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Administrative Law - Does an Alien's State Narcotics Conviction Subject Him to Mandatory Deportation under Section 241(a)(11) of the Immigration and Nationality Act if His Conviction Has Been Set Aside Pursuant to a State Procedure

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Recent Developments

ADMINISTRATIVE LAW — DOES AN ALIEN'S STATE NARCOTICS CONVICTION SUBJECT HIM TO MANDATORY DEPORTATION UNDER SECTION 241(a)(11) OF THE IMMIGRATION AND NATIONALITY ACT IF HIS CONVICTION HAS BEEN SET ASIDE PURSUANT TO A STATE PROCEDURE?

I. INTRODUCTION

Section 241(a)(11) of the Immigration and Nationality Act¹ (Act) provides in mandatory terms that any alien who has been convicted of illegal possession of or traffic in narcotic drugs or marijuana shall be deported upon order of the Attorney General.² Since the Act does not define the term “convicted,” the federal courts have been confronted with the issue of whether state expungement of an alien’s state conviction eliminates the “conviction” for the purposes of section 241(a)(11).³ Two recent conflicting decisions have highlighted the complexity of the question.

In Kolios v. Immigration & Naturalization Service,⁴ the United States Court of Appeals for the First Circuit held that an alien convicted in a Texas state court of trafficking in marijuana remained subject to mandatory deportation under section 241(a)(11)⁵ notwithstanding the fact that his conviction had been set aside by the state upon fulfillment of conditions of probation.⁶ The

2. Section 241(a)(11) provides in pertinent part:
   Any alien in the United States (including an alien crewman) shall, upon the
   order of the Attorney General, be deported who is, or hereafter at any time after
   entry has been, a narcotic drug addict, or who at any time has been convicted of
   a violation of, or a conspiracy to violate, any law or regulation relating to the
   illicit possession of or traffic in narcotic drugs or marihuana . . . .
3. For recent discussions of the relationship between state expungement statutes
   and section 241(a)(11), see Aberson, Deportation of Aliens for Criminal Convictions, 2
   PEPPERDINE L. REV. 52 (1974); Gordon, The Need to Modernize Our Immigration
   Laws, 13 SAN DIEGO L. REV. 1 (1975); Sevilla, In Defense of the Alien, 1 NAT’L J.
   CRIM. DEF. 255 (1975); Comment, Lawful “Impermanent” Residence: Deportation
5. For the text of §241(a)(11) of the Act, see note 2 supra.
6. 532 F.2d at 787-90. At present, 33 states have taken steps to lessen or remove
   the criminal sanctions commonly applied to marijuana related activity. Within the
   past three years, Alaska, California, Colorado, Maine, Ohio, and Oregon have enacted
   statutes decriminalizing the possession or use of small quantities of marijuana.
   Generally, the remaining sanction against marijuana use is a civil fine, with no
   threat of a criminal arrest or a conviction record. See ALASKA STAT. § 17.12.110(d)-(e)
   (1976); CAL. HEALTH & SAFETY CODE § 11357(b) (Supp. 1977); COLO. REV. STAT.
   § 12-22-412 (Cum. Supp. 1975); ME. REV. STAT. ANN. tit. 22, § 2383 (Supp. 1975); OHIO
   In addition, 27 other states have acted to lessen the impact of criminal
   sanctions for marijuana usage. Certain state statutes provide that the trial court may
principles enunciated in *Kolios*, which are supported by similar cases from other circuits, were subsequently challenged in *Rehman v. Immigration & Naturalization Serv.* (9th Cir. 1972) (setting aside of alien's narcotics conviction pursuant to a California statute upon fulfillment of conditions of probation did not affect the fact of alien's state conviction within meaning of §241(a)(1)); *Garcia-Gonzales v. Immigration & Naturalization Serv.* (9th Cir. 1969) (finding that petitioner was deportable as a result of a state narcotics conviction would not be influenced by a state court order setting aside the conviction and releasing petitioner from all penalties and disabilities resulting from the offense upon satisfaction of completion of the probationary period); *Cruz-Martinez v. Immigration & Naturalization Serv.* (9th Cir. 1975) (setting aside of alien's narcotics conviction pursuant to a California statute upon fulfillment of conditions of probation did not affect the fact of alien's state conviction within meaning of §241(a)(11)); *Gonzalez de Lara v. United States,* 439 F.2d 1316 (5th Cir. 1971) (an alien, convicted in state court of marijuana possession, was subject to deportation although the alien had been granted probation by the state court, releasing him from all penalties and disabilities resulting from the offense upon satisfactory completion of the probationary period); *Padilla-Partida v. Immigration & Naturalization Serv.*, 462 F.2d 619 (9th Cir. 1972) (Ninth Circuit expressly refused to abandon hard line taken in cases cited infra); *Gonzalez de Lara v. United States,*, 439 F.2d 1316 (5th Cir. 1971) (an alien, convicted in state court of marijuana possession, was subject to deportation although the alien had been granted probation by the state court, releasing him from all penalties and disabilities resulting from the offense upon satisfactory completion of the probationary period); *Cruz-Martinez v. Immigration & Naturalization Serv.*, 404 F.2d 1198 (9th Cir. 1968), cert. denied, 394 U.S. 955 (1969) (finding that petitioner was deportable as a result of a state narcotics conviction would not be influenced by a state court order setting aside the conviction and releasing petitioner from all penalties and disabilities resulting under state law from the conviction); *Brownrigg v. Immigration & Naturalization Serv.*, 356 F.2d 877 (9th Cir. 1966) (state expungement proceedings do not expunge the state narcotics conviction for purposes of section 241(a)(11)); *Kelly v. Immigration & Naturalization Serv.*, 349 F.2d 473 (9th Cir.), cert. denied, 382 U.S. 932 (1965) (setting aside of alien’s plea of guilty pursuant to a California statute upon fulfillment of conditions of probation did not expunge the conviction for possession of heroin within the meaning of §241(a)(11)); *Wood v. Hoy,* 266 F.2d 825 (9th Cir. 1959) (state conviction of alien, followed by a
Naturalization Service, wherein the United States Court of Appeals for the Second Circuit held that a state conviction for possession of marijuana does not constitute a "conviction" within the meaning of section 241(a)(11) when it is accompanied by a certificate of relief from disabilities.10

