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Constitutional Restraints on the Expulsion and Exclusion of Aliens

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NOTES

CONSTITUTIONAL RESTRAINTS ON THE EXPULSION AND EXCLUSION OF ALIENS

Events of the past year have focused attention on the immigration policies of the United States. Recent Supreme Court decisions have helped to crystallize the always-competing policies underlying the question of the constitutional restraints on the handling of the expulsion and exclusion powers. The number of deportations is increasing,¹ and the Attorney General announced that he would exclude a long-time resident from re-entry into the country where he has made his home.² The passage of the McCarran-Walter Immigration Act has not lessened the constitutional problems in the field.

1. The latest available reports show that the number of aliens deported in 1951 was more than twice the number deported during 1950. Rep. Att'y Gen. 23 (1951).

2. Former Attorney General McGranery on Charlie Chaplin, N. Y. Times, Oct. 3, 1952, p. 1, col. 5.

THE POWER

The judicial handling of expulsion and exclusion of aliens might be analyzed in terms of three competing principles. The first is the undoubted power of a sovereign state to control immigration into its borders, and the practical necessity of handling the problem through administrative agencies. The second is that principle which recognizes resident aliens as "persons" within the terms of the Fifth Amendment, and entitled to the constitutional protection of due process of law as to life, liberty and property. The third is that which arises because the control over immigration inevitably involves the rights of citizens.

Whether Congressional control of immigration is based upon the power to regulate foreign commerce,³ or inheres in sovereignty and therefore need not be found in one of the delegated powers of the Constitution,⁴ it is a power which for the most part can only be handled by the political departments. As a general rule, therefore, the courts have regarded the issues arising from that control, including the expulsion of resident aliens, as exclusively a political matter with which they will not interfere.⁵ This plenary power has been justified as an inalienable right of every sovereign and independent nation, not limited by the fact that the aliens subject to it may have become "entangled" in other prohibitions of law.⁶

The power to exclude being absolute and unqualified, a statute in exercise of that power was early held to apply to an alien who leaves temporarily and then seeks to re-enter, even though he had previously entered the United States in accordance with its immigration laws and had established a domicile here.⁷ It was also said that since the reception of an alien was purely a matter of privilege, his entrance created no obligation whatever upon the United States.

3. See *Head Money Cases*, 112 U. S. 580, 591 (1884).

4. See *Fong Yue Ting v. United States*, 149 U. S. 698, 711 (1893); *Nishimura Ekiu v. United States*, 142 U. S. 651, 659 (1892); *Chae Chan Ping v. United States*, 130 U. S. 581, 609 (1889); Konvitz, *The Alien and the Asiatic in American Law* 12, 55 (1946). This unrestrained power is justified by an appeal to International Law for recognition of the inherent power of every sovereign to forbid the entrance of aliens or admit only on conditions it may prescribe. It is interesting to note in this connection that the United States has regarded as a breach of International Law the expulsion of an alien outside the authority of the expelling nation's constitution. U. S. Foreign Rel.: 1908 at 774, 777 (Dep't State 1912).

5. See Fellman, *The Alien's Right to Work*, 22 Minn. L. Rev. 137, 139 (1938); Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn. L. Rev. 485, 492 (1924).

6. *United States ex rel. Zapp v. District Director*, 120 F. 2d 762 (2d Cir. 1941).

7. *Lem Moon Sing v. United States*, 158 U. S. 538 (1895).

Thus, he could be expelled from residence in this country as well as excluded from entry upon whatever ground Congress might choose and without judicial process,⁸ even though the grounds would be an abridgement of the First Amendment if the basis of a statute enacted pursuant to a less sacrosanct power.⁹

REVIEW OF ADMINISTRATIVE PROCEDURE

Finality of Agency Determination

A very significant corollary to the omnicompetence of Congress to exclude and deport has been the right to delegate the enforcement of immigration laws to executive officers, who have the power to make regulations in accordance with the statute.¹⁰ Early decisions went far in sustaining the conclusiveness of the administrative hearing. No other tribunal, unless authorized by statute, could re-examine the evidence offered at the hearing; and as long as the regulations of the agency were within the statutory authority they were *due process of law* to the alien.¹¹

It was soon held, however, that the agency's decision must be made on the basis of a hearing at which all the available evidence was permitted.¹² And examination of the evidence by way of the writ of habeas corpus was soon forthcoming to determine whether there was "adequate" support for the finding of the inspector—in spite of the statute making the decision of the inspector "final."¹³ As a consequence, a decision could not be made upon anonymous accusations not preserved in the record.¹⁴

The scope of review upon habeas corpus¹⁵ is somewhat unsettled.

8. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893); see *Tiaco v. Forbes*, 228 U. S. 549, 557 (1913). This view has been criticized from the outset. Justice Field, who wrote the majority opinion in *Chae Chan Ping v. United States*, 130 U. S. 581 (1889), sustaining the inherent power of the United States to exclude any and all immigrants, vigorously dissented in *Fong Yue Ting*, *supra* at 744, pointing out that the expulsion of an alien who has acquired ties in this country was an entirely different matter.

9. See *United States ex rel. Turner v. Williams*, 194 U. S. 279, 294 (1904).

10. 39 Stat. 875 (1917), repealed by 66 Stat. 198 (1952), 8 U. S. C. A. § 1225(a) (Supp. 1953). Congress has, from the beginning, sought to make the decisions of the administrative agency final. See 26 Stat. 1085 (1891); § 242(b), 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(b) (Supp. 1953).

11. *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892).

12. See *Chin Yow v. United States*, 208 U. S. 8 (1908).

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

14. *Kwock Jan Fat v. White*, 253 U. S. 454 (1920) (alternative holding).

15. Traditionally the sole method of testing the validity of the order of deportation has been by habeas corpus, which the courts have seen fit to allow even in the absence of statutory authorization. See Orlow, *Habeas Corpus in Immigration Cases*, 10 Ohio St. L. J. 319 (1949).

Although *McGrath v. Kristensen*, 340 U. S. 162 (1950), allowed a

The rule most often alluded to is that the decision of the board will be upheld if there is "any" or, at times, "some" evidence to support it.¹⁶ A great many cases in the circuit courts have expressed the rule that the evidence required to sustain the board's findings must be "substantial."¹⁷ Whatever the verbal standards, there is some doubt whether many courts are not really imposing a much stricter scrutiny over the conduct of the hearing. The most noteworthy example is the case of *Bridges v. Wixon*,¹⁸ where six Supreme Court Justices, the dissent apparently thought, did nothing more than substitute their judgment upon the evidence for that of the examining inspector and the Attorney General.¹⁹

No such review is possible where Congress has left matters to agency discretion. For example, the Attorney General has been given power to suspend deportation orders for those aliens who could qualify under the statute.²⁰ Some courts have held that the statute allows no review whatsoever.²¹ The more considered view seems to be that there is review at least to prevent arbitrary exercise of discretion or exercise upon factors that Congress has not made relevant.²² The alien seems to be entitled to individual consideration

petition for declaratory judgment to determine the alien's "status" under the immigration and naturalization laws, the case is not authority for allowing review of a deportation order. Nor is review permissible by virtue of § 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. § 1009 (1946). *Heikkila v. Barber*, 73 Sup. Ct. 603 (1953). But see H. R. Rep. No. 2096, 82d Cong., 2d Sess. 127 (1952).

