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FEDERAL POWER TO REGULATE IMMIGRATION AND JUDICIAL REVIEW OF ADMINISTRATIVE ORDERS

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FUNDAMENTALLY, JURISDICTION over immigration derives from article six of the Constitution, which declares that the Constitution and the laws of the United States which are made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land.

The authority to regulate the admission and expulsion of aliens is found in the power inherent in a sovereign state to protect itself. This regulatory authority over aliens is also found in the specific constitutional power given to Congress in article one to regulate commerce with foreign nations which includes the travel and transportation of persons. Such authority is recognized and limited by clause one of section nine of that article which declares that the migration or importation of such persons as any of the then existing States shall think proper to admit, shall not be prohibited by Congress prior to the year 1808. It necessarily follows that the States have no substantial power over these matters. By the same token, Congress, exercising the right of national sovereignty, may enact legislation providing the conditions and qualifications for the admission of aliens into the United States and designating what classes shall be apprehended and deported. Such laws provide express authority to the responsible administrative agencies to prescribe regulations to enforce the provisions of the statute; and regulations which are reasonable and consistent with the intent and purpose of the statutes have the force of law.1

The authority of the courts in this field stems from three constitutional provisions: (1) the fifth amendment which provides that "no person shall be deprived of life, liberty, or property, without due process of law"; (2) article three which declares that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and

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establish; and (3) the further provision that the judicial power shall extend to all cases of law and equity arising under the Constitution, the laws of the United States and treaties made under their authority. It may here be mentioned that under the same provisions Congress has vested the District Courts with the power to issue writs of habeas corpus.\textsuperscript{2} Congress has also vested the courts with jurisdiction "in a case of actual controversy . . . [to] declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought," and "such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."\textsuperscript{8} In addition to this general jurisdiction to make declaratory judgments, Congress has also vested the courts with specific jurisdiction to grant declaratory judgments in case any person claims a right or privilege as a national of the United States and he is denied such right or privilege by any department or agency, or executive official thereof, on the ground that he is not a national of the United States.\textsuperscript{4}

The courts adjusted their duty to support the Constitution and laws made thereunder by ruling that Congress has the power to exclude any alien for any reason\textsuperscript{6} or deport any alien for any reason;\textsuperscript{6} that the immigration statutes by enumerating conditions upon which permission to land may be denied prohibits denial in other cases;\textsuperscript{7} that the applicant for admission shall have a fair hearing;\textsuperscript{8} that as part of due process of law no alien is to be deported without having been given opportunity to be heard upon the question involving his right to be and remain in the United States,\textsuperscript{9} even though he is not entitled to due process to the extent that applies in the case of a person being tried on the charge of the commission of a crime;\textsuperscript{10} and that the decisions of immigration officers are conclusive upon matters of fact,\textsuperscript{11} where the orders of exclusion or deportation are supported by evidence.\textsuperscript{12} By these holdings the courts have assured that no alien will be excluded or deported who is not within the class which Congress prescribed by law. Otherwise, the way would be left open for executive officers to

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10. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
exclude or deport aliens upon grounds created solely by executive officers without authority of law. Such activity would be executive usurpation of a legislative function.

It should also be noted that a striking distinction is made by the courts between persons applying for admission on the ground of citizenship and those resisting deportation for the same reason. In the first class of cases the courts have ruled that the administrative decision is final if a hearing meeting all the requirements of due process of law was granted and the excluding decision was based on substantial evidence. In the second class the ruling is that if there is a substantial claim of citizenship, the courts will try the case de novo on questions of fact as well as the law involved. In this latter class of cases a declaratory judgment of citizenship is often given.

Exclusion and deportation may now be resisted by habeas corpus, or declaratory judgment, or petition for review under the Administrative Procedure Act. The deportation proceeding is civil in nature and not a criminal prosecution within the meaning of the fifth and sixth amendments to the Constitution. Therefore, deportation is not a punishment for crime. However, in effecting deportation, the rights that exist in “due process of law” may not be disregarded; and an alien, although alleged to be illegally in this country, may not be taken into custody and deported without first being accorded a hearing on his right to be and remain in the United States.

