Resident Aliens and Due Process: Anatomy of a Deportation

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# NOTE

## RESIDENT ALIENS AND DUE PROCESS: ANATOMY OF A DEPORTATION†

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† Editor's Note: The Case Note section of the Review has been omitted from this issue only. This Note represents the combined efforts of candidates for staff positions on the editorial board of Villanova Law Review.
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I.

INTRODUCTION

Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore. Send these, the homeless, tempest-tost, to me, I lift my lamp beside the golden door.¹

It was in the spirit of these words that this country dealt with aliens² for many years after the War of Independence. Aside from two acts passed in 1798, one of which was limited in its application to wartime,³ and the other of which expired in 1800,⁴ no attempt was made to place restrictions on aliens. The westward expansion of the country brought a pressing need for pioneers and the government was only too happy to accept those who were willing to come and endure the rigors of colonial life.

The first attempt by Congress to place restraints on immigration was in 1882, when it levied a head tax on immigrants.⁵ The act was subsequently upheld as a regulation of foreign commerce in the Head Money Cases⁶ but the Court specifically denied that the power exercised was the taxing power.⁷

By the year 1882, many thousands of Chinese laborers had entered this country. Agitation from west coast inhabitants fearful of the Yellow Horde within their midst resulted in Congress’ legislating to exclude Chinese laborers.⁸ The law did not apply to those presently within the country. If a Chinese laborer wished to leave the country, he had to obtain a certificate of identification in order to re-enter. This right of re-entry was later foreclosed by the Act of October 1, 1888⁹ which prohibited entry to Chinese laborers, with or without a certificate. In Chae Chan Ping v. United States,¹⁰ the validity of the Act was challenged. Although the facts of the case presented only the issue of the power of

¹. Lazarus, The New Colossus. See Merriam, Emma Lazarus, Woman With a Torch, 156 (1956). These words are inscribed on a bronze tablet on the Statue of Liberty in New York harbor—one of the first sights of this country to greet the immigrant.
⁴. An Act Concerning Aliens, 1 Stat. 570 (1798). This act together with the Sedition Act, passed the same year, met with great unpopularity which was responsible for its short life.
⁷. Id. at 595, 5 S. Ct. at 252 “... The power exercised in this instance is not the taxing power. The burden imposed on the ship-owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration.”
⁹. 25 Stat. 504 (1888).
Congress to exclude, the validity of the Act was sustained by the same reasoning Congress used to justify its passage—a theory of self preservation. These first few cases laid down the principle of Congressional power over exclusion of aliens. This power was later accepted and applied in cases holding valid, acts of Congress dealing not with exclusion—but expulsion.

It is not the purpose of this Note to revisit and to re-analyze the major cases in the deportation field. This aspect of the problem has been covered before, much more exhaustively than is possible here. It is sufficient, by way of introduction, to point out that the constitutional analysis used by the Court has not always been correct or consistent. It is the purpose of this Note to examine all aspects of, and answer the question—whether the government of the United States can, consistent with the letter and spirit of the Constitution under which it functions, deport a lawfully admitted, long time resident alien, and if so, by what procedure.

At this point it is necessary to articulate one distinction of which, unhappily, the courts have not always been mindful, that is the distinction between exclusion and expulsion. Congressional power of exclusion is the power to deny anyone admission to this country. Expulsion is the removal of a person from this country once he has entered. It is obvious that vastly different constitutional issues are raised when the full import of these terms is realized. The courts have confused the power of exclusion with the

11. Id. at 595, 9 S. Ct. at 626. Mr. Justice Field, speaking for a unanimous court stated: “They remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.”

12. The genesis of this notion of Congressional power over expulsion can be traced to the dicta of Mr. Justice Gray in Nishimura Ekiu v. United States, 142 U.S. 651, 12 S. Ct. 336 (1892). In that case he laid the foundation for the Conditional Entry theory of expulsion by stating: “It is an accepted maxim of International Law, that every sovereign nation has power, inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit . . . . In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations . . . . It . . . may be exercised either through treaties . . . or through statutes. . . . [T]he Constitution has conferred power [upon Congress] to regulate foreign commerce with foreign nations, including . . . the bringing of persons into ports of the United States; to establish a uniform rule of naturalization; and to declare war.” Id. at 659, 12 S. Ct. at 338. (Emphasis added.)


14. One author would argue strenuously against deporting resident aliens for whatever cause. See Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 COLUM. L. REV. 309 (1956). “Once . . . an alien is admitted, his relationship with the United States should be permanent, not probationary. If he turns out to be a criminal or a Communist, he is subject to our penal laws. To visit upon him the additional penalty of deportation is unworthy of a free and powerful country.” Id. at 323.
power of expulsion; they have accepted the basis of the former as authority justifying the latter. Presented with a case in which the substantive due process issue could easily have been reached and decided, the court has much preferred to take other routes to decision; when the issues have been reached, it has been in cases involving unpopular classes of aliens, where the decisions have been easily accepted by the popular notions of the day. As one authority has stated:

... "[T]he constitutional issues presented by expulsion have been considered only in cases involving extremely unpopular groups of aliens, whose very unpopularity has led to their explicit inclusion within the orbit of Congressional intent. It is not surprising, therefore, that the leading immigration cases seriously considering constitutional issues have, in historical order, involved Chinese laborers, anarchists, prostitutes, convicted wartime saboteurs, and in the present decade, ex-communists.

Naturally, it cannot be stated that all decisions which conform to the current public consensus are incorrect. But it is submitted that to delineate the rights of lawfully admitted, long time resident aliens by precedent crystallized during a period of national prejudice is both unfair to the rights of aliens as a class and inconsistent with the spirit of the Constitution under which all men are supposed to be equal.

The power of Congress to exclude is not here contested. This is a power inherent in a sovereignty and a power Congress has exercised in establishing immigration quotas. In this fashion Congress has protected against any recurrence of a situation such as the Yellow Horde fear of the late nineteenth century, and has done it without trampling the rights of any individual. By denying admission to a foreign citizen, this government has taken no rights from that person. The person lives under a system which he has probably endured from birth and the only effect of the denial of admission is that he must continue to live under it. Expulsion, however, presents vastly different issues. While the right to enter is enjoyed by no alien, the "right to remain" is enjoyed, or at least should be enjoyed by any lawfully admitted alien.


Of particular note in viewing the cases cited (supra notes 14-18) is not only the particularly unpopular classes of aliens involved, but the dates when these cases were decided and the attitude of the country at the time. The cases involving the admission of Chinese laborers arose in the late 1880's and early 1890's when fear of the Yellow Horde was rampant. Convicted wartime saboteurs were dealt with in 1924, just after the first great global conflict, and more recently, ex-communists were dealt with in the McCarthy era of the early 1950's.
An alien could certainly present no greater danger to national security than does a citizen. By his alienage he is naturally disqualified from any position of grave national trust. This fact, coupled with the closer tabs kept on aliens by the government and the far more accurate and scientific security measures in operation today, leads to the conclusion that any distinction is neither required nor justified.

But the question is raised, Why should this country accept and keep the "wretched refuse" of other lands? Why not return to his fatherland the prostitute, the anarchist, the murderer, the undesirable? The answer is not difficult. If he was such before he came, he should not have been admitted initially; if he was not, he is a product of this country. In any group of citizens, a certain number will commit crimes for which, if they were aliens, they would be deportable. To allow the mere fact of alienage to be determinative as to whether a man must suffer for his acts, not only imprisonment here, but banishment abroad, is both illogical and unjust. Daily living requires one to accept the bad with the good, which is no less true of a country than it is of the individual. To make a fact, alienage, which has no relation to a crime, the basis of a distinction, the consequences of which can be so disastrous to the individual, violates the entire spirit of the Constitution.

There is hereinafter presented a detailed comparison of criminal procedure and the procedure presently used in the deportation of an alien who has committed a deportable offense. To properly set this comparison in perspective, it is necessary first to examine several other aspects of the entire problem. This Note proceeds to examine the sources of the power to deport focusing on the validity of the power, the nature and effect of deportation, whether a punishment or a purely civil matter, and the comparison of criminal and deportation procedures.