This note will examine the relative merit of the reasoning articulated in both opinions, and will attempt to determine whether or not recognition of state expungement statutes would frustrate the congressional intent underlying section 241(a)(11). The outcome of the Rehman-Kolios controversy will have a significant impact on the field of immigration law, since a resolution in favor of Rehman would eliminate the necessity for mandatory deportation in similar factual situations.11

II. THE FIRST CIRCUIT'S DECISION IN Kolios

In 1972, petitioner, age twenty, a citizen of Greece who had immigrated to the United States in 1968, pleaded guilty to selling marijuana and was suspended sentence and placement on probation, remains a "conviction" within meaning of Immigration and Nationality Act §241(a)(4), which renders deportable any alien convicted of crime involving moral turpitude). See also Aguilara-Enriquez v. Immigration & Naturalization Serv., 516 F.2d 565 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (alien's conviction pursuant to a plea of guilty was final, rendering him deportable, even though alien had filed motion to withdraw guilty plea which was likely to succeed).

8. 544 F.2d 71 (2d Cir. 1976).
9. See note 2 supra.
10. Section 701 of the New York Correction Code provides for the discretionary granting of such certificates in the following language:

1. A certificate of relief from disabilities may be granted as provided in this article to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.

2. Notwithstanding any other provision of law, a conviction of a crime or of an offense specified in a certificate of relief from disabilities shall not cause automatic forfeiture of any license, permit, employment or franchise, including the right to register for or vote at an election, or automatic forfeiture of any other right or privilege, held by the eligible offender and covered by the certificate. Nor shall such conviction be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise any right or a disability to apply for or to receive any license, permit or other authority or privilege, covered by the certificate.

3. A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit, or other authority or privilege.

11. See notes 49–59 and accompanying text infra. Prior federal court interpretations of the requirements for a "conviction" under §241(a)(11) have uniformly been at variance with this aspect of the Rehman decision. See notes 48–59 and accompanying text infra; see also Annot., 26 A.L.R. Fed. 709 (1976).
placed on probation by a Texas state court.\textsuperscript{12} Because of his state conviction, he was subsequently found deportable under section 241(a)(11) of the Act.\textsuperscript{13} Petitioner was not deported at once, however, and in 1975, when his conditions of probation had been satisfied and his conviction in the Texas court set aside,\textsuperscript{14} he argued before the Board of Immigration Appeals that the deportation order should be reversed because his conviction within the meaning of the Act had been effectively erased.\textsuperscript{15} When the Board rejected this contention, petitioner appealed to the United States Court of Appeals for the First Circuit. The First Circuit, apparently with considerable misgivings,\textsuperscript{16} opted to adhere to what it conceived to be congressional policy,\textsuperscript{17} and affirmed the Board's decision. Although recognizing the theoretical inconsistencies and harsh personal realities inherent in such a determination,\textsuperscript{18} the court nonetheless concluded that Congress could not have intended state expungement statutes to shield alien drug offenders from the federal sanction of mandatory deportation.\textsuperscript{19}

\textsuperscript{12} Kolios v. Immigration & Naturalization Serv., 532 F.2d 786, 787 (1st Cir.), cert. denied, 429 U.S. 884 (1976).

\textsuperscript{13} 532 F.2d at 787. For the text of § 241(a)(11) of the Act, see note 2 supra.

\textsuperscript{14} 532 F.2d at 787.

\textsuperscript{15} Id.

\textsuperscript{16} See note 17 infra.