The hearing, though summary, must be fair and in good faith. To meet the fundamental requisites of a fair hearing it has been generally held that

(a) the course of the proceeding shall be appropriate to the case and just to the party affected;

(b) the accused shall be notified of the nature of the charge against him in time to meet it;

(c) he may have the advice and assistance of counsel of his own choice and at his own expense, if he so desires;

(d) he may have the time and opportunity, after all the evidence is produced and known to him, to introduce his own evidence and witnesses to refute it;

(e) he may, if he chooses, cross-examine witnesses testifying against him;
(f) the decision shall be governed by and based solely upon the evidence brought out at the hearing; and
(g) there must be some substantial evidence taken at the hearing to support the decision.

The rules of evidence to be employed must be within reason and fairness, although those applicable in judicial proceedings need not be strictly followed. Generally, evidence is admissible if it is relevant to the issue and the best obtainable.

In deportation proceedings the burden in all cases is upon the government to prove alienage and deportability. When United States citizenship is claimed, the burden is upon the claimant after the government has made out its case. However, administrative officers are obliged to establish status, that is, alienage or citizenship; and, if the claim of citizenship is rejected by the administrative agency, the claimant is entitled to a judicial determination of his status.

In view of the fifth amendment, an alien who is deprived of his liberty or who is about to be deported may resort to judicial review of the proceeding by habeas corpus. Generally in a habeas corpus proceeding based on a deportation case, the court determines whether the following three elements are present: (1) a fair hearing, (2) correct interpretation of the law, and (3) substantial evidence to support the order of deportation.

It is not well settled whether the doctrine of res judicata applies to the discharge of an alien in habeas corpus proceedings. But a

22. Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928).
23. Backus v. Owe Sam Goon, 235 Fed. 847 (9th Cir. 1916).
25. 4 Solicitor of Labor File 2983 (Feb. 27, 1932).
27. Yuen Boy Ming v. United States, 103 F.2d 355 (9th Cir. 1939).
32. Cases holding that res judicata does not apply to determinations made in habeas corpus: Wong Doo v. United States, 265 U.S. 239 (1924); United States ex rel. Ket-
judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights and questions of law or fact put in issue and adjudicated therein, when the same come again into controversy between the same parties. Hence, when an alien has already been accorded judicial review of his deportation case by habeas corpus, he is not entitled to a subsequent review in a declaratory judgment action.

It is well settled that under the doctrine of res judicata a judgment on the merits in a prior suit bars a second suit between the same parties on the same cause of action, and that under the doctrine of collateral estoppel by judgment there is precluded relitigation of issues actually litigated and determined in a prior suit regardless of whether it was based on the same cause of action as the second suit. It would therefore seem that, under the doctrine of collateral estoppel by judgment, the Attorney General of the United States may be precluded from relitigating issues of fact and law actually litigated and determined in a prior deportation proceeding, even though the Executive Department is not strictly bound by res judicata.

The writ of habeas corpus is unavailable to one who is not actually in custody, even though he may have good reason to believe that his arrest is imminent. By the same token, one who has been released on bail or parole may not maintain habeas corpus unless he first surrenders to the custody of the immigration officers.

Finally, the alien must exhaust his administrative remedies, and a final order of deportation must have been issued before the courts will intervene in a habeas corpus proceeding.

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33. Wyoming v. Colorado, 286 U.S. 494 (1932); Continental Oil Co. v. Jones, 176 F.2d 519 (10th Cir. 1949); Oklahoma ex rel. Comm'nrs. v. United States, 155 F.2d 496 (10th Cir. 1946); Cruz-Sanchez v. Robinson, 136 F. Supp. 53, 55 (S.D. Cal. 1955); RESTATEMENT, JUDGMENTS § 117 (1942); 30 AM. JUR., Judgments § 283, (1940).