II.
DEPORTATION AND SUBSTANTIVE DUE PROCESS

A. Source of the Power to Deport

Constitutional authorization for the power to deport has from the beginning rested on uncertain grounds. Depending on the period of United States history under consideration, the power has been implied from the specific powers given to the federal government or thought to be a power inherent in every sovereign state.21

21. One authority would classify the sources of implied power as follows: the war power, the foreign commerce power, the treaty power and sovereignty. Hesse, The Pre-1917 Cases, 1582. See also Note, The Role of Congress and the Federal Judiciary in the Exclusion of Aliens, 23 Mo. L. Rev. 491 (1958); Note, The Alien and the Constitution, 20 U. Chi. L. Rev. 547 (1953).
1. Implied and Specific Powers

The Constitution gives no express right to deport. Madison and Jefferson both thought that the power did not exist except in time of war. The ideas of these two great Americans have not prevailed however, and deportation is now used as freely in peace time as it is in war time, though perhaps not as frequently. The power has been implied from other powers given by the Constitution.

The implication of power, at the outset, meets with an objection. The federal government is one of delegated powers and if the power is not specifically granted by the Constitution, it is presumed not to exist. This line of argument is given force by the statement of Chief Justice Marshall in *McCulloch v. Maryland*: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it . . . is now universally admitted." Years later Chief Justice Waite wrote: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution." As late as 1907, Justice Brewer argued: "The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of power, is in direct conflict with the doctrine that this is a government of enumerated powers." This line of authority precipitates a search for a specific power to authorize deportation. The war power was apparently the earliest source used to justify deportation of aliens. In 1798, the Enemy Alien Act was passed and remains in effect today basically unchanged. The power of deportation under this statute is limited in its application to time of war or the imminent threat of war.

During such times, the power of the federal government must be augmented. Acts performed during war time are permitted which, if done in time of peace would be invalid. Since in time of war the national security and integrity are the paramount concern and all acts of State are directed toward their protection, deportation under the authority of the war power is the easiest accepted justification.

Peace time expulsion presents a different set of standards. Without the trying conditions of a national crisis and the concomitant necessity of

22. "With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the (Alien) Act of (1798) of Congress is denied to be constitutional . . . ." Madison, Report on the Virginia Resolutions, 4 ELLIOTT'S DEBATES 546, 554. "(A)lien friends are under the jurisdiction and protection of the laws of the state wherein they are; . . . no power over them has been delegated to the United States . . . (accordingly) the (Alien) act of (1798) . . . is not law, but is altogether void and of no force." Jefferson, Kentucky Resolutions of 1798 and 1799, id. at 540-41.
26. 1 Stat. 577 (1798).
increased power in the federal government, greater effort should be expended on the safeguarding of personal rights and the power of deportation, no matter how justified, should be more critically examined. The power to regulate peace time immigration was early found to be supported by the power of Congress over foreign commerce. 28

2. "Power Inherent in Sovereignty"

The real cornerstone of peace time regulation of aliens, however, is attributable to a "power inherent in sovereignty". 29 It is reasoned that the United States, being a sovereign government, must necessarily have all the powers of a sovereignty, whether specifically mentioned in the Constitution or not. International law recognizes the power of a sovereign to deport 30 and thus, the United States has the power. 31

It must be remembered, however, that this government, though sovereign, is constitutionally established and must act within the framework of the Constitution. The Constitution thrusts upon the government the burden of acting with due process of law, in its relations with all persons, 32 including aliens. Hence, the very document which launches the federal government as a sovereign, also commands that it must not exercise all the powers enjoyed by other sovereigns and recognized in international law if those powers would violate due process. Indeed the very body of International law which sanctions the exercise of the powers also recognizes the right of a sovereign to give up the power.

There is no doubt that a State need not make use of all the rights it has by the Law of Nations, and that, consequently, every State can

28. In The Head Money Cases, the court, in holding valid a tax on immigrants, said:

"[T]he power exercised in this instance is not the taxing power. The burden imposed on the ship-owner by this statute is the mere incident of the regulation of commerce—of that branch of foreign commerce which is involved in immigration." Edye v. Robertson, 112 U.S. 580, 595, 5 S. Ct. 247, 252 (1884).


30. "... (1)n strict law a state can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State of the expelled alien does not constitute an illegal, but only a very unfriendly act." 1 OPPENHEIM, INTERNATIONAL LAW 498-502 at 499 (3d ed., Roxburgh, 1920). But cf., 1 OPPENHEIM, INTERNATIONAL LAW 630-634 at 631 (7th ed., Lauterpacht, 1948). See also 4 MOORE, INTERNATIONAL LAW 210-211 (6th ed., Keith, 1929); Fong Yue Ting v. United States, 149 U.S. 698, 13 S. Ct. 1016 (1893).

31. Hesse describes this doctrine of power inherent in sovereignty as "[t]he highest barrier to a fresh consideration of the long time resident alien's status...." Hesse, The Pre-1917 Cases 1586.

32. "We have long held that a resident alien is a 'person' within the meaning of the Fifth and the Fourteenth Amendments." Dissent of Justice Douglas in Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S. Ct. 512, 523 (1952).

"While he (an alien) lawfully remains here, he is entitled to the benefit of the guarantees of life, liberty, and property secured by the Constitution to all persons of whatever race, within the jurisdiction of the United States." Lem Moon Sing v. United States, 158 U.S., 538, 547, 15 S. Ct. 967, 971 (1895).

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by its laws expressly renounce the whole or partial use of such rights, provided always that it is ready to fulfill such duties, if any, as are connected with those rights.\(^{33}\)

The quotation is couched in terms of an *express* renunciation of the use of such rights and continues: "[h]owever, when no such renunciation has taken place, municipal courts ought, if the interests of justice demand it, to presume that their State has tacitly consented to make use of such rights."\(^{34}\)

It is submitted that there is an *express* renunciation of the blanket power to deport contained in the Constitution, in form—the due process clause of the Fifth Amendment. This clause restricts the government through its requirement to act with justice and fairness in its dealings with its members. There is no better statement of the dangers of deportation when justified by a power inherent in sovereignty than the fearful exclamations of Mr. Justice Brewer in *Fong Yue Ting*:\(^{35}\)

Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations to ascertain the limits?

**B. Unequal Treatment Under Law**

Inability to pinpoint a specific constitutional warrant for deportation, thus failing to provide the legislature with a clear cut directive, has resulted in a Congressional regulation which, while accurately reflecting the vacillating attitude of the country toward aliens, ignores and confuses the basic constitutional issues at stake. This factor coupled with the ever present stimulus to protect the national security is responsible for unequal treatment of the alien in some areas.

For the most part the government has recognized a parity of rights between aliens and citizens. Law and the Constitution render him economic equality of opportunity with the citizen;\(^{36}\) habeus corpus is available to safeguard his personal liberty\(^{37}\); in criminal prosecutions the protections of the Fifth and Sixth Amendments are available to both alien and citizen.\(^{38}\) In the area of property rights no distinction is made unless an enemy alien is involved and then his property cannot be taken without just compensation.\(^{39}\) A law abiding alien is treated the same as a law abiding citizen. There are however, some distinctions which must be set forth. An alien

34. Ibid.
35. 149 U.S. 698, 737-738, 13 S. Ct. 1016, 1031 (1893).
38. Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977 (1896).
is not a citizen and should not be treated as such for certain political purposes, notably voting. In a footnote to the Harisiades decision, Justice Jackson summarized the remaining principal areas of disparity as including the inability to stand for election to many public offices, impairment of the right to travel outside the United States, owing to restrictions not applicable to citizens, and the absence of a presumption of lawful entry putting the alien to his proof of the right to enter or remain.

The justice of these disabilities is not completely free of doubt. The voting disqualifications are certainly warranted in view of the alien's unrenounced allegiance but the other areas, travel restrictions and the burden of proof, present fertile areas for discussion and disagreement. It must be noted, however, that none of the discriminations mentioned have so disastrous and final an effect upon the resident alien as does deportation. None deprive him directly of the things that "make life worth living." None tear him from his home, his loved ones, his very way of life and hurl him to a strange land where he is more an alien in fact, than he was in this country. The other debilitating effects of deportation need not be detailed to anyone who has given the subject minimal reflection.