\textsuperscript{17} 532 F.2d at 789. The court voiced its reluctance to compel the deportation of petitioner in such a "sympathetic case," stating that "[h]is crime appears to have been near the minimum in the drug spectrum." \textit{Id.} at 788. Nonetheless, the court concluded, "not without some hesitancy," that relief in such cases as this is properly a matter for the Congress. We add our own view that some flexibility would appear to be desirable; automatic deportation of all drug offenders, despite conviction for a minor offense, satisfactory completion of a probationary term, and erasure of the conviction by the concerned state, would seem to serve no national interest.

\textit{Id.} at 790.

\textsuperscript{18} The First Circuit in \textit{Kolios} recognized the persuasive force of petitioner's contentions, in which [h]e questions why he should be deported when someone convicted of a crime of moral turpitude could avoid deportation by obtaining the same order of expungement. He also notes that had he been convicted for a narcotics offense under federal law and dealt with under the Federal Youth Corrections Act, he would not be deported following expungement . . . . Further, the Service now accords recognition to state expungements of marijuana offenders treated and expunged under state juvenile statutes . . . . In light of the currently ambivalent community and Congressional attitudes toward minor marijuana offenses . . . . the policy of construing deportation laws strictly against deportability . . . ., and the legitimate goal of stimulating rehabilitation behind any expungement statute, he contends that the time has come to ameliorate the harshness of the rule initiated by the 1959 opinion of the Attorney General.

\textit{532 F.2d} at 788-89 (citations omitted).

\textsuperscript{19} \textit{Id.} at 788-89. The position adopted in \textit{Kolios}, that established federal policies would be contravened by the infusion of state procedures into an analysis of a § 241(a)(11) "conviction," was articulated in \textit{Cruz-Martinez v. Immigration \\& Naturalization Serv.}, 404 F.2d 1198 (9th Cir. 1968), \textit{cert. denied}, 394 U.S. 955 (1969). In \textit{Cruz-Martinez}, the Ninth Circuit insisted that,

\[\text{[d]eportation is a function of federal and not of state law. In the context of a narcotics conviction, deportation is a punishment independent from any that may or may not be imposed by the states. While it is true that the same event, the state conviction, triggers both sets of consequences, it would be anomalous for a federal action based on a state conviction to be controlled by how the state}\]
The court commenced its analysis by examining the 1956 amendment to the Act, which expressly prohibited alien drug offenders from obtaining relief from deportation through executive pardon or judicial recommendation, while leaving those avenues available for aliens convicted of crimes involving moral turpitude. Although relying on this statute as a statement of congressional intent, the court readily conceded that a strict implementation of the policy favoring wholesale deportation of narcotics offenders would inevitably conflict with an equally pressing national concern: the rehabilitation of youthful offenders. Congressional intent in this latter area, the First Circuit noted, was evidenced by enactment of the Federal Youth Corrections Act, under which a young alien drug offender convicted chooses to subsequently treat the event. It is the fact of state conviction, not the manner of state punishment for that conviction, that is crucial.

404 F.2d at 1200.


21. Id. The amendment, inter alia, incorporated the final sentence into the current § 1251(b) which now provides:

The provisions . . . 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 section.


22. 532 F.2d at 787. Chief Judge Coffin, writing for the majority, stressed that the federal courts had long and faithfully adhered to the pronouncements of the Attorney General, and that the increasingly stringent measures imposed upon alien narcotics offenders by the 1956 amendment were indicative of a crystallized national policy to insulate the federal substantive requirements for deportation from intrusions by state expungement statues. Id. at 788. The Attorney General's pronouncements on the subject of state expungement procedures were enunciated in Matter of A-- -- F-- , 8 I. & N. Dec. 429 (1959). The Attorney General there announced that a post-probation expungement of a state narcotics conviction pursuant to a California statute was ineffective to erase the “conviction” required for deportation under § 241(a)(11). 8 I. & N. Dec. at 446. The Attorney General stated:

Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction . . . . I do not believe that the term “convicted” may be regarded as flexible enough to permit an alien to take advantage of a technical ‘expungement’ which is the product of a state procedure wherein the merits of the conviction and its validity have no place. I believe that Congress intended the inquiry to stop at the point at which it is ascertained that there has been a conviction in the normal sense in which the term is used in Federal law.

Id. at 445-46.

23. 532 F.2d at 789.