34. Cruz-Sanchez v. Robinson, supra note 33.


38. Wales v. Whitney, 114 U.S. 564 (1885); Van Meter v. Sanford, 99 F.2d 511 (5th Cir. 1938).


The courts are in conflict as to whether a petitioner may be released on bail during the pendency of habeas corpus proceedings. In some jurisdictions, judges deny that they have any power to grant a release on bail, holding that the right to bail is dependent on statute and that only the Attorney General is vested with statutory power to permit enlargement on bail in deportation cases. Other jurists, however, proceed on the assumption that they have inherent power to award the privilege of bail, and that it is within the discretion of the court to grant such privilege in meritorious cases. There appears to be general agreement, however, that bail may be permitted while an appeal is pending, particularly if such appeal is by the government.

Having already discussed habeas corpus as an avenue for challenging administrative deportation orders, let us now consider injunctive relief under the Federal Declaratory Judgment Act and review under the Federal Administrative Procedure Act.

Before the enactment of the Federal Administrative Procedure Act of June 11, 1946, the only procedure for obtaining judicial review was by habeas corpus. However, deportation was successfully resisted in 1939, when, in Perkins v. Elg, the complainant litigated an erroneous determination of her status of American citizenship in an action for declaratory and injunctive relief. Such right to a judicial hearing on the claim of citizenship had been recognized as early as 1922 in Ng Fung Ho v. White.

All of the provisions of the Administrative Procedure Act, with the exception of sections 7, 8, and 11, became effective on September 11, 1946, three months after the date of approval. Sections 7 and 8, the formal provisions as to hearing and decision, became effective on December 11, 1946, six months after the date of approval. Although the act doesn’t say so expressly, it would seem that subsection (c) of section 5 relating to separation of functions became operative also on December 11, 1946, by reason of the fact that its provisions cover the conduct of officers presiding at hearings under section 7.

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42. Bridges v. Wixon, 326 U.S. 135 (1945); Whitfield v. Hanges, 222 Fed. 745 (8th Cir. 1915); Wah v. Colwell, 187 Fed. 592 (9th Cir. 1911); Principe v. Ault, 62 F. Supp. 279 (N.D. Ohio 1945); In re Lum Foy, 128 Fed. 974 (D. Mont. 1904).
45. 307 U.S. 325 (1939).
46. 259 U.S. 276 (1922).
In 1950, the United States Supreme Court, in *Wong Yang Sung v. McGrath*, declared that deportation hearings came within the scope of the Administrative Procedure Act sections providing formal requirements and a separation of functions. The majority of the court gave no weight to the argument that to apply the act would cause inconvenience and added expense to the Immigration Service. As a consequence of the decision, pending hearings and many cases already decided were ordered reopened and retried administratively. In the same year, contemporaneous with the *Sung* case, the United States Supreme Court decided, in *McGrath v. Kristensen*, that an erroneous determination of eligibility for statutory relief from deportation was subject to review under the Federal Declaratory Judgment Act of June 25, 1948, because it presented an actual controversy between the alien and the immigration officials over the alien's legal right to remedial relief from deportation.

To offset the impact of the *Sung* decision, Congress, in a rider to the Supplemental Appropriations Act of 1951, declared deportation proceedings exempt from the requirements of sections 5, 7, and 8 of the Administrative Procedure Act. Then, in *Heikkila v. Barber* the United States Supreme Court held that section 19 of the Immigration Act of February 5, 1917, which governed the deportation order in this proceeding, "clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," that is to say, except by habeas corpus. It is to be here noted that the Heikkila proceeding was instituted before December 24, 1952, the effective date of the McCarran-Walter Omnibus Immigration and Nationality Act of June 27, 1952. The effect of the decision was to narrow the scope of judicial inquiry to what it had been before the decision in the *Sung* case.