It cannot be argued that simply because deportation has such lasting and disastrous effects that it is therefore wrong. A death sentence is worse; life imprisonment is worse, but these are accepted. These sentences are imposed as the consequence of an accomplished crime. They are designed as punishment, social retribution, and for the protection of society. As such, they offer ample justification for their imposition. A similar analysis of the justification for deportation presents a far less satisfying result.

C. International Redress

Paradoxically, the very body of international law which confers on the sovereign the power to deport affords the deportee only a very limited scope of remedies. Traditionally only states have standing to complain in international law. Thus, an individual who alleges injury at the hands of another sovereign must predicate that state's liability for reparation "on the fiction that the demanding state has vicariously suffered through the harm inflicted on its subject." The conditions which summon into operation this fictional relief are said to be: "(1) [a]n act or omission in violation of international law (2) which is imputable to the state and (3) which results in injury to the claimant state either directly or indirectly through damage to the national." Thus in order to qualify for direct

41. Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S. Ct. 492, 495 (1922).
reparation in the international arena (if it exists at all) the injury to the alien must be tantamount to an injury to his state.

The United States deportation standards and procedures are not normally so abusive or arbitrary when measured by international standards that the uprooted alien may seek redress. The future of international law, while striving to focus more on the protection of the individual, does not appear to hold the key to adequate relief. In the absence of such a remedy it is necessary to take a more critical look at our own often oppressive procedures with a view towards improvement from within—hopefully revising them to more nearly accord with the fair play traditions embodied in the due process clause.

D. Deportation as Punishment

Any critical examination of United States deportation law must begin by probing the conclusion that deportation is not a punishment. This doctrine forms the cornerstone of all the procedural inequities employed to deport an alien which offer such a sad commentary on our democratic traditions exemplified in the due process clause.

The genesis of the concept that deportation is not a punishment, termed by some a “mammoth fiction”, if not “unconscionable”, is an intriguing one for legal scholars and humanitarians alike. It has its birth and growth in deportation cases in which the issue of deprivation of constitutional rights or procedural due process has been raised. The judiciary has been generally content to dismiss these objections in one of three ways. In the one instance it is said that the power to deport is an exercise of a power inherent in every sovereign state (and thus implicitly not subject to constitutional due process protections). The counter-part of this argument states that deportation partakes of the foreign relations power. In either event, owing to the overriding interest in national


45. There has been considerable discussion in recent years on the question of standing of an individual in international law. Among the most vocal champions of the cause for protection of human rights through international law is Luis Kutner. He argues for the establishment of an international writ of habeas corpus which would rescue the alien from an arbitrary or illegal detention. The writ, however, would not lie if “... under all the factual conditions and circumstances existing within the particular arena, the continued detention of the petitioner is reasonable.” Kutner & Carl supra note 42 at 539. The scope of the writ, while not broad enough to cover pre or post deportation hearing detentions in the United States, does represent a significant step towards the defense of human rights on an international basis. Hopefully the defense will be further implemented by the recognition of a set of standards for international due process and strengthened by the confidence of all signatories. See also Kutner, World Habeas Corpus for International Man: A Credo for International Due Process of Man, 36 U. DET. L. J. 235 (1959); Kutner, World Habeas Corpus: A Legal Absolute for Survival, 39 U. DET. L. J. 279 (1962).


48. See note 28 supra.

49. See case cited in note 29 supra.
security, the government’s deportation process violates no known constitutional (or extra-constitutional) procedural safeguards so long as the proceeding is not arbitrary.\(^{50}\)

The third justification that recurs, apparently as a satisfactory disposition of recognized constitutional rights, is that deportation is not a punishment.\(^{51}\) The cases that reach this conclusion analyze the issue in terms of the sovereign power which supports the deportation order. The argument is premised on the inherent power of every sovereign to exclude and expel aliens. The threat of deportation is a method whereby the sovereign can secure the compliance of the alien with the Congressionally imposed conditions which determine his continued residence in this country. The power can be delegated to executive officers and when not exercised unreasonably constitutes due process.

1. The Sovereign Power Theory

This theory is the product of the \textit{Fong Yue Ting}\(^ {52}\) decision, which is apparently the first case raising the issue of deportation as a punishment. Petitioner, a Chinese laborer, was arrested pursuant to the Chinese Exclusion Act\(^ {53}\) which prescribed deportation for Chinamen who failed to obtain a residence certificate from the Secretary of the Treasury. In sustaining the deportation order Mr. Justice Gray speaking for the majority stated:

\begin{quote}
The order of deportation is not punishment for crime. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property without due process of law. ... \(^ {54}\)
\end{quote}

A later case\(^ {55}\) brought under the same Act followed a similar line of reasoning in countering an attack by petitioner that deportation was in the nature of punishment and therefore could not be imposed without a trial type hearing. The justification was expressed by describing the source of the power exercised. Relying on \textit{Fong Yue Ting} the court classified the right to exclude or expel aliens as the "inherent and inalienable" right of every sovereign.\(^ {56}\) The third important case deciding this point was \textit{Bugajewitz v. Adams}.\(^ {57}\) Petitioner was being deported pursuant to a statute making

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\(^{50}\) See Section III. of this Note for a fuller discussion of this point.


\(^{52}\) 149 U.S. 698, 13 S. Ct. 1016 (1893).

\(^{53}\) Chinese Exclusion Act, 27 Stat. 25 (1892).

\(^{54}\) Fong Yue Ting v. United States, 149 U.S. 698, 730, 13 S. Ct. 1016, 1028-29 (1893).

\(^{55}\) Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977 (1896).

\(^{56}\) Id. at 231, 16 S. Ct. at 978-79.

\(^{57}\) 228 U.S. 585, 33 S. Ct. 607 (1913). This case is frequently cited for the proposition that deportation is not a punishment when this conclusion is reached through the "sovereign power" route. See, e.g., United States \textit{ex rel. Bilokumsky v.}

http://digitalcommons.law.villanova.edu/vlr/vol8/iss4/4
prostitution, when practised by an alien, a deportable offense.\textsuperscript{58} The punishment issue was squarely before the court because on the same facts petitioner could have been convicted of the crime of prostitution.\textsuperscript{59} That Congress intended deportation as a punishment, and in so doing was exercising its police power rather than its sovereign power, is manifest in the close wording of the statute. Section three\textsuperscript{60} of the statute makes the procurer and keeper of the house guilty of a felony and (without paragraph or separation of any kind) declares in the same breath that the alien is deportable. To argue that in the same act Congress was using its foreign relations power in one sentence and its police power in another sentence is untenable and unrealistic.\textsuperscript{61} None the less Mr. Justice Holmes relinquished this opportunity for fresh analysis of the problem in favor of following his predecessors holding, “The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is deportation a punishment; it is simply a refusal by the government to harbor persons whom it doesn’t want.”\textsuperscript{62}

Contrary to what is frequently stated,\textsuperscript{63} this trilogy of cases does not stand for the proposition that deportation is not a punishment; actually they merely demonstrate that when Congress deports it is exercising its sovereign power as distinguished from its police power. Implicit in the sovereign power theory is the assumption that Congress cannot punish except when it employs its police power in creating a crime. Because it is utilizing its sovereign power, no crime is created and it would appear that no matter what the sanction—no punishment is therefore imposed. This, succinct syllogistic approach ignores the basic issue: whether in fact the alien is punished for acting contrary to the exacting commands of the Immigration Act.