24. 18 U.S.C. § 5005-5026 (1970). Although, as previously noted (see note 2 supra), § 241(a)(11) of the Immigration and Nationality Act provides for the automatic deportation of an alien who has, at any time after entry, been convicted at either the state or federal level of an offense involving narcotic drugs or marijuana, Congress
on federal, rather than state, charges may avoid deportation. Nevertheless, the court reluctantly concluded that Congress, in passing the 1956 amendment declaring that alien drug offenders could obtain no reprieve through executive or judicial clemency, could not have intended that state expungements accomplish what a solemn and deliberate act of the President could not — the eradication of narcotics convictions for aliens. Moreover, the majority doubted whether broad state expungement statutes, which render expungement possible so long as the convicted alien is placed on probation regardless of his age at the time of the offense, could be reconciled with the stern congressional attitudes toward alien narcotics offenders. In 1950, established a nondeportation disposition of narcotics offenses through the enactment of the Federal Youth Corrections Act, Pub. L. No. 81–865, 64 Stat. 1085 (codified at 18 U.S.C. §5005–5026 (1970)). This Act provides for the expungement of a youthful offender’s federal narcotics conviction upon satisfactory completion of probation. Id. However, in apparent contrast to the lenient spirit of the Federal Youth Corrections Act, Congress amended the Immigration and Nationality Act in 1956 to specifically preclude aliens found deportable under §241(a)(11) from evading deportation by way of an executive pardon or a judicial recommendation against deportation. 8 U.S.C. §1251(b) (1970), as amended by the Narcotics Control Act of 1956, Pub. L. No. 728, §301, 70 Stat. 575. See Aberson, supra note 3, at 67.

25. 532 F.2d at 789. The Federal Youth Corrections Act provides in pertinent part: If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision . . . .

18 U.S.C. §5010(b) (1970). This statute also provides for the ultimate expungement of the youthful offender’s conviction upon satisfactory completion of the probationary term. “Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.” Id. at §5021(a).

After enactment of this legislation the issue that remained to be resolved by the federal courts was whether an expungement of a federal conviction pursuant to the Federal Youth Corrections Act eradicated the “conviction” for the purposes of §241(a)(11) of the Immigration and Nationality Act. This was answered in the affirmative by the First Circuit in Mestre Morera v. Immigration & Naturalization Serv., 462 F.2d 1030 (1st Cir. 1972). For a discussion of Mestre Morera, see notes 48 & 85–92 and accompanying text infra.

26. See note 21 supra.

27. 532 F.2d at 789–90.

28. Id. at 790. In an attempt to contrast the state statutes with the more restrictive methods by which Congress has moved to lessen sanctions for narcotics use, Chief Judge Coffin referred to the Controlled Substances Act which contemplates the possibility of expungement exclusively for first offenders convicted merely of possession of a controlled substance. 532 F.2d at 790. Section 844 of the Controlled Substances Act provides in pertinent part:

(a) It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was . . . otherwise authorized . . . .

(b) (1) If any person who has not previously been convicted of violating . . . any other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, is found guilty of a violation of subsection (a) of this section after trial or upon a plea of guilty, the court may . . . place him on probation . . . . If during the period of his probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him . . . . Such discharge or dismissal shall not be deemed a conviction for...
addition, the court noted that although Congress had manifested signs of adopting an increasingly benign position toward punishment for minor marijuana offenses, it had not displayed a willingness to extend such treatment to drug offenses in toto.

Judge McEntee, in a dissenting opinion, conceded that "[t]his case is a difficult one — in terms both of its human dimensions and of the problems of statutory construction which it involves." His dissent relied upon the holding of the Supreme Court in Fong Haw Tan v. Phelan, which announced that doubts as to the appropriate construction of the Act should be resolved so as to "trench on [an alien's] freedom" only to the extent required by the "narrowest of several possible meanings of the words used." Therefore, Judge McEntee emphasized the absence of an express statutory prohibition against consideration of state expungement statutes for the purpose of determining if there had been a "conviction" in the state court for purposes of section 241(a)(11). He contended, moreover, that the reasoning in Mestre Morera v. Immigration & Naturalization Service, in which the First Circuit held that Congress would have established an express prohibition if it had intended Federal Youth Corrections Act expungements to have no effect upon deportation of alien offenders, applied with equal force to the instant case.

Judge McEntee likewise rejected the majority's view that nonuniformity of application of section 241(a)(11) would contravene congressional intent. He asserted that Congress was aware of the different scope of state expungement statutes as contrasted with federal provisions and contended that courts should be "reluctant to strain toward uniformity where Congress has clearly countenanced variety through a system which partially relies on state laws." Lastly, Judge McEntee concluded that it is incumbent upon purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . or for any other purpose. 21 U.S.C. § 844 (1970) (emphasis added). It is submitted, however, that Chief Judge Coffin's argument appears unpersuasive in the face of state expungement of an alien's conviction for simple possession of a controlled substance — an offense of the precise nature which Congress has deemed worthy of unconditional expungement. Indeed, he conceded that "[a] closer question would be posed if a young offender's state conviction for simple possession had been expunged. In such a case it could be argued that he should be treated no more harshly than he would have been under 21 U.S.C. § 844." 532 F.2d at 790 n.11.