16. See *Bridges v. Wixon*, 326 U. S. 135, 149 (1945); *Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329 (1932); *United States ex rel. Vajtauer v. Commissioner*, 273 U. S. 103, 106 (1927) ("some" and "any").

17. See, e.g., *United States ex rel. Wlodinger v. Reimer*, 103 F. 2d 435 (2d Cir. 1939); *Kielema v. Crossman*, 103 F. 2d 292 (5th Cir. 1939); *Del Castillo v. Carr*, 100 F. 2d 338 (9th Cir. 1938); *Davis*, *Administrative Law* § 221 (1951). However, some courts maintain that the scope of review under habeas corpus is very different from the "substantial evidence" test required by the APA. See *Heikkila v. Barber*, 73 Sup. Ct. 603, 606 (1953); *Yiakoumis v. Hall*, 83 F. Supp. 469, 472 (E.D. Va. 1949).

18. 326 U. S. 135 (1945).

19. See *Davis*, *Administrative Law* § 221 (1951).

20. § 244, 66 Stat. 214 (1952), 8 U. S. C. A. § 1254 (Supp. 1953), formerly 62 Stat. 1206 (1948), 8 U. S. C. § 155(c) (Supp. 1952).

21. E.g., *Sladdens v. Shaughnessy*, 177 F. 2d 363 (2d Cir. 1949); *United States ex rel. Zabadlija v. Garfinkel*, 77 F. Supp. 751 (W.D. Pa. 1948), *aff'd per curiam*, 173 F. 2d 222 (3d Cir. 1949); see *United States ex rel. Walther v. District Director*, 175 F. 2d 693, 694 (2d Cir. 1949), *rev'd on other grounds*, 189 F. 2d 517 (2d Cir. 1951).

22. See *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489, 491 (2d Cir. 1950); *United States ex rel. Weddeke v. Watkins*, 166 F. 2d 369, 373 (2d Cir.), *cert. denied*, 333 U. S. 876 (1948). The extreme difficulty of securing judicial relief is discussed in 60 *Yale L. J.* 152 (1951).

The Attorney General also has discretion to allow deportables with good moral character to depart voluntarily in lieu of deportation. § 244(e), 66 Stat. 214 (1952), 8 U. S. C. A. 1254(e) (Supp. 1953), formerly 62 Stat. 1206 (1948), 8 U. S. C. § 155(c) (Supp. 1952). Here the same principles

of his case,²³ and where the Attorney General has promulgated regulations creating a quasi-judicial procedure to enable him to exercise his discretion, the alien must have a fair hearing and a decision based solely on evidence in the record.²⁴

The language of the statutes authorizing the Attorney General to release an alien on bail pending final disposal of his case²⁵ has been as broad as the language concerning the discretionary power to suspend deportation or allow voluntary departure. Yet before *Carlson v. Landon*²⁶ the courts had exercised considerable review over the Attorney General's exercise of that power,²⁷ setting standards to be considered by the Attorney General.²⁸ Where there were no indications that the alien previously released on bail would not continue to be available in the future, a denial of bail was held an abuse of discretion.²⁹

One petitioner in the *Carlson* case had previously been arrested in deportation proceedings and released on bail pending the outcome; after passage of the Internal Security Act of 1950³⁰ he was rearrested without warrant. The others were arrested under the Act and refused bail. All were permanent residents of the United States—some having lived here most of their lives, and having wives and families who were American citizens. There was nothing to indicate that they would not be available if eventually ordered deported, yet the order that they be held without bail—on the ground that as members of the Communist Party they might indoctrinate others with false beliefs—was upheld by the Supreme

seem to apply—the courts asserting that there is no review, *United States ex rel. Bartsch v. Watkins*, 175 F. 2d 245 (2d Cir. 1949); *United States ex rel. Salvetti v. Reimer*, 103 F. 2d 777 (2d Cir. 1939); *cf. United States ex rel. Zeller v. Watkins*, 167 F. 2d 279 (2d Cir. 1948), although it seems clear that a manifest abuse of discretion will not be permitted. *United States ex rel. Engelbert v. Watkins*, 84 F. Supp. 409 (S.D. N.Y. 1946); *cf. United States ex rel. Hadrossek v. Shaughnessy*, 101 F. Supp. 432 (S.D. N.Y. 1951).

23. *Mastrapasqua v. Shaughnessy*, 180 F. 2d 999 (2d Cir. 1950).

24. *Alexiou v. McGrath*, 101 F. Supp. 421 (D. D.C. 1951).

25. § 242(a), 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(a) (Supp. 1953), formerly 64 Stat. 1010 (1950), 8 U. S. C. § 156 (Supp. 1952).

26. 342 U. S. 524 (1952).

27. See, e.g., *United States ex rel. Heikkinen v. Gordon*, 190 F. 2d 16 (8th Cir. 1951), *vacated per curiam*, 344 U. S. 870 (1952); *United States ex rel. Pirinsky v. Shaughnessy*, 177 F. 2d 708 (2d Cir. 1949); *United States ex rel. Potash v. District Director*, 169 F. 2d 747 (2d Cir. 1948).

28. In *id.* at 751, the court listed the following considerations: "the probability of the alien being found deportable, the seriousness of the charge against him, if proved, the danger to the public safety of his presence within the community, and the alien's availability for subsequent proceedings if enlarged on bail."

29. *United States ex rel. Heikkinen v. Gordon*, 190 F. 2d 16 (8th Cir. 1951), *vacated per curiam*, 344 U. S. 870 (1952).

30. 64 Stat. 1010 (1950), repealed by § 242(a), 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(a) (Supp. 1953).

Court, four justices dissenting.³¹ The majority reasoned that aliens remain subject to the plenary power of Congress to expel them under the sovereign right to determine which noncitizens shall be permitted to remain; the power belongs to the political branches of the government and may be exercised entirely through executive officers with such opportunity for judicial review as Congress may see fit to permit; and the Attorney General's discretion, properly delegated to subordinate officials, to grant or withhold bail can be overturned only upon a showing of clear abuse. This decision, while not outside the philosophy of early cases, allows almost unrestrained administrative control of a matter which the courts are peculiarly competent to handle.