\begin{footnotesize}
\footnotesize\textsuperscript{58} 34 Stat. 899 (1907), as amended, 36 Stat. 263 (1910) extending the statute of limitations.
\footnotesize\textsuperscript{59} The statute prohibits an alien from practising prostitution, from participating in the earnings resulting from prostitution and from in any way assisting or protecting from arrest any prostitute under threat of deportation. \textit{Supra} note 58. These are generally the elements of the crime of prostitution as well as the punishment meted out to aiders and abettors under most state criminal statutes. See 3 BURDICK, \textit{LAW OF CRIME} \textsection 973 (1946).
\footnotesize\textsuperscript{60} \textit{Supra} note 58.
\footnotesize\textsuperscript{61} The contrast is clearer in the original statute which separates the two provisions of the statute by a semicolon only. Section three of the Act reads in part as follows:\footnotesize
\begin{quote} \textit{[W]}hoever shall directly or indirectly, import or attempt to import, into the United States, any alien for the purpose of prostitution \ldots{} shall, in every such case be deemed guilty of a felony \ldots{}; and any alien woman or girl who shall be found an inmate of a house of prostitution or practising prostitution \ldots{} shall be deported. \ldots{} \textsection 3, 34 Stat. 899 (1907).
\end{quote}
\footnotesize\textsuperscript{62} Bugajewitz \textit{v.} Adams, 228 U.S. 585, 591, 33 S. Ct. 607, 608 (1913).
\footnotesize\textsuperscript{63} See cases cited in note 57 \textit{supra}.
\end{footnotesize}
2. The "Civil Proceeding" Justification

The second justification for the proposition that deportation is not a punishment introduces the factor of classifying the proceedings which produce the deportation order. The examination concludes that since the procedure is civil in form, no punishment results. Analytically such a justification would seem to be a secondary precept flowing from the sovereign power theory. Invariably the designation of the proceeding as criminal or civil will depend upon the power used to create it. Nevertheless, the courts have preferred to treat this as a separate rationale and will be considered as such here.

In its most standard form, the alien raises procedural due process objections which would present grave constitutional issues were he being tried for a crime, but the contentions are rejected by labelling the deportation proceeding civil in nature. This thinking is typified in an early case, Zakonaitė v. Wolf. Petitioner was found to be practising prostitution within three years after her entry. She contested the constitutionality of the summary proceeding on the ground that she was denied a speedy public trial by an impartial jury. The court held that a proceeding to enforce immigration regulations was not a criminal prosecution within the meaning of the Fifth and Sixth Amendments. A number of the more important procedural due process protections have been rejected under this rationale.

A new tangent to this approach has appeared more recently in Carlson v. Landon. This was a review of habeas corpus proceedings instituted by four aliens which involved the legality of detaining the aliens without bail in deportation proceedings. In affirming a denial of the writ, Mr. Justice Reed appeared to conclude that deportation was not a criminal proceeding (and therefore no punishment was inflicted) by examining the form of the proceeding, observing that no jury sits and there is no judicial review guaranteed by the Constitution. This analysis recedes farther from the basic issue by favoring a conclusion based upon a cursory survey of the components of the hearing in place of determining what effect, punitive or otherwise, deportation might have upon the alien.

3. Additional Effects of the Doctrine

Whether by label or form, designating the deportation hearing as a civil proceeding denies to the alien additional safeguards, which, though not elevated to the dignity of constitutional protections, are well established elements of our criminal jurisprudence. In a deportation hearing there is no burden of persuasion comparable to the "beyond a reason-
able doubt" standard used in a criminal case; what might be termed the equivalent of the presumption of innocence in such a proceeding, a presumption of citizenship casting on the government the burden of coming forward with the evidence, has been rejected. The common law doctrine of coercion which would excuse a wife from criminal liability for any act resulting from her husband's force or threat of force is not available to the alien in a deportation hearing.

4. Deportation as Punishment—Effect on the Alien

Therefore, it is submitted, that to answer the question whether deportation is a punishment, the examination must proceed, not in terms of the power exercised or the nature of the proceedings, but rather on the effect of deportation on the alien. In essence deportation is a punishment if the alien is punished. It thus becomes material to inquire what constitutes punishment.

(a) Argument from Definition. The attorney who takes great refuge in the argument from definition will find resort to the dictionary unavailing and incongruous. As one author has demonstrated, reference to Black's Law Dictionary is a lexicographer's and a logician's nightmare. Black confronts us with three seemingly irreconcilable propositions: Deportation is banishment, banishment is punishment, but deportation is not a punishment. It is this basic semantic exposition which demonstrates most boldly the glaring inconsistencies in our treatment of deportation; yet, it fails us in a determination of what an individual must undergo before he is punished in contemplation of law.

The writers in the field of penology furnish some clue as to the elements of a punishment. The late Professor Sutherland has stated that there are two essential ideas contained in the concept of punishment "... (a) It is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group, (b) punishment involves pain or suffering produced by design and justified by some value that the suffering is assumed to have..." Other writers are substantially in agreement with the proposition that punishment involves some form of pain or suffering, and on this point dictionaries concur in identifying suffering with punishment.

68. See Section III., K. of this Note.
70. The doctrine has been imported into legislative penal enactments. See, e.g., CAL. PENAL CODE § 26 (1955).
71. See generally 1 BURDICK, LAW OF CRIME § 162-65 (1946).
72. Iku Kono Ishihama v. Carr, 81 F.2d 1012 (9th Cir. 1936).
75. See, e.g., Privette, Theories of Punishment, 29 U. KAN. CITY L. REV. 46 (1961), where the author defines crime as "the violation of a standard which the community demands be observed and for which violation satisfaction is exacted. This group-sanctioned satisfaction for a wrong done a member of the group is punishment, which in its root 'poena' includes pain or suffering of some form."
76. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1959).
Judicial definitions of punishment complete the inquiry by denomi-
ating not only what punishment is but also by endeavoring to answer the
related question of what will constitute pain or suffering in a legal sense.
The classical judicial treatise on punishment is propounded in *Cummings v. Missouri.*77 Mr. Justice Field states that the theory upon which our
political institutions rest is that all men have certain inalienable rights,
life, liberty and the pursuit of happiness being numbered among them. He
concludes, "... the protection of these are all equal before the law. Any
deprivation or suspension of any of these rights for past conduct is punish-
ment and can be in no otherwise defined."78 Other judicial definitions.
have followed *Cummings* in seeing as elementary to a punishment the
deprivation of a right.79 Still other definitions have approved of pain and
suffering as the elements.80

Thus to punish an individual there must be pain or suffering either
actually or in the legal sense through the deprivation of some civil right.
Aliens are invested with nearly all the civil rights of citizens with the
exception of the franchise. It is clear that all the civil rights conferred by
the Constitution and the Bill of Rights upon "persons" apply to the alien.
And while common law rights are conferred by the states, generally it is
true that an alien may hold and dispose of personal property,81 with some
statutory variations, may hold and dispose of real property,82 is free to
marry and has the right to engage in the trade83 or occupation84 of his choice
and that these rights were established very early in this country's history.

Deportation severs an alien from his roots and rights alike, yet we
are reluctant to recognize this deprivation as a punishment.85 The reports
are full of cases illustrating the injustice of this position. The tragic story