29. 532 F.2d at 790 & n.10. See note 83 infra.
30. See note 83 infra.
31. 532 F.2d at 790 (McEntee, J., dissenting).
32. 333 U.S. 6 (1948).
33. Id. at 10.
34. 532 F.2d at 791 (McEntee, J., dissenting). For the text of § 241(a)(11) of the Act, see note 2 supra.
35. 462 F.2d 1030 (1st Cir. 1972).
36. Id. at 1032. For a further discussion of Mestre Morera, see notes 48 & 85-92 and accompanying text infra.
37. 532 F.2d at 791 (McEntee, J., dissenting).
38. Id.
39. Id. For a comparison of pertinent state and federal provisions, see notes 2 & 6 supra.
40. For an examination of the manner in which the Federal deportation laws rely upon state law, see notes 67 & 69 infra.
Congress alone to limit the scope of mandatory deportation in these instances.41

III. THE SECOND CIRCUIT'S DECISION IN Rehman

Petitioner, a twenty-two year old citizen of Pakistan temporarily admitted to the United States on a student visa, was convicted of possession of hashish in violation of New York law.42 At trial, petitioner received a sentence of a conditional discharge for one year and a fine of one hundred dollars, while contemporaneously receiving a "certificate of relief from disabilities" under the discretion of the trial judge.43 Subsequently, the Immigration and Naturalization Service initiated deportation proceedings against petitioner because of this conviction.44 Petitioner argued before the Board of Immigration Appeals that receipt of a "certificate of relief from disabilities" removed his "conviction" for the purposes of section 241, thereby eliminating the potentiality of mandatory deportation.45 The Board, however, rejected petitioner's contentions and found him deportable on the strength of his state conviction.46 On appeal, the United States Court of Appeals for the Second Circuit set aside the order of deportation, explicitly rejecting the reasoning of Kolios and a long line of prior authority.47 Instead, the majority employed a less formalistic approach in ascertaining policy and determined that where federal law provides for eradication of federal narcotics convictions under identical factual circumstances, it is insupportable to deny state expungement statutes the same force and effect.48

41. The Second Circuit questioned the justification for the fixed state of the law in this area in Oliver v. United States Dep't of Justice, Immigration & Naturalization Serv., 517 F.2d 426 (2d Cir. 1975). Although the question of the statutory requirements for a "conviction" were never reached in the case, the court stated in dicta: While particularly drastic deportation sanctions with respect to aliens found guilty of participating in the importation of narcotics could readily be justified, we must confess difficulty in seeing the rationality of the broad sweep of § 241(a)(11), applying to mere addiction and even to the possession of marijuana, particularly as reinforced by the final sentence of § 241(b). Id. at 428. For the text of § 241(b), 8 U.S.C. § 1251(b) (1970), see note 21 supra.

42. Rehman v. Immigration & Naturalization Serv., 544 F.2d 71, 72 (2d Cir. 1976). Rehman was charged with the illegal possession of a controlled substance in the seventh degree pursuant to § 220.23 of the New York Criminal Code. N.Y. PENAL LAW § 220.23 (Supp. 1975). 544 F.2d at 72. Seventh degree possession, or simple knowing possession, is New York's lowest grade drug offense. Id.

43. 544 F.2d at 72; see note 10 supra.

44. 544 F.2d at 72; see note 2 supra.

45. 544 F.2d at 72. For the text of § 241(a)(11) of the Act, see note 2 supra.

46. 544 F.2d at 72.

47. Id. at 75. For a listing of the authorities supporting the Kolios decision, see note 7 supra.

48. 544 F.2d at 74–75. The majority's discussion focused upon two such analogous federal procedures. Id. at 74. Section 404 of the Controlled Substances Act, 21 U.S.C. § 844 (1970), provides that a federal court has the discretionary power to place a first offender on probation in lieu of a conviction for drug possession, thereby ruling out deportation under § 241(a)(11) for want of a "conviction." See note 28 supra. In addition, youthful offenders may, pursuant to the Federal Youth Corrections Act, 18 U.S.C. §§ 5005–5025 (1970), have their convictions expunged upon satisfactory
Judge Lumbard, writing for the majority, commenced his analysis by acknowledging that since construction of a term in a federal immigration statute is peculiarly a federal issue, an interpretation of the meaning of "convicted" within section 241(a)(11) necessitated a determination of congressional intent. The majority conceded that persuasive evidence of that intent appeared in the express dictate of section 241(b) that an alien convicted of a narcotics offense could not evade deportation by way of an executive pardon or a judicial recommendation against deportability, whereas an alien convicted of a crime involving moral turpitude was under no such restriction. However, Judge Lumbard noted that this posture was not so unyielding as to preclude exceptions to a strict deportation theory grafted onto the federal law itself in the form of the Federal Youth Corrections Act and the Controlled Substances Act. As a result of this apparent theoretical inconsistency, the Rehman majority speculated that the petitioner would probably not presently be subject to deportation had he been tried on federal, rather than state, charges. Thus, Judge Lumbard reasoned that a "less formalistic approach" was proper to ascertain whether petitioner had received a "conviction" for deportation purposes in state court. Using this approach, the majority concluded that "[t]here is no sound reason why state policies should not be accorded the same respect as federal leniency policies would receive under the same circumstances."
Finally, the Rehman court urged that the underlying philosophy of the Kolios decision — that it would contravene the intent of Congress if state expungement statutes were permitted to exempt alien offenders from federal penal enactments — was largely unrealistic. In the face of federal procedures that can accomplish precisely those objectives sought by the state statutes deemed deleterious by the Kolios court, the majority emphasized that it was self-evident that “states' freedom to remove persons from the ambit of deportation law would extend no further than where Congress itself has gone for federal criminals.