Under the Immigration and Nationality Act of 1952, court review will, in many cases, be more difficult than ever to obtain. Subjective opinions of executive officials rather than objective facts have, in large measure, been substituted as the tests of the right of entry or as grounds for deportation. Thus, aliens may be excluded who "in the opinion of the consular officer . . . or . . . the Attorney General . . . are likely at any time to become public charges";³² or if either of those officers "has reason to believe [the aliens] seek to enter the United States . . . to engage in activities which would be prejudicial to the public interest . . .";³³ or if either "has reasonable ground to believe [the alien] probably would . . . [engage in subversive activities]."³⁴ Relief from exclusion on the grounds of various affiliations may be obtained by establishing "to the satisfaction of the consular officer" that such affiliation was innocent.³⁵ An alien may be expelled who, "in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry";³⁶ or if "it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill his or her marital agreement which in the opinion of the Attorney General was hereafter made for the purpose of procuring his or her entry as an immigrant."³⁷

31. *Carlson v. Landon*, 342 U. S. 524, 547, 558, 568, 569 (1952).

32. § 212(a)(15), 66 Stat. 182 (1952), 8 U. S. C. A. § 1182(a)(15) (Supp. 1953).

33. § 212(a)(27), 66 Stat. 182 (1952), 8 U. S. C. A. § 1182(a)(27) (Supp. 1953).

34. § 212(a)(29), 66 Stat. 182 (1952), 8 U. S. C. A. § 1182(a)(29) (Supp. 1953).

35. § 212(a)(28)(I), 66 Stat. 182 (1952), 8 U. S. C. A. § 1182(a)(28)(I) (Supp. 1953).

36. § 241(a)(8), 66 Stat. 204 (1952), 8 U. S. C. A. § 1251(a)(8) (Supp. 1953).

37. § 241(c), 66 Stat. 204 (1952), 8 U. S. C. A. § 1251(c) (Supp. 1953).

In the past, similar indefinite delegations of authority have been sustained. Under the Act of 1920,³⁸ it was provided that aliens convicted of listed crimes against the security of the United States should be deported "if the Secretary of Labor . . . finds that such aliens are undesirable residents of the United States. . . ." This indefinite delegation was sustained solely on the assumption that the outline of crimes itself sufficiently clarified the class of aliens to be deported.³⁹ No issue could arise as to the validity of this statute absent a prior conviction of a specified crime—for the conviction and a finding of undesirability were both necessary elements. There is some possibility, therefore, that the present sections may be subjected to scrutiny—at least to ensure that the opinions of the immigration officers be based on a fair hearing and substantial evidence.

The second competing principal struggling for recognition in the field of deportation derives explicitly from the Constitution: aliens are "persons" within the meaning of the First, Fifth and Fourteenth Amendments of the Constitution. Therefore an alien may be secure in his freedom of speech,⁴⁰ his right to acquire, own and dispose of property⁴¹ and to receive just compensation for property requisitioned under the power of eminent domain,⁴² and the right to work in a job or business of his choosing.⁴³ This protection does not entirely cease upon the issuance of a warrant for deportation. Thus, an alien held for deportation is entitled to protection against unreasonable searches and seizures,⁴⁴ although there is some conflict whether the privilege against self-incrimination may be invoked.⁴⁵

A whole body of law surrounding the deportation and exclusion procedure has grown up by judicial decision, and the constitutional protection of due process has become a part thereof.⁴⁶ It was early

38. 41 Stat. 593 (1920).

39. Mahler v. Eby, 264 U. S. 32, 40 (1924).

40. See Bridges v. California, 314 U. S. 252 (1941) (by implication).

41. E.g., Sei Fujii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

42. Russian Volunteer Fleet v. United States, 282 U. S. 481 (1931).

43. Truax v. Raich, 239 U. S. 33 (1915); Yick Wo v. Hopkins, 118 U. S. 356 (1886); Fellman, *The Alien's Right to Work*, 22 Minn. L. Rev. 137, 153 (1938); Oppenheimer, *The Constitutional Rights of Aliens*, 1 Bill of Rights Rev. 100, 103 (1941).

44. Colyer v. Skeffington, 265 Fed. 17, 24 (D. Mass. 1920), *rev'd on other grounds*, 277 Fed. 129 (1st Cir. 1922); *Ex parte Jackson*, 263 Fed. 110 (D. Mont. 1920); see United States *ex rel.* Bilokumsky v. Tod, 263 U. S. 149, 155 (1923); cf. United States v. Wong Quong Wong, 94 Fed. 832 (D. Vt. 1899). But see Li Sing v. United States, 180 U. S. 486, 495 (1901); Fong Yue Ting v. United States, 149 U. S. 698, 730 (1893).

45. See Graham v. United States, 99 F. 2d 746, 749 (9th Cir. 1938); Carlson v. London, 342 U. S. 524, 566 (1952) (dissenting opinion); Schoeps v. Carmichael, 177 F. 2d 391, 400 (9th Cir. 1949), *cert. denied*, 339 U. S. 914 (1950). But see United States v. Lee Hee, 60 F. 2d 924, 925 (2d Cir. 1932).

46. Eisler v. Clark, 77 F. Supp. 610 (D. D.C. 1948); see Lum Man

established that an alien, although never lawfully admitted to the United States, could not be deported without a fair hearing;⁴⁷ and an alien being excluded must have a hearing in accordance with an antecedent definition of his rights.⁴⁸ Although the hearing may be summary, the agency's determination will be reversed as unfair if it is conducted in a prejudicial atmosphere,⁴⁹ or without allowing the alien to confer with counsel.⁵⁰ Due process is also violated where a deportation is ordered upon charges unsupported by any evidence,⁵¹ or if the board ignores evidence favorable to the alien without good reason.⁵² The alien must be given fair notice of the specific charges that he must meet,⁵³ and the cross-examination of witnesses or authors of affidavits made part of the evidence is a constitutional right which cannot be abridged.⁵⁴ Nevertheless, it has been held that denial of the right to counsel in *exclusion* cases is not a denial of due process.⁵⁵

It will be observed that although these basic safeguards are required, the agency's inquiry is far from what would be necessary in a judicial proceeding⁵⁶ or even in most administrative hearings in other areas.⁵⁷ Particularly criticized has been the Department's practice of combining in one person the functions of prosecutor and

Sing v. Acheson, 98 F. Supp. 777, 780 (D. Honolulu 1951); see Note, *Due Process Restrictions on Procedure in Alien Exclusion and Deportation Cases*, 31 Col. L. Rev. 1013 (1931).