77. 71 U.S. (4 Wall.) 277 (1867).
78. *Id.* at 321, 322.
79. "The deprivation of any civil right for past conduct is punishment for such
   "To constitute a 'punishment' or 'penalty' there must be deprivation of property
   or some right such as the enjoyment of liberty." *State v. Cowen,* 231 Iowa 1117, 3
   N.W. 2d 176, 179, 182 (1942).
80. "'Punishment' is generally defined as pain or any other penalty inflicted on
   a person for a crime or an offense by an authority to which the offender is subject."*Pawley v. American Mail Line Ltd.,* 69 F.2d 905, 907 (9th Cir. 1934). To the same
effect: *Gunning v. People,* 86 Ill. App. 174 (1899); McIntyre v. Commonwealth, 154
   Ky. 149, 156 S.W. 1058, 1059 (1913); *State v. Pope,* 79 S. Ct. 87, 60 S.E. 234, 237
   (1908).
    Fitz Simmons v. Fitz Simmons, 10 Wend. (N.Y.) 9 (right to bequeath); *M'Learn
    v. Wallace,* 10 U.S. (Pet.) 625 (1836) (receive it as next of kin); *Cosgrove v.
    Cosgrove,* 69 Conn. 416, 38 Atl. 219 (1897) (receive it as legatee).
82. See e.g., *N. Y. REAL PROPERTY LAW § 10; CAL. CIVIL CODE § 671.*
83. Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7 (1915) (holding invalid under the
    equal protection clause a state law requiring 80% of the workers to be native-born
    where five or more are employed at any one time.)
84. Templar v. *State Examiners,* 131 Mich. 254, 90 N.W. 1058 (1902) (State
    may not deny issuance of barber's license on grounds of alienage). However, a
    requirement that applicants for admission to the bar be citizens has been thought
    justifiable. *In re Takuii Yamashita,* 30 Wash. 234, 70 Pac. 482 (1902).
85. United States *ex rel.* Mezei v. Shaughnessy, 195 F.2d 964 (2d Cir. 1952).
of Ignatz Mezei\(^86\) graphically presents only one conclusion—that deportation is punishment. He was born on Gibraltar in 1897, immigrated to this country in 1923 and resided here for twenty-five years. He settled in Buffalo, New York where he married, acquired a home and plied his trade as a carpenter. In 1948 he sailed for Rumania to visit his dying mother. On his return to this country in 1950 he was refused re-entry and confined to Ellis Island. Later, the Attorney General ordered Mezei permanently excluded without a hearing on the grounds that the information, which formed the basis of the order, was confidential. Mezei was virtually a prisoner at Ellis Island for two years pending disposition of his habeas corpus\(^87\) petition, which was finally denied.\(^88\) Yet without a hearing this man was and still may be incarcerated by the United States Immigration Authority.\(^89\) In 1953 he made application for admission to twenty-five countries, seventeen of which have rejected him.\(^90\) There is no information available indicating whether or not he ever left the Island.\(^91\)

Karl Assari Latva\(^92\) came to this country from Finland at the age of thirteen. At the time of his hearing he had been married thirty years, and had sired two sons both of whom were honorably discharged from service in World War II. He was a loom fixer of good reputation and had never been arrested for more than minor traffic violations. After thirty-four years residence Mr. Latva was ordered deported for his six-month membership in the Communist Party to which he had contributed a total of ninety cents and whose aims he understood to be organizing unions and helping strikers. He had no knowledge that the party advocated the violent overthrow of the United States Government.\(^93\) These cases do not stand alone.\(^94\) Random samplings of most deportation cases record similar find-

87. See dissenting opinion of Black, J., \textit{id.} at 216, 73 S. Ct. at 631.
89. See dissenting opinion of Jackson, J., \textit{id.} at 220, 73 S. Ct. at 633.
93. Deportation for Mr. Latva was prevented by executive intervention presumably attributable to the national publicity given the case. This has been termed by one author as "a dispensation not of justice but of mercy." Bullitt supra note 86 at 210 note 30.
94. See, \textit{e.g.}, Jordan v. DeGeorge, 341 U.S. 223, 71 S. Ct. 703 (1957). Respondent resided in the United States for thirty years, married and had two children. Except for some liquor law violations during prohibition, he had a good record as a citizen. He was ordered deported as having been twice convicted of and sentenced for a crime involving moral turpitude—conspiracy to defraud the Federal government of liquor taxes. Thus, what would have amounted to a two-year prison term as punishment had a citizen committed the same offenses—for an alien was the prison term plus deportation.

In Marcello v. Bonds, 349 U.S. 302, 75 S. Ct. 751 (1955) petitioner was brought to this country at the age of eight months and was a resident here forty-four years. His wife and four children were American citizens. The alien was convicted of violating the \textit{Marihuana Tax Act} (26 U.S.C. \S 2591), sentenced to a year's imprison-
ings. Yet, courts will continue to distress humanitarians and historians (and leave unimpressed our lawmakers) with statements to the effect that while the effects of deportation may be devastating they are not punishing. Mr. Will Maslow traces the punishing effect of a deportation two steps further. He points to the painful election the American born spouse and children of a deportee must make: "either to abandon their native land and follow their alien parent to some foreign country or to abandon their parent and remain in this country." For those who choose the latter, society is saddled with the additional burden of providing for the deportee's dependents who may take their place on the relief rolls.

(b) Argument from History. History provides a fruitful accompaniment to often sterile logical analysis. In this setting it reveals the place of banishment as punishment as historians and civilizations have most naturally classified it.

Set in its historical context, punishment has and still manifests itself in several forms: death, physical torture, fine, imprisonment, probation, parole, banishment, transportation and social degradation. The latter is expressed today in the deprivation of a civil right, for example, suffrage and the right to hold public office.

Banishment or some type of community separation as a form of punishment has been known since the earliest tribal civilizations. In 509 B.C. Cleisthenes is said to have introduced the practise in Greece as a means of disposing of prominent persons guilty of criminal acts. Later it was imposed for treasonable offenses. Development of banishment as a punishment in Rome took more rapid strides. Initially reserved for political offenders, soon it became the fate of transgressors of the more notorious crimes: adultery, murder, poisoning and embezzlement. It was England that molded banishment as a modern form of punishment under the less offensive title—transportation. Several causes concurred to occasion its

| Note | 583 |


96. Ibid. The author cites one Congressional District where two hundred such families are being aided at a cost to the taxpayer of $300,000 per year.


98. GILLIN, CRIMINOLOGY AND PENOLOGY 389 (3d ed. 1935).

use for the first time in the 1700's.\textsuperscript{100} The "growth of crime, the inadequacy of old methods of punishment and the unsuitability of the old local jails" created a need for a new type of punishment.\textsuperscript{101} Moreover, responding to the humanitarian impulses of its penal reforming conscience, England "... hoped to achieve by less repellent methods than by the gallows the evacuation of the most dangerous elements from ... the community."\textsuperscript{102} Ultimately thirty-eight felonies and ninety-six misdemeanors were punishable by transportation.\textsuperscript{103} Australia and the United States served as the desired countries for England's undesirable countrymen.

The War of Independence marked the end of transportation either to or from this country.\textsuperscript{104} Since that time banishment as a form of punishment has had a scanty history in the United States.\textsuperscript{105} In Massachusetts, intense religious intolerance of dissenters from rigid Puritan standards resulted in numerous banishments from the colony, notably Roger Williams in 1635 and Anne Hutchinson in 1638.\textsuperscript{106} Despite its unpopularity as a punitive measure, from these colonial beginnings banishment has always been recognized as punishment and imposed as such except where aliens have been involved. The cases on banishment are sparse but their tenor indicates some judicial hesitancy to impose the penalty. Absent specific statutory and constitutional authority, banishment as punishment for a citizen has been held void.\textsuperscript{107} A conditional sentence—that is, departure from the jurisdiction when given as an alternative to a more common form of punishment such as imprisonment—has the approval of several earlier cases.\textsuperscript{108} The recent and more realistic decisions, reflecting the rehabilitative ideal in punishment have seen banishment as nothing more than a transfer rather than a solution of the criminal's problem and accordingly have invalidated such a sentence.\textsuperscript{109} While it is true that banishment as a "cruel and unusual" punishment within the meaning of the constitutional

\begin{thebibliography}{99}
\bibitem{100} Radzinowicz, Changing Attitudes Towards Crime and Punishment, 75 L. Q. Rev. 381, 387 (1959). See also Sutherland, \textit{op. cit. supra} note 74 at 259-272.
\bibitem{101} Gillen, \textit{op. cit. supra} note 98, at 360.
\bibitem{102} Radzinowicz, \textit{supra} note 100 at 393.
\bibitem{103} \textit{Id.} at 388.
\bibitem{104} \textit{Ibid.}
\bibitem{105} This is, of course, aside from the banishment of aliens which is euphemistically distinguished by the use of the word "deportation."
\bibitem{106} Hicks, \textit{The Federal Union} (1957) 31-32.
\bibitem{107} State v. Baker, 58 S. C. 111, 36 S.E. 501 (1900) ; Bernstein v. Jennings, 231 Iowa 1280, 4 N.W.2d 428 (1942) ; People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930). In the latter case Justice Potter unwittingly notes that "Deportation of the nationals of foreign countries is a popular method of punishing undesirable aliens who commit crimes against the United States. (Emphasis added.)\textit{ Id.} at 96.
\bibitem{108} \textit{Ex parte} Marks, 64 Cal. 29, 28 Pac. 109 (1883) ; \textit{State ex rel.} Davis v. Hunter, 124 Iowa 569, 100 N.W. 510 (1904) ; \textit{State ex rel.} O'Connor v. Wolfer, 53 Minn. 135, 54 N.W. 1065 (1893).
\end{thebibliography}
prohibition has been rejected,\textsuperscript{110} no court has or will deny that it is nevertheless a punishment, where aliens are not involved.\textsuperscript{111}

III.