IV. A RESOLUTION OF THE Kolios-Rehman Controversy

Although the decisions in Kolios and Rehman may appear to be diametrically opposed, it is submitted that the First and Second Circuits agree upon several salient issues. Both circuit courts accept the propositions that interpretation of the federal immigration statutes requires an intensive examination of congressional purpose, that Congress itself has tempered its policy of automatic deportation of alien drug offenders by enacting legislation motivated by rehabilitative objectives, and that provisions of immigration statutes are to be construed strictly against deportation. However, the courts disagree as to the effects that federal recognition of state expungement statutes would have on the uniform application of immigration law. The First Circuit determined that congressional intent demanded that a “conviction” for the purposes of federal law be unaffected by state expungement statutes. The Kolios view is supported by the
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unequivocally expressed national policy of unconditional deportation of alien drug offenders. Consequently, despite the absence of statutory directives on the issue of state expungements, the Kolios court declined to extend the Federal Youth Corrections Act's deportation barrier to similar state statutes, ostensibly because this would undermine express congressional purpose. The Rehman court, on the other hand, concluded that enforcement of state expungement statutes would not lead to haphazard application of federal law; rather, the Second Circuit contended that federal law would be applied more uniformly since "deportation will not be triggered by minor differences and fortuitous technicalities in state laws." In addition, the Second Circuit stressed the inconsistency of recognizing federal procedures which prevent federal convictions from activating deportation procedures while refusing to accord the same treatment to state procedures.

The key issue which remains to be resolved, therefore, is whether or not state expungement statutes should be recognized in determining whether there has been a state court "conviction" for purposes of section 241(a)(11). A realistic evaluation of congressional intent in this area must be considered

64. Id. See note 22 and accompanying text supra.
66. See note 24-25 & 48 and accompanying text supra.
67. 544 F.2d at 75. Although Judge Lumbard did not elaborate upon this contention, it is presumed that the statement was made in reference to the fact that state convictions pivot upon the existence of state penal codes which regard drug related activity as criminal offenses. Moreover, the Board of Immigration Appeals, in Matter of Andrade, 14 I. & N. Dec. 651 (1974), has announced that state expungements pursuant to state statutes modeled after the Federal Youth Corrections Act, 18 U.S.C. §§5005-5026 (1970), would be given effect in eradicating the effect of the "conviction" for purposes of deportation. Id. at 652. See notes 95-98 and accompanying text infra. Hence, it is submitted that uniformity of enforcement is patently unattainable, in spite of the federal court's attempts to shield the immigration laws from the effects of state law idiosyncrasies. See note 69 infra.
68. 544 F.2d at 74-75. See notes 48, 56 & 67 and accompanying text supra.
69. An examination of the legislative history of the Narcotic Control Act of 1956, Pub. L. No. 728, § 301, 70 Stat. 575 (codified at 8 U.S.C. § 1251(b) (1970), reveals no express congressional intent to insulate deportation from the potential effects of state expungement procedures; indeed, no mention is made in the Senate report of state expungement statutes or of a fixed congressional policy to require only convictions "in fact" for the purposes of section 241(a)(4). See S. Rep. No. 1997, 84th Cong., 2d Sess. 3 (1956). Therefore, it would appear that the only substantive support for the contention in Kolios that deportation under the statute was designed to function independently from state procedural "technicalities" is to be derived from the theory that Congress, in rendering ineffectual executive pardons and judicial recommendations against deportation, must also have intended that no state expungement procedure be permitted to contravene the automatic effects of §241(a)(11). Notwithstanding congressional intent, however, the peculiarities of state law may effect the operation of §241(a)(11). For example, in states where marijuana-related activity has been decriminalized, a conviction would not be attainable. In contrast, in other states where criminal sanctions do append to such activity, a conviction may result which could lead to subsequent deportation. See note 6 supra.

In Matter of G——, 9 I. & N. Dec. 159 (1960), the Attorney General stated that the question of whether an alien is deemed "convicted" of an activity involving moral turpitude, and thereby deportable under §241(a)(4) of the Act, 8 U.S.C. § 1251(a)(4) (1970), is not "purely a 'federal question' to be determined in terms of the policy
in conjunction with evolving societal attitudes toward deportation and drug use. It is urged that the *Rehman* holding that state judicial relief from disabilities is effective to insulate a narcotics offender from the sanction of deportation under section 241(a)(11) does no violence to the spirit of the federal immigration laws, while demonstrating a heightened sensitivity to the plight of the alien and the practical realities of deportation.