Since the 1952 act has been in effect, the courts have been in accord that the judicial review provided therein is not synonymous with habeas corpus but is assimilated to the scope of inquiry expressed in the Administrative Procedure Act. In 1955, the United States Supreme Court declared, in *Shaughnessy v. Pedreiro*, that the Administrative Procedure Act applies in deportation proceedings instituted

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under the 1952 act, and that the Commissioner of Immigration and Naturalization is not an indispensable party. The Court reasoned that since the orders of the District Director are final under the regulations, it seems highly appropriate that the one charged with enforcement of such orders should represent the government's interest and that there is no adequate reason to subject the alien to the burden and expense of traveling to the District of Columbia with his witnesses, in order to contest his deportation.

In a series of decisions handed down by the Court of Appeals for the District of Columbia Circuit on October 13, 1955, it was held that judicial review of deportation orders issued before December 24, 1952 was available where the complaints for review had been filed after that date and that the legality of an exclusion order issued before December 24, 1952, may be challenged either by habeas corpus or review under the Administrative Procedure Act, if the complaint was filed after the effective date of the 1952 act. It is revealing to note the rationale of the Supreme Court in the We Shung case:

"It may be that habeas corpus is a far more expeditious remedy than that of declaratory judgment, as the experience of Shung may indicate. But that fact may be weighed by the alien against the necessity of arrest and detention after which he may make his choice of the form of action he wishes to use in challenging his exclusion. In either case, the scope of the review is that of existing law."

Following the reasoning in Shaughnessy v. Pedreiro, the United States Supreme Court, on March 11, 1957, declared in Ceballos v. Shaughnessy that neither the Attorney General nor the Commissioner of Immigration is a necessary party to an alien's suit for a judgment declaring him eligible for suspension of deportation and restraining the District Director from taking him into custody for deportation. The Court reasoned that the District Director is the official who would execute the order of deportation; hence, he is a sufficient party defendant. The courts have no power to review administrative discretion when it is reasonably exercised. But, in appropriate circumstances,
they can compel correction of an abuse of discretion or compel an official to exercise his discretion where he has obviously failed or refused to do so. Furthermore, the courts may not interfere with administrative determinations unless upon the record the proceedings were manifestly unfair or substantial evidence to support the finding is lacking, or the evidence reflects manifest abuse of discretion. It is the general attitude of the judiciary not to interfere with a discretionary act by the Attorney General, except for a refusal to exercise discretion or for taking action founded on an improper legal basis, or for failure to observe due process.

Obviously, the courts are without power to substitute their discretion for that of the Attorney General in whom the power is vested by statute. But, to carry out the Congressional intent, the statute must be given a reasonable construction.

A resident alien is entitled to due process of law, since deportation is equivalent to punishment or exile.

Section 10(e) of the Administrative Procedure Act provides:

“So far as necessary to decision . . . the reviewing court shall . . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence . . . or (6) unwarranted by the facts. . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party. . . .”

It follows that the scope of judicial inquiry under the Administrative Procedure Act encompasses a review of the entire record.

Before concluding, we should like to discuss some areas in which the courts have defined the scope of their inquiry.

A basic principle of our administrative law is that of exclusiveness of the record. Under that principle, the agency’s decision must be based

59. Mastrapasqua v. Shaughnessy, 180 F.2d 999, 1002 (2d Cir. 1950).
60. United States ex rel. Adamantides v. Neely, 191 F.2d 997, 1000 (7th Cir. 1951).
exclusively on materials contained in the public record which both sides know about and have a chance to rebut. More and more in recent years, however, adherence to this rudiment of administrative justice has given way in areas deemed to be affected by considerations of national security. The Supreme Court has not been quick to censure these deformities in agency procedure. On the contrary, where the point has been squarely presented to it, the Court has found means to rationalize these departures from the fundamentals of fair play.

The most recent case of this type is Jay v. Boyd.\(^67\) It arose under the Immigration Act which provides that the Attorney General "may in his discretion" suspend deportation of any deportable alien fulfilling certain statutory requirements relating to moral character, hardship, and period of residence in this country. Suspension of deportation had been denied Jay on the basis of certain confidential information, which was not revealed to him at the administrative hearing. On appeal to the courts, he urged that the regulation authorizing reliance upon such secret evidence was invalid. The Supreme Court rejected this claim.