DEPORTATION: PROCEDURE AND DUE PROCESS

Whatever the authorization, Congress possesses and extensively exercises the power to deport. It is the manner of its exercise that now calls for more critical examination. The courts have virtually disclaimed any responsibility for the procedures used to deport, and have instead delivered plenary powers to Congress by affirming that due process is what Congress chooses to make it.\textsuperscript{112} As a result Congress has fashioned its own brand of procedural due process for the alien in a deportation proceeding. This has engendered the development of two types of due process—Congressional and Constitutional. The former is choked in the administrative and legislative machinery, while the latter is cultivated and vigorously protected by the judiciary in a manner befitting a constitutional court. When the courts are summoned to halt this dualism they refuse on the grounds that deportation is not punishment. The contrast between criminal and alien due process is clearly demonstrated in the following step by step comparison which matches the procedural protections afforded the accused against those available to the alien at a similar point in a deportation proceeding. Consideration is also given to the constitutional defenses to a criminal prosecution—that the statute creating the offenses is void for vagueness or is an ex post facto law. No reference is made to the grand or petit juries. While they are characteristic of our criminal justice and of unquestioned value in assuring the accused of a fair hearing, there is nothing remotely similar to or worthy of comparison with these institutions in deportation proceedings.

A. Ascertainable Standards

It seems to be well established that a criminal statute that is vague is unconstitutional in that it provides no ascertainable standards to determine guilt.\textsuperscript{113} Mr. Justice Warren succinctly stated the proposition:

The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.\textsuperscript{114}

\textsuperscript{110} \textit{Ex parte} Sheehan, 100 Mont. 244, 49 P.2d 438 (1935).
\textsuperscript{114} United States v. Harriss, 347 U.S. 612, 617, 74 S. Ct. 808, 812 (1954).
The Supreme Court has also ruled that a criminal penalty need not be involved in order for a citizen to take advantage of this "void for vagueness" doctrine. For the Court Mr. Justice Van Devanter argued that it was error to try to distinguish cases which held a statute void for vagueness merely because criminal sanctions were involved. The essence of the "void for vagueness" doctrine is the requirement of obedience to a standard which is indeterminable. It is relatively easy to visualize a civil standard that would not satisfy the above test.

Aliens have sought the constitutional shield of the "void-for-vagueness" doctrine in their attempts to avoid deportation. In *Jordan v. De George*, an alien challenged the validity of his deportation on these grounds. The statute in question provided that an alien may be deported from the United States "[who] at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." This was held not to be "void-for-vagueness." There seems to be little doubt since *Jordan* that the phrase "crime involving moral turpitude" satisfies the due process test. True, there are times when courts will argue that a specific set of facts does or does not involve moral turpitude, but no court seems concerned with whether or not there is a deficiency in the phrase itself.

In a recent case, a resident alien was sought to be deported on the ground that he was "afflicted with psychopathic personality." The defendant was said to be a homosexual and that such a condition rendered him a psychopathic personality—a class of alien deportable under the terms of the act. The Circuit Court, applying the basic constitutional principles held:

The conclusion is inescapable that the statutory term "psychopathic personality," when measured by common understanding and practices, does not convey sufficiently definite warning that homosexuality and sex perversion are embraced therein. Since this statutory term thus fails to meet the test to be applied in determining whether a statute is vague in the constitutional sense, we hold that the statute is void for

116. Id. at 239, 45 S. Ct. at 297.
117. 341 U.S. 223, 71 S. Ct. 703 (1951). The Court found, however, that the phrase "crime involving moral turpitude" was definite enough.
120. See in this connection: United States ex rel. Giglio v. Neelly, 208 F.2d 337 (7th Cir. 1953) (Counterfeiting pennies and nickels and passing the same did not involve moral turpitude); Tseung Chu v. Cornell, 247 F.2d 929 (9th Cir. 1957) (A conviction for attempting to evade taxes, where fraud is charged in the indictment is a crime involving moral turpitude.) Neither case considered the fact that the statute was deficient itself although it could be argued that by saying in *Neelly* that the facts did not constitute moral turpitude, the court was avoiding the problem as to whether the statute was "void for vagueness".
121. Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962).
vagueness, as applied in this case. Enforcement of the deportation order would therefore deprive Fleuti of the due process of law.\textsuperscript{123}

The Supreme Court, however, did not view the case in the same light.\textsuperscript{124} Mr. Justice Goldberg, for the Court, refused to address the constitutional issue of whether the term psychopathic personality was "void for vagueness". Instead, he noted that in order for section 1182 (a) (4)—the psychopathic personality provision—to be operative, Fleuti must have been excludable, that is, a psychopathic personality, at the time of his entry into this country.\textsuperscript{125} The entry in question occurred following a short pleasure visit to Mexico. The Court, after interpreting the definition of entry,\textsuperscript{126} ruled that this fell outside the proscribed class and vacated the judgment with directions to the lower court to make a further investigation as to why Fleuti took the trip.

It could very well be that the Court was thinking only of statutory construction. In that view of the case the Fleuti decision is not good news for the alien. However, underlying the case could be a feeling on the part of the Court that some provisions of the Immigration Act must be liberally construed to protect the alien. The Court evidently was not ready for the constitutional question, but some language in the opinion is interesting. "The more civilized application of our immigration laws given recognition by Congress in § 101 (a) (13) and other provisions of the 1952 Act protects the resident alien from unsuspected risks and unintended consequences of such wholly innocent action."\textsuperscript{127} This decision could very well represent the first step in a tide of judicial humanitarianism which will seek to amend the most unfavorable and illogical deportation precedents developed in the "pink" climate of the early 1950's.

B. Ex Post Facto Clause

"No Bill of Attainder or ex post facto Law shall be passed".\textsuperscript{128} Although many laymen and some lawyers argue that this prohibition should apply to all laws with retroactive application, be they civil or criminal, it was established very early in our history that the constitutional ban against ex post facto legislation applies only to criminal legislation.\textsuperscript{129} Justice Patterson stated the rule as follows: "The words, ex post facto, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties."\textsuperscript{130} This formula has held sway in the area of ex post facto legislation since the date of its utterance. Thus a person,
in order to receive protection under the ex post facto clause, must show the court that the law he is held in violation of made criminal an act which was innocent when done, or which inflicted a greater punishment than the law annexed to the crime when committed.\footnote{The fundamental unfairness of this type of legislation is recognized in American constitutional theory. Although the prohibition against ex post facto laws bars only retroactive criminal statutes, the courts have often reached similar results with civil legislation through the impairment of contracts, and due process clauses.}{132}

Many resident aliens have employed the ex post facto doctrine attempting to rescue themselves from deportation under the McCarran-Walter Act.\footnote{However, these challenges invariably have been vanquished. The reasoning has been that the ex post facto inhibition applies only to criminal statutes, and is thus inapplicable to expulsion laws, since they are civil and not criminal in nature.}{134}

Mr. Justice Holmes, some years ago seems to have laid the matter to rest. After establishing that Congress has power to order the deportation of aliens, he concluded that "[t]he determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want. . . . The prohibition of ex post facto laws in article I, \S\ 9, has no application."\footnote{Hence, since retroactive laws or results under the deportation acts have been considered civil rather than penal, they do not comport with the requirements of the ex post facto doctrine, that is, that they be criminal in nature. Such a view has held steady command from the beginnings of deportation law.}{135} Hence, since retroactive laws or results under the deportation acts have been considered civil rather than penal, they do not comport with the requirements of the ex post facto doctrine, that is, that they be criminal in nature. Such a view has held steady command from the beginnings of deportation law.