47. Japanese Immigrant Case, 189 U. S. 86 (1903).

48. United States *ex rel.* Brandt v. District Director, 40 F. Supp. 371 (S.D. N.Y. 1941).

49. Chun Kock Quon v. Proctor, 92 F. 2d 326 (9th Cir. 1937); Jours v. Allen, 222 Fed. 756 (8th Cir. 1915).

50. Chew Hoy Quong v. White, 249 Fed. 869 (9th Cir. 1918).

51. See United States *ex rel.* Vajtauer v. Commissioner, 273 U. S. 103, 106 (1927).

52. United States *ex rel.* Schachter v. Curran, 4 F. 2d 356 (3d Cir. 1925); Wong Kew v. Ward, 33 F. Supp. 994 (D. Mass. 1940) (exclusion).

53. *E.g.*, Takeo Tadano v. Manney, 160 F. 2d 665 (9th Cir. 1947); Yuen Boo Ming v. United States, 103 F. 2d 355 (9th Cir. 1939); Wong Sun Fay v. United States, 13 F. 2d 67 (9th Cir. 1926); Unger v. Seaman, 4 F. 2d 80 (8th Cir. 1924); *Ex parte* Woo Wah Ning, 67 F. Supp. 56 (W.D. Wash. 1946); *accord*, Chang Chow v. United States, 63 F. 2d 375 (9th Cir. 1933). Fair notice that the alien must sustain the burden of proof is also required. United States *ex rel.* Giacalone v. Miller, 86 F. Supp. 655 (S.D. N.Y. 1949).

54. Gonzales v. Zurbrick, 45 F. 2d 934 (6th Cir. 1930); Maltez v. Nagle, 27 F. 2d 835 (9th Cir. 1928); Svarney v. United States, 7 F. 2d 515 (8th Cir. 1925); Whitfield v. Hanges, 222 Fed. 745 (8th Cir. 1915); *cf.* Chin Quong Mew v. Tillinghast, 30 F. 2d 684 (1st Cir. 1929); see Sardo v. McGrath, 196 F. 2d 20, 22 D.C. Cir. 1952). But see United States *ex rel.* Ng Wing v. Brough, 15 F. 2d 377 (2d Cir. 1926).

55. United States *ex rel.* Lew Chung Jon v. Commissioner, 18 F. Supp. 641 (S.D. N.Y. 1937), *aff'd without opinion*, 96 F. 2d 1023 (2d Cir. 1938).

56. See Van Vleck, *The Administrative Control of Aliens* 219-225 (1932).

57. See Rep. Pres. Comm'n on Imm. & Nat., *Whom We Shall Welcome* 155-158 (1953), for a bibliography and summary of various appraisals of immigration procedure.

judge.⁵⁸ But however unwise this combination, it has not been held to render the hearing *per se* unfair.⁵⁹ The judicial attempt⁶⁰ to make deportation proceedings conform to the Administrative Procedure Act⁶¹ has been overcome by later Congressional action specifically exempting exclusion and deportation hearings from its operation.⁶² But in addition to holding the APA applicable, the Supreme Court appeared to say that such an exemption might be unconstitutional. Although that view has been said to have little support in previous case law,⁶³ the appeal to the Constitution is based on the fact that the hearing afforded did not meet "at least currently prevailing standards of impartiality."⁶⁴ Lower courts, however, have subsequently sustained the Congressional exemption.⁶⁵

Criticism has also been directed toward the provision of the 1952 Act⁶⁶ which allows an order of deportation to be made in absentia if the alien is given reasonable opportunity to be present.⁶⁷ Whether wise or unwise, this provision seems to be merely confirmatory of past practice, already sustained on the ground that deportation is not a criminal proceeding.⁶⁸

Akin to the constitutional problem of whether Congress can

58. See *id.* at 161; Davis, Administrative Law § 118 *et seq.* (1951).

59. See, e.g., *In re Giacobbi*, 32 F. Supp. 508 (N.D. N.Y. 1939), *aff'd without opinion sub nom.* United States *ex rel.* Giacobbi v. Fluckey, 111 F. 2d 297 (2d Cir. 1940).

60. *Wong Yang Sung v. McGrath*, 339 U. S. 33 (1950).

61. 60 Stat. 239 (1946), 5 U. S. C. § 1004 (1946).

62. 64 Stat. 1048 (1950), 8 U. S. C. § 155a (Supp. 1952). The 1952 Act continues this exemption by describing a procedure which does not require separation of judicial and prosecutorial functions, and which is the "sole and exclusive" procedure for determining the deportability of an alien, § 242(b), 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(b) (Supp. 1953), or admissibility of an alien. § 236(a), 66 Stat. 200 (1952), 8 U. S. C. A. § 1226(a) (Supp. 1953).

63. See Davis, Administrative Law § 118 (1951).

64. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 50 (1950). The Court went on: "A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring us to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

65. E.g., *Belizaro v. Zimmerman*, 200 F. 2d 282 (3d Cir. 1952). Justice Jackson, however, has recently reaffirmed his opinion in the *Wong Yang Sung* case that a deportation procedure not in conformance with the APA might be constitutionally objectionable. See *Shaugnessy v. United States ex rel. Mezei*, 73 Sup. Ct. 625, 635-636 (1953) (dissenting opinion). Although administrative regulations were issued to conform to the decision in the *Wong Yang Sung* case, they were said to be rendered inoperative by the subsequent Congressional action. See *United States ex rel. Di Dente v. Ault*, 101 F. Supp. 496, 498 (N.D. Ohio 1951).

66. § 242(b), 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(b) (Supp. 1953).

67. See Sen. Rep. No. 1137 pt. 2, 82d Cong., 2d Sess. 8 (1952) (minority views).

68. *Weinbrand v. Prentis*, 4 F. 2d 778 (6th Cir. 1925).

effect its deportation policies solely through administrative agencies is the problem raised when failure to comply with the applicable regulations is made the basis for criminal punishment. It was early held that Congress could not authorize administrative officials to arrest and imprison all Chinese found by the agency to be illegally within the United States, since it is not consistent with due process that Congress should, after having defined an offense, "find the fact of guilt and adjudge the punishment by one of its own agents."⁶⁹

A somewhat similar problem is posed by Section 242(e) of the Immigration and Nationality Act of 1952,⁷⁰ which provides that any alien who wilfully refuses to depart from the country within six months from the date of his deportation shall be guilty of a felony. Although the statute assumes that a criminal trial shall be had, it does not indicate whether during that trial the court may re-examine the most important element of the crime—the order of deportation. It has been contended that for these reasons the statute violates the Fifth Amendment.⁷¹ At least one federal district court has sustained the statute by reference to the plenary power of Congress over deportation and the power to effectuate its laws by administrative control.⁷²

Analogous decisions do not provide authority for such a complete deference to Congressional will. In a criminal prosecution for violation of an OPA price control order it was held that failure to test the validity of the order by the administrative procedure provided foreclosed that issue as a defense to the prosecution.⁷³ The court reasoned that there is no constitutional requirement that the order be tested in one tribunal rather than another "*so long as there is an opportunity . . . for judicial review which satisfies the demands of due process. . .*"⁷⁴ Similarly, in a prosecution for accepting a concession from a rate prescribed properly, the defense that the

69. *Wong Wing v. United States*, 163 U. S. 228, 237 (1896). *But cf. Lloyd Sabaudo Societa v. Elting*, 287 U. S. 329 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320 (1909) (money penalties).