Notwithstanding this decision, the United States District Court for the Southern District of Florida held in 1956, in United States ex rel. Kasel de Pagliera v. Savoretti,\(^68\) that aliens seeking entry in an exclusion proceeding, had a right to present written statements and accompanying information which had to be considered by the agency as well as a right to be informed of the reasons why they were being excluded. It is recognized that the decision goes beyond the prior cases on the subject, which have drawn a sharp distinction between deportation and exclusion, holding the latter not subject to the demands of due process. However, this distinction is an illogical one which has been sharply criticized. Compare United States ex rel. Nicoloff v. Shaughnessy,\(^69\) holding that before an alien could be finally excluded on the basis that he would prejudice the public interest or endanger national security, he was entitled to submit a written statement and accompanying information.

On the question of "fair hearing," the District Court for the Southern District of California, in Fausto v. Brownell,\(^70\) decided in 1956, strongly condemned the administrative procedure at a Board of Special Inquiry Hearing involving the question of citizenship. In this case one member of the board was the twenty-one year old secretary of

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\(^67\) 351 U.S. 345 (1956).
\(^68\) 139 F. Supp. 143 (S.D. Fla. 1956).
\(^70\) 140 F. Supp. 660 (S.D. Cal. 1956).
the chairman, the second member was not present at the hearing, and
the third member acted as chairman and interrogator. Since the alien
spoke no English and only the chairman understood Spanish he also
acted as translator and interpreter. Under the immigration law, Boards
of Inquiry are required to be composed of three members. The court
declared that this is the sort of "administrative procedure" which
caused investigation in Congress relative to administrative agencies
constituting themselves prosecutors, juries, and judges at one and the
same time. This is the activity condemned by the Supreme Court in
_Wong Yang Sung v. McGrath._

Section 292 of the Immigration and Nationality Act of 1952
provides the right to counsel of the alien's own choice, employed at
his own expense, so long as such counsel is one regularly enrolled on
the roster of attorneys authorized to practice before the Board of
Immigration Appeals.

_United States v. Minker_ illustrates the fact that agencies possess
powers of subpoena only to the extent to which those powers are
delegated to them. The Immigration and Nationality Act of 1952
empowers immigration officers to subpoena the attendance and testi-
mony of witnesses in any immigration proceeding. The question at
issue in this case was whether this section empowered an immigration
officer to subpoena a naturalized citizen who was the subject of an
inquiry by the Service. It was held that his testimony could not be
compelled. However, in _United States v. Zuskar_, the Court of Appeals
for the Seventh Circuit held, in 1956, in a case arising out of proceed-
ings by the United States to compel two naturalized citizens to testify
before Immigration investigators concerning two other named persons,
that the _Minker_ rule did not apply, even though one of the defendants
claimed that he might be the subject of inquiry by the Service.
Nevertheless, it would seem from the dictum that the courts would not
compel the testimony of a naturalized citizen in a proceeding concerning
other named persons, if the evidence disclosed that the real purpose
behind the District Director's subpoena was to obtain the witness' appearance in order to secure testimony adverse to the witness.

In summary, it may be said that to meet the standard of due
process of law in exclusion or deportation cases there must be a fair
administrative hearing and substantial evidence of probative value to
support a finding of excludability or deportability.

73. 237 F.2d 528 (7th Cir. 1956).
Administrative orders of exclusion or deportation may now be challenged judicially either by habeas corpus, declaratory judgment, or review under the Administrative Procedure Act; and all three forms of proceeding may be instituted in the same action, if the alien is in the custody of the Immigration Service. Otherwise, he may file a complaint for declaratory judgment and petition for review under the Administrative Procedure Act, in one action to test the order of deportation.

The vast expansion in administrative authority caused by the war and postwar emergencies has led people on both sides of the partisan political boundary to realize the need for safeguards. Extremists on both sides have moved toward the middle; and it may be said that the procedural safeguards imposed by the Administrative Procedure Act have not, despite fears which were expressed to the contrary, really interfered with the effective functioning of the administrative process.