g.} CAL. PENAL CODE § 1016.5 (West 1985); CONN. GEN. STAT. ANN. § 54-1j; (West 1985); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1981); OR. REV. STAT. § 135.385 (1979); WASH. REV. CODE § 10.40.200 (West Supp. 1986).}


135. \textit{Id. at 1047. Since the time limit for making a recommendation had expired, the alien in \textit{Pozo} probably chose the wiser of two strategies, based on current case law: petitioning the court to withdraw his guilty plea and to vacate his conviction rather than asking the court to issue a \textit{nunc pro tunc} recommendation. It may have been more efficient, however, to permit the sentencing court to hear arguments in deciding whether or not to grant a belated recommendation, instead of withdrawing the plea and allowing the alien to plead anew. Upon a plea of not guilty, or if found guilty, the alien would then be allowed to petition the court for a recommendation against deportation. Cases decided in accord with \textit{Pozo} include \textit{Lyons v. Pearce}, 298 Or. 554, 694 P.2d 969 (1985); \textit{Commonwealth v. Wellington}, 305 Pa. Super. 24, 451 A.2d 223 (1982); \textit{Edwards v. State}, 393 So. 2d 597 (Fla. Dist. Ct. App. 1981). \textit{Contra Trench v. INS}, 783 F.2d 181 (10th Cir. 1986) (holding that alien cannot collaterally attack the legitimacy of a state criminal conviction in a deportation proceeding by contending he was denied effective counsel when attorney failed to advise him of deportation consequences as a result of guilty plea); \textit{State v. Chung}, 210 N.J. Super. 427, 510 A.2d 72 (1986) (stating it is not the responsibility of court to advise alien of deportation consequences at time of guilty plea). Earlier cases held that where the sole purpose of vacating and reentering judgment is to make a seasonable recommendation against deportation, the recommendation is not effective. \textit{See United States ex rel. Piperkoff v. Esperdy}, 267 F.2d 72, 74 (2d Cir. 1959); \textit{In re S.}, 9 I. & N. Dec. 613, 618 (BIA 1962).

A unique situation arose in the recent case of \textit{United States v. Shonde}, 803 F.2d 937 (8th Cir. 1986), where the court, on its own initiative, "informally" recommended against deportation. The alien in \textit{Shonde} pled guilty to unlawful dealing in food stamps, received two years' probation, and the district court ordered that the alien not be deported. The court also ordered that if further deportation proceedings ensued, it would hear defendant's motion to vacate his guilty plea. \textit{Id.} at 938. When the alien was subsequently brought up on deportation charges, the district court entertained his motion, vacated the plea, and dismissed the indictment. \textit{Id.} On appeal, the government contended that the district court did not have the authority to recommend against deportation and to vacate the conviction. The court of appeals, however, affirmed. \textit{Id.}
\end{flushright}
In Janvier v. United States, the Second Circuit expanded Pozo's effective assistance of counsel analysis by concluding that the recommendation against deportation is part of the sentencing process, "a critical stage of the prosecution to which the Sixth Amendment safeguards are applicable." Accordingly, by having judgment vacated on grounds of ineffective assistance of counsel and having judgment entered anew, an alien can then petition for a timely recommendation. By adopting a directory interpretation of the thirty-day limit and notice requirement, courts need not correct a perceived injustice by vacating pleas and judgments to accomplish indirectly what cannot be done directly.

V. CONCLUSION

The judicial recommendation against deportation is a small part of the Immigration and Nationality Act, but this provision "extends to the alien an important right or privilege." Unfortunately, many criminal lawyers and many courts are unaware of the requirements of the provision. Additionally, if a criminal attorney initially representing the alien is not familiar with immigration laws, he or she may not be aware that deportation may occur as a result of an alien's conviction or guilty plea. The ambiguity of the language of this section, coupled with the scant legislative history, has apparently left courts guessing as to the precise mode of its application.

The inherent nature of the term "discretionary relief" necessi-

136. 793 F.2d 449 (2d Cir. 1986).
137. Id. at 455. The district court in Janvier never reached the question of whether defendant's counsel had been defective, ruling instead that the alleged ineffective counsel had occurred at a time other than a critical stage of a criminal proceeding. Id. at 450.
138. Id. at 455-56. The Janvier court did not decide whether counsel had been ineffective; this was to be decided on remand. Id. at 456. If the alien had been deprived of his sixth amendment rights, however, his sentence would be vacated and argument heard on whether or not to recommend against deportation. Id.
139. Gubbels v. Hoy, 261 F.2d 952, 954 (9th Cir. 1958).
141. See Comment, supra note 133, at 195. This is not to say that ignorance of the law is an excuse. Where strong arguments exist for viewing the time and notice requirements as directory, however, it seems better to do so than to construe the requirements as mandatory. Otherwise, courts may be more willing to entertain suits for inefficient counsel, reenter judgment, and allow the trial counsel and judge to make a timely and proper recommendation, rather than nullify a procedurally defective recommendation and subject an alien to deportation proceedings.
RECOMMENDATION AGAINST DEPORTATION

states the exercise of administrative discretion in deciding whether to grant such relief. When a recommendation against deportation prevents an immigration judge from considering a prior conviction in deciding a discretionary measure, this exercise of discretion is necessarily hindered. Furthermore, as the Ninth Circuit asserts, the plain language of the judicial recommendation provision and the legislative purpose supporting it seem to limit its powers to preventing the deportation of an alien convicted under INA section 241(a)(4) (committing a crime of moral turpitude). Consequently, without further clarification from Congress, the judicial recommendation should not be binding in discretionary matters.

While the scope of the recommendation provision of the INA should not be broadened in the absence of Congressional action, the procedural requirements of the provision seem to lend themselves more readily to a broader interpretation. Accepted principles of statutory construction would justify a directory interpretation of the thirty-day time limit and notice requirement. Case law has already accepted a directory view of the notice requirement, and by analogy, the time limit should also be viewed as directory. Finally, where the legislative intent is not hampered by a directory application of the requirements, a procedurally defective recommendation should not bar a sincere judicial effort to prevent an alien’s deportation.

Marisa A. Marinelli