70. 66 Stat. 208 (1952), 8 U. S. C. A. § 1252(e) (Supp. 1953), formerly 64 Stat. 1012 (1950), 8 U. S. C. § 156(c) (Supp. 1952).

71. In *United States v. Spector*, 343 U. S. 169 (1952), the statute in question was attacked on the ground that it was void for vagueness. The majority of the Court did not reach the question presented here, while Justices Jackson and Frankfurter dissented, condemning the statute as a subtle attempt to avoid due process by making conclusive on the question of the alien's unlawful presence an administrative determination not subject to constitutional safeguards. *Id.* at 177.

72. *United States v. Karasek*, Criminal No. 1-7, S. D. Iowa, Jan. 2, 1953.

73. *Yakus v. United States*, 321 U. S. 714 (1944).

74. *Id.* at 444 (emphasis supplied). The dissenting opinions were vigorous. See *id.* at 448, 460 (Justices Roberts, Rutledge and Murphy).

rate was unreasonable was not allowed because the policy of the applicable act to secure uniform rates would be aborted by allowing judges and juries in various districts to determine what rates were reasonable.⁷⁵

Because of the qualifying factors, neither of these cases sustains the provisions in question. Therefore, their validity seems in doubt unless the constitutional issue can be avoided. Since the defendants in at least two cases⁷⁶ involving this problem were aliens who could not be deported because they were not citizens of any existing country,⁷⁷ the Act could be construed as not applying to them.⁷⁸ This construction is unlikely, since the statute was specifically intended by Congress to solve the problem of "non-deportables."⁷⁹

Another possible solution is the one reached in the Selective Service classification cases, where it has been held that the defendant in a prosecution for violation of the Selective Service order could interpose the defense that the order was unlawful.⁸⁰ Review has been limited to a determination of whether there was some basis in fact for the classification.⁸¹ There is no reason to suppose that the Court would give any less a review in the deportation cases. Nor is there reason to suppose they will invalidate an act of Congress where a formidable constitutional question can be ignored by granting some review of the order.

The influence of the fact that deportation and exclusion laws inevitably involve the rights of citizens has given rise to one important exception to the "finality" of administrative control. In *Ng Fung Ho v. White*,⁸² it was held that one who has asserted in *expulsion* proceedings that he is a citizen of the United States and

75. *United States v. Vacuum Oil Co.*, 158 Fed. 536 (W.D. N.Y. 1908), *aff'd*, 179 Fed. 614 (2d Cir.), *cert. denied*, 218 U. S. 681 (1910).

76. *United States v. Spencer*, 343 U. S. 169 (1952); *United States v. Karasek*, Criminal No. 1-7, S. D. Iowa, Jan. 2, 1953.

77. See King and Ginger, *The McCarran Act and the Immigration Laws*, 11 Law. Guild Rev. 128, 137 (1951).

78. See *United States ex rel. Wiczynsky v. Shaughnessy*, 185 F. 2d 347, 349 (2d Cir. 1950).

79. See 96 Cong. Rec. 10675 (1950). Some deportees had demonstrated that personal application was successful in gaining admission into a country where official action had been futile. The statute was to induce them to aid in their own deportation.

80. *Estep v. United States*, 327 U. S. 114 (1946). It is difficult to accept the reasoning of the Court that review was allowed only because the selective service board had "exceeded its jurisdiction" in classifying the petitioner in violation of what the Court thought the Selective Service Regulations demanded.

81. See *Cox v. United States*, 332 U. S. 442 (1947). Justices Murphy and Rutledge dissented on the ground that such narrow review would not sustain the constitutionality of the conviction. *Id.* at 457.

82. 259 U. S. 276 (1922).

supports his claim with substantial evidence⁸³ is entitled to a de novo court trial upon that issue.⁸⁴ This holding was a departure from the reasoning of earlier *exclusion* cases which had held that even though jurisdiction of the board over the petitioner would be lacking if he proved to be a citizen, no judicial review was permissible except to determine whether the finding was arbitrary⁸⁵ or without any evidence to support it.⁸⁶

Thereafter the lines were drawn. In exclusion cases, the findings of the administrative officers would be final—even on the issue of citizenship. In expulsion cases, the expellee must be given a court trial. Some justification for the distinction could be made in the ordinary exclusion case, where one is entering the United States for the first time. Even where he is seeking admission as a citizen, the hardship resulting from a denial of his right to enter would not approach the extreme losses which might be incurred by one uprooted from his permanent residence and banished to what might be to him a “foreign” land.

As was pointed out above,⁸⁷ however, even a United States domiciliary is regarded as an entering immigrant if he leaves the country—even temporarily and with an intent to return. Although in immigration nomenclature his hearing would be regarded as an *exclusion* proceeding, it is obvious that the extreme hardship which the *Ng Fung Ho* case sought to obviate for *expulsion* would be present here. Nevertheless, some courts have consistently refused to extend the *Ng Fung Ho* doctrine to this kind of case.⁸⁸ Others have recognized that the rights of a possible citizen should not be determined by the form of the proceeding if he shows prior residence in the United States.⁸⁹

83. Judicial due process becomes necessary whenever the alien presents some claim to citizenship, even though his evidence is no more than his own testimony. *Espino v. Wixon*, 136 F. 2d 96 (9th Cir. 1943) ; see *United States v. Wong Gong*, 70 F. 2d 107 (9th Cir. 1934).

84. The decision rests partly on the somewhat discredited “jurisdictional fact” theory of judicial review of administrative orders, but probably its primary basis is merely a recognition of the vastly greater security afforded by judicial process and the great need for security in light of the risk to loss of liberty involved. See Davis, *Administrative Law* § 255 (1951).

85. See *Tang Tun v. Edsell*, 223 U. S. 673 (1912).

86. *United States v. Ju Toy*, 198 U. S. 253 (1905). As was to be expected, various tests were voiced as to the amount of evidence required to sustain the finding. See, e.g., *Kwock Jan Fat v. White*, 253 U. S. 454 (1920) (“adequate” evidence).

87. See note 7 *supra* and text thereto.

88. E.g., *United States ex rel. Medeiros v. Watkins*, 166 F. 2d 897 (2d Cir. 1948). See also *In re K*..... (56143/464), 1 Dec. Imm. & Nat. L. 587 (1943).