In Harisiades v. Shaughnessy,\footnote{In Harisiades v. Shaughnessy,\footnote{Mr. Justice Jackson, speaking for the majority, emphasized the old arguments, namely, that the ex post facto clause, through history had applied only to criminal legislation and that deportation proceedings had for years been classified merely as a civil proceeding. In reading between the lines one might surmise that Jackson himself might have felt differently were he deciding the question \textit{ab initio}, but because this Note for a more complete discussion of this point.}{136}} the Court held that a provision authorizing deportation of resident aliens because of membership in the Communist party terminating before enactment of the act was not ground for invalidating the act. Mr. Justice Jackson, speaking for the majority, emphasized the old arguments, namely, that the ex post facto clause, through history had applied only to criminal legislation and that deportation proceedings had for years been classified merely as a civil proceeding. In reading between the lines one might surmise that Jackson himself might have felt differently were he deciding the question \textit{ab initio}, but because

of the array of precedents facing the Court a far less desirable result was reached.\textsuperscript{137}

In Marcello v. Bonds,\textsuperscript{138} the petitioner, a resident alien, was ordered deported under the authority of the Immigration Act of 1952. In essence that section states that an alien who had at any time been convicted of a narcotics violation could presently be deported. Among other things the petitioner urged that this was retroactive legislation. Mr. Justice Clark replied simply, "We perceive no special reasons, however, for overturning our precedents on this matter."\textsuperscript{139}

Galvan v. Press,\textsuperscript{140} while primarily of interest on the constitutionality of the Internal Security Act of 1950, is a case whose enunciated principles have a significant bearing on this subject. Petitioner contended that making his past Communist affiliations a deportable offense under the Act violated the ex post facto clause. Speaking for the Court, Mr. Justice Frankfurter seemed to foreclose the matter to further judicial discussion stating:

\ldots And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the \textit{ex post facto} Clause, even though applicable only to punitive legislation, should be applied to deportation. \ldots But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history" but a whole volume. \ldots But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever may have been said at an earlier date for applying the \textit{ex post facto} Clause, it has been the unbroken rule of this Court, that it has no application to deportation.\textsuperscript{141}

So far, ex post facto arguments as applied to deportation have been futile.\textsuperscript{142} One would think that taking an alien away from his family, his friends and his property for an act performed many years before in innocence and without sanction is punishment in its most horrible sense. This view is not without its proponents. Mr. Justice Douglas, dissenting in Harisiades v. Shaughnessy,\textsuperscript{143} disregarded the history of the ex post facto clause and concerned himself mainly with the practical aspects of deportation. His basic argument was that whether or not one calls deportation proceedings punishment really does not solve the problem.\textsuperscript{144} By its nature and its consequences deportation must be considered punishment. Men may be taken from their wives and children, life plans may be scrapped,
and human beings may end up wanderers in strange lands. Unfortunately, this is still a voice in the wilderness.

C. The Arrest

1. Warrant of Arrest

To prevent illegal restraint for trivial cause "an arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony and in breaches of the peace committed in presence of the officer." A criminal arrest warrant is issued by a judicial authority only upon the sworn complaint of one who has information showing probable cause that the accused did in fact commit such crime. Such warrant of arrest confers the legal authority by virtue of which an arresting officer may place the accused in his custody and directs the officer, upon apprehension of the accused, to bring him "before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined."

In deportation proceedings the Code of Federal Regulations permits a district director to issue a warrant of arrest "at the commencement of" the proceedings or at any later point in the proceedings "whenever, in his discretion, it appears that the arrest of the [alien] is necessary or desirable." Mr. Justice Brennan delineates points of comparison between the criminal and administrative arrest when, in speaking of a deportation arrest, he says:

Here the arrest, while had on what is called a warrant, was made totally without the intervention of an independent magistrate; it was made on the authorization of one administrative official to another. And after the [alien] was taken into custody, there was no obligation upon the administrative officials who arrested him to take him before any independent officer, sitting under the conditions of publicity that characterize our judicial institutions, and justify what had been done. [Emphasis added.]

In a criminal proceeding the complaint is presented to the proper judicial official and it becomes his duty to determine whether an offense has been committed and to decide whether there is probable cause to issue an arrest warrant. This authority exercises a judicial function and must use judicial discretion in his analysis of the complaint.

145. Id. at 600, 72 S. Ct. at 524 (1952).
149. 8 C.F.R. § 242.2 (a) (1958).
Until 1960, "the constitutional validity of . . . [the] administrative arrest procedure in deportation cases [had] never been directly challenged in reported litigation." In *Abel v. United States*, Attorney James Donovan contended "that the administrative warrant by which [the alien] was arrested was invalid, because it did not satisfy the requirements for 'warrants' under the Fourth Amendment." If in the deportation procedure, the alien is given no more protection than that the warrant of arrest may issue at the district director's discretion, the alien is unquestionably denied constitutional protection. Perhaps an analysis of this administrative arrest section in its code context will yield an answer to this constitutional challenge.

Prior to 1956, the alien's arrest initiated all deportation actions. The warrant of arrest then had a twofold purpose; first, to open the proceedings and secondly, to notify the alien of the charge. The rule then provided that in order that the arrest warrant might issue, prima facie deportability had to be shown. This condition precedent would seem to have compared favorably with the criminal warrant qualification of probable cause. The 1956 procedure provides that every alien deportation proceeding be inaugurated by the issuance of an order to show cause, the arrest to follow if and when decided by the director to be necessary. The order to show cause embodies a compendious factual presentation of evidentiary matter supporting the charge against the alien. The supported charges set forth in the order to show cause should be sufficient, if true, to make the alien deportable. Practically speaking, this means that the director must make a decision similar to the judgment made by the magistrate; that is, whether the facts as presented are such as to sanction the issuance of the order to show cause. However, to allow a director to exercise such wide discretion raises very serious problems.

2. Issuance of the Warrant

Conceding that the standards which must be met pursuant to the issuance of the order to show cause are equivalent to the standards by which a magistrate concludes that an arrest warrant may issue, it nevertheless seems that the spirit of the Fourth Amendment provision for probable cause requires that such conclusion "be drawn by a neutral and detached magistrate [not by an official] . . . engaged in the often competitive enterprise of ferreting out crime." In deportation proceedings the order

153. 8 C.F.R. § 242 (1952).
156. 8 C.F.R. § 242.2 (a) (1958).
158. 8 C.F.R. § 242.1 (b) (1958) "The order will require the respondent to show cause why he should not be deported."
to show cause is issued on the authorization of one administrative officer to another. The standards exist, but correct standards are rendered nugatory if not applied by one above the law enforcement process—one in a neutral position who is capable of making a rational determination on the presented facts and who will not be prejudiced by an overzealous devotion to duty, a devotion capable of bloating facts and blinding reason. In *Abel*, "the warrant of arrest for [the alien] was issued by the . . . District Director . . . at the same time as he signed an order to show cause."\(^{160}\) Such procedure illustrates that the order to show cause can be reduced to a procedural formality offering no real protection as envisioned by the framers of the Fourth Amendment when they inserted the probable cause requirement.

What protection has the alien from unconstitutional apprehension? If the Immigration and Naturalization Service wants an alien arrested, perhaps as an excuse for incidental search in a case where there were not the necessary facts to cause a search warrant to issue, the district director after reviewing the facts in his *discretion*, may determine they are sufficient and issue an order to show cause. Then in his *discretion* he may decide the arrest is necessary so he is authorized to issue an arrest warrant. The order to show cause and the arrest warrant are presented at the same time and the alien is taken into custody.

3. Post-Arrest Procedures

A criminal arrest warrant directs the arresting officer upon apprehension of the accused to bring him before the court so issuing the warrant or before the nearest committing magistrate without delay in order to enable the proper judicial authority to acquire jurisdiction of the accused and hold a preliminary hearing.\(^{161}\) The deportation statute provides that "[a]ny such alien taken into custody may, in the discretion of the Attorney General, and pending such final determination of deportability, . . . be continued in custody."\(^{162}\)

The abuse that may be engendered by the lack of post arrest protections in the deportation process is illustrated by the *Abel*\(^{163}\) case in which the alien, "upon his arrest, was taken to a local administrative headquarters and then flown in a special aircraft to a special detention camp over 1,000 miles away. He was incarcerated in solitary confinement there. As far as the world knew, he had vanished."\(^{164}\) Any objections the alien has as to defects in the arrest procedure must be raised preceding the finding of deportability, (which may often mean being raised while being detained in custody) since if enough evidence has been gathered to


\(^{161}\) Fed. R. Crim. P. 5 (a) "An officer making an arrest under a warrant issued upon a complaint . . . shall take the arrested person without delay before the nearest available commissioner."