The rationale espoused in the *Kolios* line of cases, concerning the impotence of state expungement statutes to prevent federally sanctioned deportation, appears to be derived from the 1959 opinion of the Attorney General of the United States in *Matter of A --- F ---*. In that case, the Attorney General admonished that the “clear national policy” of deportation of narcotics offenders precludes an alien narcotics violator from evading deportation simply because “the State affords a procedure authorizing a technical erasure of the conviction.” Therefore, the Attorney General held on review that state expungements following a probationary term will have no bearing upon the validity of a deportation order under section 241(a)(11), since “Congress intended the inquiry to stop at the point at which it is ascertained that there has been a conviction in the normal sense in which the term is used in Federal Law.” The First Circuit’s reliance upon this statutory analysis is, however, subject to criticism on

behind its enactment and without regard to state law and procedure” and that a state expungement of an alien’s conviction “withdraws the support of that conviction from a deportation order ... and brings it to the ground.” Id. at 169. Thus, the application of federal law in the realm of deportation of aliens would appear to require an inquiry into the existence of state procedures, despite the fact that such procedures may operate to remove aliens from the sphere of federal sanctions.

Therefore, it is submitted that, although the legislative histories of the amendments of 1956 and 1960 unequivocally pronounce a congressional policy of severity towards alien drug offenders, this alone is insufficient to establish a congressional intent to disregard state expungement procedures in determining whether a conviction has been obtained at the state level. See S. REP. No. 1651, 86th Cong., 2d Sess. 4, reprinted in [1960] U.S. CONG. & AD. NEWS 574, 576. S. REP. No. 1997, 84th Cong., 2d Sess. 3, reprinted in [1956] U.S. CONG. & AD. NEWS 651, 661.


71. See note 2 supra.

72. Mr. Justice Brandeis, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), recognized that deportation “may result also in loss of both property and life; or of all that makes life worth living.” Id. at 284. Similarly, Mr. Justice Douglas observed in *Bridges v. Wixon*, 326 U.S. 135, that “[t]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty — at times a most serious one — cannot be doubted.” Id. at 154. For further discussion of the characteristics of punishment inherent in deportation, see Note, *Resident Aliens and Due Process: Anatomy of a Deportation*, 8 VILL. L. REV. 566, 576-85 (1963).

73. See note 7 supra, 12-41 and accompanying text supra.


75. Id. at 445. See note 22 supra.

76. 8 I. & N. Dec. at 445.
several grounds. Although the amendment of 1956 specifically precluded aliens subject to deportation under Section 241(a)(11) from employing executive pardon or judicial recommendation against deportation as a shield, section 241(a)(11) contained no reference to marijuana prior to 1960, and applied exclusively to crimes involving narcotics. The Attorney General's oft quoted statement of congressional intent on the subject of state expungement procedures was thus made solely in reference to state narcotics convictions, and did not consider state convictions for sale or possession of marijuana. Consequently, although the Attorney General's pronouncements may have accurately reflected the prevailing congressional sentiment in 1959 toward narcotics violations by aliens, a presumption that the severe congressional posture toward crimes involving narcotics necessarily attaches by extension to marijuana related offenses would seem unfounded.

Alternatively, the subsequent inclusion of marijuana offenses within the ambit of section 241(a)(11) does not, in and of itself, indicate that Congress intended to eliminate the effects of state expungement statutes.

Recent legislation has effected a lessening of criminal sanctions for the possession and personal use of marijuana, in keeping with modified societal attitudes toward marijuana. These developments, in conjunction with an