89. *Carmichael v. Delaney*, 170 F. 2d 239 (9th Cir. 1948) ; *Lee Fong Fook v. Wixon*, 170 F. 2d 245 (9th Cir. 1948), *cert. denied*, 336 U. S. 914

Some of the criticism of those cases which denied judicial trial was thought to be unjust⁹⁰ in light of Section 503 of the Nationality Act of 1940⁹¹ which provided for a declaratory judgment action for any person denied rights by an official on the ground that he was not a citizen. This provision has now been repealed by the 1952 Act⁹² and its counterpart⁹³ expressly excepts from its operation any disputes of citizenship which arise by reason of any exclusion proceeding. The intent of Congress to prohibit judicial intervention is clear. But since the courts have never given complete finality to administrative rulings and have generally guarded the determination of citizenship with especial care, they are not likely to revert to the complete abdication once observed. Actually, it can be argued that one returning to his domicile in this country deserves greater constitutional protection than one who has never resided here. It must be noted, however, that if granting a judicial trial on the citizenship issue is made by the Supreme Court to depend on prior residence, the doctrine of *United States v. Ju Toy*,⁹⁴ from which the whole issue has sprung, will actually be overruled, for in the *Ju Toy* case the petitioner was actually a prior resident returning after a temporary absence.

The constitutional rights once accorded to aliens have been made extremely nebulous by two recent cases. The first of these is *United States ex rel. Knauff v. Shaughnessy*.⁹⁵ A Presidential Proclamation,⁹⁶ supplemented by a regulation of the Attorney General,⁹⁷ provided that an alien seeking admission could be excluded and deported without a hearing if the Attorney General found him excludable upon the basis of information the disclosure of which

(1949). The ratiocination of these decisions has been to seize upon language in some of the earlier decisions in which the courts were denying judicial trial only to persons who had never resided in the United States. *E.g.*, *Quon Poy v. Johnson*, 273 U. S. 352, 358 (1927); *United States v. Ju Toy*, 198 U. S. 253, 263 (1905); *cf.* *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, 77 (1936) (concurring opinion).

90. See *United States ex rel. Chu Leung v. Shaughnessy*, 176 F. 2d 249, 250 (2d Cir. 1949).

91. 54 Stat. 1171 (1940), 8 U. S. C. § 903 (1946).

92. 66 Stat. 280 (1952).

93. § 360, 66 Stat. 273 (1952), 8 U. S. C. A. § 1503 (Supp. 1953).

94. 198 U. S. 253 (1905). See note 86 *supra* and text thereto for discussion of the doctrine.

95. 338 U. S. 537 (1950).

96. Proc. No. 2523, 6 Fed. Reg. 5821 (1941).

97. 8 Code Fed. Regs. § 175.57 (1949). The operation of this regulation has now become notorious since the exclusion and long detention of Ellen Knauff, the war bride of an American soldier who finally secured admission into the country after a storm of public protest had forced a hearing which failed to disclose conceivable grounds for her exclusion. *Knauff, The Ellen Knauff Story* (1952).

would be prejudicial to the public interest. The Supreme Court refused to hold this procedure invalid, asserting that the power to exclude is inherent in the executive, and the alien has no right to admission but only a privilege on such terms as the United States may provide.

In accordance with a long line of cases which had held that a resident alien who temporarily departs from the country is, when he returns, in the same position as one who has entered for the first time,⁹⁸ the rule of the *Knauff* case was applied in the lower courts in *Kwong Hai Chew v. Colding* to an alien who had signed on a United States merchant ship and upon his return was excluded without a hearing.⁹⁹ The Supreme Court reversed, holding that the petitioner's long residence in the United States took him out of the class of aliens being "excluded"—and therefore he was not within the purview of the regulation.¹⁰⁰ This holding provides only a temporary escape from the constitutional question, for the regulation authorizing exclusion without a hearing has become part of the Immigration and Nationality Act of 1952;¹⁰¹ where Congress has expressly included those of petitioner's class within the definition of aliens seeking "entry" into the United States.¹⁰²

There are strong arguments for accepting the Court's dicta that the *constitutional* status which the alien indispensably enjoyed prior to his departure was not terminated thereby. The Court seemed to be giving expression to the principle that restraints on the power to deport or exclude depend not upon the inalienable and sovereign nature of the power but upon the degree of constitutional protection to which the person is entitled. One month later, however, in *Shaughnessy v. United States ex rel. Mezei*,¹⁰³ this principle seems to have been forgotten. The Supreme Court held, four justices dissenting,¹⁰⁴ that a twenty-five year resident who left the country temporarily to visit his mother could, on his return, be excluded without a hearing and confined indefinitely on Ellis Island although,

98. *E.g.*, *United States ex rel. Volpe v. Smith*, 289 U. S. 422 (1933); *Lapina v. Williams*, 232 U. S. 78 (1914); *Schoeps v. Carmichael* 177 F. 2d 391 (9th Cir. 1949), *cert. denied*, 339 U. S. 914 (1950); *Ex parte Rodriguez*, 15 F. 878 (S.D. Tex. 1926). *But cf.* *Petition of Hersvik*, 1 F. 2d 449 (S.D. Cal. 1924).

99. *United States ex rel. Kwong Hai Chew v. Colding*, 97 F. Supp. 592 (E.D. N.Y.), *aff'd*, 192 F. 2d 1009 (2d Cir. 1951).

100. *Kwong Hai Chew v. Colding*, 344 U. S. 590 (1953).

101. § 235(c), 66 Stat. 198 (1952), 8 U. S. C. A. § 1225(c) (Supp. 1953).

102. § 101(a) (13), 66 Stat. 166 (1952), 8 U. S. C. A. § 1101(a) (13) (Supp. 1953).

103. 73 Sup. Ct. 625 (1953).

104. *Id.* at 631, 632 (Justices Black, Douglas, Frankfurter and Jackson).

after the United States had branded him an undesirable, no other country could be found to which he could be sent. While affirming the *constitutional* basis for the *Kwong Hai Chew* decision, a distinction was sought between the two cases on the ground that there the petitioner was, on embarkation, cleared by the Coast Guard and although voluntarily in foreign ports, was continuously at sea.¹⁰⁵ If this reasoning could be compromised with the historical test to determine when an alien is to be treated as "entering" for the purposes of enforcing the exclusion and deportation laws,¹⁰⁶ still it could not be accepted as a rational basis for determining a resident's *constitutional* rights.¹⁰⁷ Both petitioners were long time residents. It would not seem that constitutional protection could be given to one and denied another on the grounds either of a clearance by the Coast Guard or a failure to negotiate the gangway when in a foreign port. As the Court in *Kwong Hai Chew* clearly pointed out, "[f]rom a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien. . . ."¹⁰⁸

Those cases which have consistently affirmed the operation of procedural due process have not restricted their operation to expulsion proceedings. Often they have held that even the alien stopped at the border is entitled to some constitutional protection.¹⁰⁹ Further, the *Japanese Immigrant Case*,¹¹⁰ relied on so often for the proposition that a hearing is constitutionally required in *expulsion* cases, actually involved an *exclusion*. Therefore the Court in the *Knauff* and *Mezei* cases—in stating that an alien seeking admission had no rights other than those Congress, acting through the executive, saw fit to give—was ignoring the decisions of the last fifty years.

105. *Id.* at 630.

106. An example of the situations giving rise to the question of what an "entry" is within the meaning of the immigration laws is that which occurs when deportation is sought on the ground that the alien has committed a crime within five years "after entry." See § 241(a)(4), 66 Stat. 204 (1952), 8 U. S. C. A. § 1251(a)(4) (Supp. 1953), formerly 39 Stat. 889 (1917), 8 U. S. C. § 155(a) (1946). Historically, even a seaman on an American ship has been regarded as making an "entry" on his return if the ship had docked at foreign ports. See, e.g., *United States ex rel. Stapf v. Corsi*, 287 U. S. 129 (1932); *United State ex rel. Claussen v. Day*, 279 U. S. 398 (1929).

107. Neither of the cases cited by the majority, *United States ex rel. Polymeris v. Trudell*, 284 U. S. 279 (1932); *Lem Moon Sing v. United States*, 158 U. S. 538 (1895), sheds any light on the constitutional problem presented here. But see *Van Laeken v. Wixon*, 84 Supp. 958, 963 (N.D. Cal. 1949).

108. *Kwong Hai Chew v. Colding*, 344 U. S. 590, 600 (1953).

109. E.g., *Chun Kock Quon v. Proctor*, 92 F. 2d 326 (9th Cir. 1937); *Chin Quong Mew v. Tillinghast*, 30 F. 2d 684 (1st Cir. 1929); *United States ex rel. Schachter v. Curran*, 4 F. 2d 356 (3d Cir. 1925); *Chew Hoy Quong v. White*, 249 Fed. 869 (9th Cir. 1918).

110. 189 U. S. 86 (1903).

The *Mezei* case, of course, is an extreme extension even of the *Knauff* case, for it does not follow from the Congressional power to exclude that the alien can be confined without the right to confront his accusers beyond the time when deportation is shown to be impossible.¹¹¹

A holding that an alien seeking entry has some rights would not mean that the fundamental difference between expulsion and exclusion would be overlooked. It would mean only that the alien detained at a port of entry be entitled at least to a fair hearing to determine whether he falls within the classes of excludable aliens which Congress has defined.¹¹²

LIMITATIONS ON SUBSTANCE

In *Harisiades v. Shaughnessy*,¹¹³ the Supreme Court was faced with the problem of whether the constitutional prohibition against ex post facto legislation may be applied to a deportation statute. Petitioners had all come into this country at an early age and had, at various times in the past—one as long ago as 1929—been members of the Communist Party. Their deportation was sought in compliance with the Alien Registration Act of 1940¹¹⁴ which for the first time authorized deportation for *past* membership in the Communist Party. As the statute existing before 1940¹¹⁵ was construed—in 1939, membership in the Party after entry did not remain cause for deportation after it had ceased.¹¹⁶ Therefore it became possible to deport aliens for past membership in an organization for which they could not have been deported a year earlier. Cavalierly stating that the law was not retroactive in effect, the Court in the *Harisiades* case refused to reconsider what it regarded as settled law—that the ex post facto limitation can only apply to laws imposing criminal punishment, and that deportation was neither a criminal proceeding nor punishment.¹¹⁷ Admittedly underlying the decision was the doctrine that our policy toward aliens is so “exclusively entrusted to the political branches . . . as to be largely immune from judicial . . .

111. See *United States ex rel. Mezei v. Shaughnessy*, 195 F. 2d 964, 968 (2d Cir. 1952), *rev'd*, 73 Sup. Ct. 625 (1953).

112. “Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration.” *Shaughnessy v. United States ex rel. Mezei*, 73 Sup. Ct. 625, 635 (1953) (Justice Jackson’s dissenting opinion, referring to the *Knauff* case).

113. 342 U. S. 580 (1952).

114. 54 Stat. 670 (1940), § U. S. C. § 155(a) (1946).

115. 40 Stat. 1012 (1918).

116. *Kessler v. Strecker*, 307 U. S. 22 (1939).

117. See *Harisiades v. Shaughnessy*, 342 U. S. 580, 594 (1952).

interference."¹¹⁸ It is not true, however, that the provisions against ex post facto legislation apply only to strictly criminal proceedings. Although those instances where the ex post facto prohibition has been applied to civil penalties¹¹⁹ have been explained as disabilities which were really criminal penalties in disguise,¹²⁰ it would seem that the banishment of residents for acts which constitute crimes by municipal law would fall within that same category.¹²¹

The idea that deportation is not punishment deserves consideration only because it is so often misapplied. It may be traced to the case of *Fong Yue Ting v. United States*,¹²² but it was there applied only to an alien who had entered the country illegally—the Court asserting that deportation was not punishment for anything done in the United States.¹²³ The case of *Calder v. Bull*¹²⁴ was cited by the majority in the *Harisiades* case for the holding that "ex post facto" applies only to criminal statutes, but the soundness of that case has been questioned.¹²⁵ Further, those cases cited for the proposition that the ex post facto prohibition will not apply to deportation laws¹²⁶ fail, on their facts, to sustain that assertion.¹²⁷ The

118. *Id.* at 588.

119. *Ex parte Garland*, 4 Wall. 333, 337 (U.S. 1866), held that an act of Congress which imposed an oath upon those who wanted to practice before the federal courts could not disqualify an attorney who was not in a position to take the oath because of past conduct. *Accord*, *Cummings v. Missouri*, 4 Wall. 277, 319 (U.S. 1866); *cf.* *Pierce v. Carskadon*, 16 Wall. 234 (U.S. 1872). Certainly a proceeding to vindicate one's privilege to practice law is not a criminal proceeding. Yet these laws were invalid as ex post facto. That the principle of these cases still survives is evidenced by their recent approval in *United States v. Lovett*, 328 U. S. 303 (1946).

120. See *Burgess v. Salmon*, 97 U. S. 381, 385 (1878).

121. This is evident from the recent application to deportation statutes of the "void for vagueness" test of criminal statutes. See *Jordan v. De George*, 341 U. S. 223, 231 (1951): "Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case."

122. 149 U. S. 698 (1893), cited in *Bugajewitz v. Adams*, 228 U. S. 585, 591 (1913), which was cited in *Harisiades v. Shaughnessy*, 342 U. S. 580, 594 (1952).