77. See note 21 supra.
78. See note 2 supra.
79. See note 21 supra.
81. See note 80 supra.
82. Indeed, then Solicitor General Bork remarked that “[w]hile the inclusion of marihuana offenses in Section 1251(a)(11) in 1960 did reflect a judgment that such offenses could be a basis for deportation, the legislative history of that amendment does not suggest a specific congressional intent that expungement of a marihuana conviction (or indeed of any conviction covered by Section 1251(a)(11)) should be completely disregarded for deportation purposes.” Letter from Robert H. Bork, Solicitor General, to Charles Gordon, Esq., General Counsel for the Immigration & Naturalization Serv., reprinted in Matter of Andrade, 14 I. & N. Dec. 651, 659 n.6 app. (1974).
83. See note 70 supra. In addition to those congressional activities designed to exclude select marijuana offenses as bases for deportation that were enunciated in Kolios, 532 F.2d at 790 n.10, there have been other equally persuasive manifestations of congressional concern over the effects of marijuana use in the United States. Preceding the establishment of the National Commission on Marijuana and Drug Abuse (Commission), it was noted that, “[t]he Congress finds that the use of marihuana is increasing in the United States, especially among the young people thereof, and that there is a need for a better understanding of the health consequences of using marihuana. The Congress further finds that ... there is a lack of an authoritative source for obtaining information involving the health consequences of using marihuana.” Act of June 30, 1970, Pub. L. No. 91-296, §501, 84 Stat. 352. Hence, Congress provided for the establishment of the Commission to study, inter alia, “the pharmacology of marihuana and its immediate and long-term effects, both physiological and psychological” and “the relationship of marihuana use to aggressive behavior and crime.” Act of Oct. 27, 1970, Pub. L. No. 91-513, §601, 84 Stat. 1236. Additionally, the enactment of §404 of the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified at 21 U.S.C. §844 (1970)) provided for the availability of expungement for first convictions on charges of simple possession of...
application of the well-established judicial principle that deportation statutes are to be construed in favor of the alien, would appear to rebut the Kolios court's contention that congressional dictates leave the courts powerless to revise past interpretations of congressional objectives. Earlier, in Mestre Morera v. United States Immigration & Naturalization Service, the First Circuit ruled that an expungement of a marijuana conviction pursuant to successful completion of a probationary term under the Federal Youth Corrections Act constituted an erasure of the "conviction" mandating deportation under section 241(a)(11). In reaching this conclusion, the First Circuit considered the language of section 241(b) to be an unsubstantial obstacle to a determination that a certificate of relief effectively thwarts deportation under the Act. The Mestre Morera court emphasized that such federally endorsed "technical erasures" expressed a "Congressional concern, which we cannot say to be any less strong than its concern with narcotics, that juvenile offenders be afforded an opportunity to atone for their youthful indiscretions." However, in Kolios, the First Circuit attempted to distinguish the policy objectives behind the Federal Youth Corrections Act from those of state expungement statutes generally, and stated that their decision in Mestre Morera stemmed from "the Congressional policy of rehabilitation for young offenders." It is submitted, however, that this reasoning is contrary to the court's statement in Mestre Morera that "[t]he clear purpose for the automatic setting aside of a youthful offender's conviction . . . under the Federal Youth Correction Act is to relieve him not only of the usual disabilities of a criminal conviction, but also to give him a second chance free of a record tainted by such a conviction." Based on this reasoning, there appears to be no valid basis for distinguishing expungements under the Federal Youth Corrections Act from those under state statutes on the basis of underlying policy, since both seek to insulate the first offender from deportation and provide an opportunity for the young alien to right himself.

controlled substances, rendering the prior conviction a nullity for any and all purposes. See note 28 supra. Finally, the Commission's 1972 report contained the recommendation that both possession of marijuana for personal use and "casual distribution of small amounts of marijuana for no remuneration, or insignificant remuneration not involving profit" be decriminalized. First Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding, at 152 (1972). For a pertinent discussion on the topic of marijuana and deportation, see Gordon, supra note 3, at 20-21.

86. See note 25 supra.
87. 462 F.2d at 1032.
88. See note 21 supra.
89. 462 F.2d at 1032.
90. Id.
91. 532 F.2d at 789-90.
92. Id. at 789.
93. 462 F.2d at 1032.
94. For a discussion of Mestre Morera and subsequent cases of significance, see Aberson, supra note 3, at 68-81.
There remains, then, only the assertion of the Kolios line of authority that reliance upon state expungement procedures would cause deportation to be wholly dependent upon the individual characteristics of state law, and would thereby defeat the purposes of federal law. This contention was implicitly rejected, however, in Matter of Andrade, which held that a state marijuana conviction of a youth offender expunged pursuant to a state statute analogous to the Federal Youth Corrections Act will not constitute a deportable "conviction" so long as the youthful alien would have qualified for federal expungement of his conviction. This decision, sparked by a recommendation of the Solicitor General of the United States, extended the Mestre Morera doctrine to the domain of the states pursuant to the Solicitor General's conclusion that "there is little, if any, reason to justify a different result where the expungement of a youth offender's conviction occurred pursuant to state law." In light of the Andrade ruling, it is therefore submitted that the contention in Kolios that state procedures may not intrude upon the sphere of federal penal enforcement is clearly illusory. This conclusion is supported by Andrade since certain state expungement procedures are given effect in spite of the fact that uniformity of application will be frustrated.

V. Conclusion

Andrade thus precludes an argument against the efficacy of state expungement statutes that is predicated upon a "federal autonomy" analysis. Moreover, no compelling distinctions can be drawn between state expungement statutes which adopt the form of the Federal Youth Corrections Act and those that provide for an extended probationary term before expungement will be made available. The failure of the federal courts to recognize the need for reformation of judicial thought in this area may be attributable to a reluctance to depart from a statutory analysis solidified over time by application of stare decisis. This passive maintenance of the status quo is particularly unfortunate when it results in such extreme consequences — deportation for minor drug related offenses that society no longer considers repugnant.

It is accordingly submitted that Rehman, along with Mestre Morera and Andrade, reflects a welcome and timely change in judicial interpretation of federal immigration laws. It is hoped that in the future, other courts will follow the progressive lead established in these cases.

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95. See notes 19 & 22 and accompanying text supra.
97. Id. For an in-depth discussion of Andrade, see Aberson, supra note 3, at 76–81.
98. See note 82 supra.
100. See note 69 supra.
101. See note 67 and text accompanying notes 95–99 supra.
102. See notes 67 & 69 and text accompanying notes 95–99 supra.