123. *Fong Yue Ting v. United States*, *supra* note 122 at 730.

124. 3 Dall. 386 (U.S. 1798).

125. The records of the Constitutional Convention of 1787, which indicate that the Convention had more than restraints on criminal laws in mind, were not available at the time the case was decided. McAllister, *Ex Post Facto Laws in the Supreme Court of the United States*, 15 Calif. L. Rev. 269, 270 (1927). It has also been pointed out that contemporary usage and the records of the state ratifying conventions evidence a far different definition of the term from that given by the Court. See Crosskey, *Politics and the Constitution in the History of the United States* 324-351 (1953). In any event, the decision, while it attempts to set out that which is included in the ex post provision, is not authority for that which is not within its condemnation—as evidenced by the later cases cited note 119 *supra*.

126. *Mahler v. Eby*, 264 U. S. 32 (1924); *Bugajewitz v. Adams*, 228 U. S. 585 (1913); *Johannessen v. United States*, 225 U. S. 227 (1912).

127. See Boudin, *The Settler Within Our Gates: III*, 26 N. Y. U. L. Rev. 634, 637 (1951).

willingness of the Supreme Court in the *Harisiades* case to be bound by them is therefore—in light of the retroactive provisions of the 1952 Act¹²⁸—an extremely unfortunate extension of judicial stoicism in regard to measures which may result to the alien in the “loss of both property and life; or of all that makes life worth living.”¹²⁹

Undoubtedly the most vital question raised by a consideration of the scope of the expulsion power is a substantive one: can Congress validly make the right to avoid banishment depend upon conditions which it could not forbid generally because of the prohibitions of the Bill of Rights? The only important decision seeming to hold the affirmative of that question is a case where the expellee was not a permanent resident of the United States but had come for the sole purpose of giving a lecture tour in advocacy of anarchism.¹³⁰ And it must be noted that the *holding* of the court was not that a mere philosophical anarchist could be deported, but that the alien actually advocated violent overthrow of the Government and was not within the protection of the First Amendment.¹³¹ It has been pointed out¹³² that each of the other cases historically cited for the bold proposition that there is no constitutional limit to the power of Congress to exclude *or expel* aliens¹³³ can be shown to hold actually must less. Each can be explained on the ground that its facts involve *exclusion* rather than *expulsion*,¹³⁴ aliens not legally within the country,¹³⁵ aliens merely seeking transit,¹³⁶ or not involving deportation at all.¹³⁷

Congress could, of course, abolish all immigration whatsoever or exclude any classes of immigrants. And probably no one would contend that it would raise a substantive constitutional question if Congress ordered deportation of anyone who entered the country in violation of its restrictions. But if resident aliens are constitu-

128. All grounds for deportation in the 1952 Act are applicable notwithstanding that the factual basis for deportation occurred prior to the enactment of the Act. § 241(d), 66 Stat. 204 (1952), 8 U. S. C. A. § 1251(d) (Supp. 1953).

129. *Ng Fung Ho v. White*, 259 U. S. 276, 284 (1922).

130. *United States ex rel. Turner v. Williams*, 194 U. S. 279 (1904).

131. *Id.* at 294.

132. See the painstaking refutation of the whole notion of the unrestrained power of Congress over deportation in Boudin, *The Settler Within Our Gates*, 26 N. Y. U. L. Rev. 266, 451, 634 (1951).

133. See, e.g., *United States ex rel. Turner v. Williams*, 194 U. S. 279, 290 (1904); *Prentiss v. Manoogian*, 16 F. 2d 422, 423 (6th Cir. 1926).

134. *Lem Moon Sing v. United States*, 158 U. S. 538 (1895); *Nishimura Ekiu v. United States*, 142 U. S. 651 (1892); *Chae Chan Ping v. United States*, 130 U. S. 581 (1889).

135. *Fong Yue Ting v. United States*, 149 U. S. 698 (1893).

136. *Fok Yung Yo v. United States*, 185 U. S. 296 (1902).

137. *Wong Wing v. United States*, 163 U. S. 228 (1896).

tional "persons" with respect to their life, liberty and property,¹³⁸ there is no reason why they should not continue to be "persons" with respect to the most important of all rights—the right to remain in the country.

This is an area where "the tendency of a principle to expand itself to the limit of its logic"¹³⁹ is notoriously evident. But the principle must be tested in the light of changed circumstances. When the *Fong Yue Ting* case¹⁴⁰ was decided in 1893, the expulsion process as it is known today did not exist—for deportation was largely a mere adjunct of exclusion and was available for only a few years after entry.¹⁴¹ The grounds did not read, as they do today under the McCarran Act, like a penal code. Nor was deportation the extreme measure that it is today, for not until 1918¹⁴² did it become a felony for an alien once deported to return to this country.

The present Act provides for deportation for mere membership or affiliation with the Communist Party,¹⁴³ although the alien does not understand its conspiratorial character, is not aware of its subordination to a foreign power, and does not subscribe to its doctrine of violence.¹⁴⁴ While Communism is essentially an alien force,¹⁴⁵ it does not follow that the admittedly innocent can be condemned with the guilty. There is no doubt that membership alone could not be made the basis of other punishments or withdrawals of privilege.¹⁴⁶ It would be exceedingly injudicious to hold that a resident could be banished to what might be a strange land¹⁴⁷ for the same conduct.¹⁴⁸

138. See notes 40-43 *supra* and text thereto. It has been suggested, see Boudin, *supra* note 132, at 451, that persons who enter a country with the intention of establishing a permanent home and becoming part of the community are not "aliens" at all in the constitutional sense.

139. Cardozo, *The Nature of the Judicial Process* 51 (1925).

140. 149 U. S. 698 (1893).

141. 26 Stat. 1086 (1891).

142. 40 Stat. 1012 (1918).

143. § 241(a) (6) (C), 66 Stat. 204 (1952), 8 U. S. C. A. § 1251(a) (6) (C) (Supp. 1953).

144. *Latva v. Nicolls*, 106 F. Supp. 658 (D. Mass. 1952).

145. See Sen. Rep. No. 1515, 81st Cong., 2d Sess. 782 (1950).

146. *Wieman v. Updegraff*, 344 U. S. 183 (1952).

147. An alien is subject to deportation, of course, long after his immigration into the United States and long after losing all ties with the country of his birth. But even recent arrivals are subject to being sent to a completely strange land. If the country designated by the alien does not accept him, and certain others refuse, he may be sent to any country in the world which will take him. § 243(a), 66 Stat. 212 (1952), 8 U. S. C. A. § 1253(a) (Supp. 1953).

148. The issue whether mere membership in the Communist Party can be the ground for deportation was before the Supreme Court in *Heikkila v. Barber*, 73 Sup. Ct. 603 (1953), but the case was disposed of on a procedural issue.