\(^{164}\) *Id.* at 251, 80 S. Ct. at 703.
adequately support a final deportation order, all defects in the arrest are extinguished.\textsuperscript{165} In such a manner, the alien is protected from apprehension by what is called a warrant.\textsuperscript{166}

4. Arrest Without a Warrant

In criminal proceedings a police officer may arrest without a warrant any person who he has reasonable ground for believing has committed a felony or anyone who, in his vision or presence, has attempted to commit a felony.\textsuperscript{167} When an arrest is made without a warrant the arresting officer is authorized to detain the accused in custody only until such time as a preliminary hearing may be had.\textsuperscript{168}

An INS official has authority\textsuperscript{169} to make an arrest without warrant if he has reason to believe that an alien, who is in the United States in violation of the law, is likely to escape before a warrant can be obtained for his arrest or if an alien is attempting to enter the United States illegally in his presence or view. The court has indicated that a reasonable justification must exist for the decision that the alien will escape before an arrest warrant can be obtained.\textsuperscript{170} Section 1357 (a) (2) provides, "... the alien arrested [without arrest warrant] shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States."\textsuperscript{171}

On their face the administrative and criminal procedures for arrest without warrant seem to be in accord. But, although the procedural protection is provided by an examination of the alien's right to remain in the United States by an authorized officer, that authorized officer is nevertheless a member of the same law enforcement service that secured the alien's arrest. The absence of a neutral examiner is as much a drawback in this area as it is when the arrest is made with a warrant.

The power\textsuperscript{172} of an INS officer to interrogate without warrant any person believed to be an alien as to his right to remain in the United States may result in proceedings which, although in literal conformity with the law, may, nevertheless, be open to challenge because of a particular application which such broad statutory language has engendered. A liberal judicial definition of the term "arrest" will be used to determine if any of the ramifications of procedure under the interrogation power would parallel a procedure that would be termed arrest without warrant in a criminal

\textsuperscript{165} United States \textit{ex rel.} Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54 (1923).
\textsuperscript{166} Abel v. United States, 362 U.S. 217, 251, 80 S. Ct. 683, 703 (1960).
\textsuperscript{170} Diogo v. Holland, 243 F.2d 571 (3d Cir. 1957).
action. *Henry v. United States,*\(^{173}\) finds an arrest occurring when a police officer interrupts the freedom of a defendant and restricts his liberty of movement. Then it becomes "necessary [for the court] to determine whether at or before that time they [the police] had reasonable cause to believe that the crime had been committed."\(^{174}\) The question that arises is: When does an alien under interrogation have his freedom interrupted and his liberty restricted sufficiently so as to constitute arrest without a warrant? It seems plausible that a situation could arise where a person, being interrogated in connection with a deportation investigation, would be so detained as to be considered under arrest without a warrant. If the possibility of such a situation is accepted it becomes necessary to inquire as to the reasonableness of the cause for such detention.

In criminal proceedings arrests resulting from "tips" from undisclosed informers are usually made without warrants because under the federal constitutional provision prohibiting the issuance of warrants without probable cause such a method is insufficient to fulfill this constitutional requirement.\(^{175}\) The prior reliability of the informer must first be established or his information verified before it can be considered a predicate for "trustworthy" information to support an arrest without warrant.\(^{176}\) By comparison, the deportation regulations stipulate that the service shall "investigate the case of every person believed to be subject to arrest and deportation."\(^{177}\) "[I]nvestigations are ordered in response to reports by public officials, notably those in charge of jails and public welfare institutions and also in response to 'tips' often motivated by spite or revenge which come from members of the general public."\(^{178}\) If the deportation investigation, based upon such "tips", progresses to the interrogation stage, serious constitutional questions could be raised by a procedure so resembling an arrest without a warrant yet not justified even by deportation regulations providing for such an arrest.

"Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."\(^{179}\) Although Mr. Justice Douglas here speaks only of the protection given the citizen, the Fourth Amendment extends its protection to the rights of the people; the latter term embracing citizens and aliens alike.


\(^{174}\) Id. at 103, 80 S. Ct. at 171.

\(^{175}\) Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955).


\(^{178}\) *Developments in the Law—Immigration and Nationality, 66 Harv. L. Rev. 643, 691 (1953)*, citing *Van Vleck, The Administrative Control of Aliens* 92-95 (1932); *2 National Commission on Law Observance and Enforcement Reports 52* (1931).

D. Search and Seizure

1. Incident to Administrative Arrest

The common law belief that the use of search warrants “was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals”\(^{180}\) has carried over to the present day and served as basis for the argument that since deportation proceedings have been held to be civil in nature,\(^{181}\) the arrest of an alien pursuant to an administrative arrest warrant “did not confer upon the arresting officers the right to search the hotel room in which the arrest was made.”\(^{182}\) The Court of Appeals in *United States v. Abel*,\(^{183}\) answered the argument by showing that the use of search warrants was limited to criminal proceedings at common law because civil suits were considered to concern only suits wherein a private party would prosecute a personal claim. “Deportation obviously is not a civil cause involving only the rights of one individual as against another. Such a proceeding is initiated in the interests of the United States and for the protection of its citizens.”\(^{184}\) Therefore the label civil or administrative doesn’t defeat the right of search and seizure incident either to a search warrant or to an administrative arrest.\(^{185}\)

2. Practical Necessity of Search and Seizure in Administrative Arrest

In criminal proceedings search and seizure is necessary to protect the arresting officer and to deprive the prisoner of potential means of escape; also to avoid the destruction of evidence and to seize instrumentalities by which the crime was committed.\(^{186}\) In deportation proceedings the search for a weapon is justified since an administrative officer in making an arrest has as much need for protecting himself and preventing the prisoner from escaping as does a policeman arresting for a crime.\(^{187}\) Materials that prove deportability\(^{188}\) may be searched for and seized with equal reasonableness.

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\(^{183}\) Ibid. The lower court in United States v. Abel, 155 F. Supp. 8, 11 (E.D.N.Y. 1957) had stated this challenge was “a matter of first impression.”


\(^{185}\) We will assume for the purpose of this discussion that the administrative arrest procedure is constitutional. But see, section III. C. of this Note.

\(^{186}\) Harris v. United States, 331 U.S. 145, 154, 67 S. Ct. 1098, 1103 (1947), held that during a search incident to a valid arrest “objects which may validly be seized [include] the instrumentalities and means by which a crime is committed, the fruits of the crime, such as stolen property, weapons by which the escape of the person arrested might be effectuated, and property the possession of which is a crime.”


\(^{188}\) Vlisidis v. Holland, 245 F.2d 812 (3d Cir. 1957) (passports and crewmen’s landing permits); Williams v. Mulcahey, 250 F.2d 127 (6th Cir. 1957), cert. denied, 356 U.S. 946 (1958) (official registries of entry).
because the need for proof is as great in administrative as in criminal pro-
cedure since deportation can be accomplished only after a hearing at which
deportability is established upon adequate evidence.\textsuperscript{189}

To decide there are some things justifiably seizable by the authorities
in both criminal and civil action pursuant to arrest is to implicitly deter-
mine that there are other things not justifiably seizable. This in turn
prompts the question: How are persons (citizens and aliens) protected from
unjust searches and resulting seizures?

3. The Safeguards Against Illegal Search and Seizure

A search without a search warrant incident to an arrest is dependent
for its validity upon a valid arrest.\textsuperscript{190} A search may not be exploratory\textsuperscript{191}
nor may merely evidentiary matter be seized.\textsuperscript{192} The Fourth Amendment
to the Constitution of the United States provides for the right of the people
to be secure in their persons, houses, papers, and effects, against unreason-
able searches and seizures.

In criminal proceedings the right of the people to be secure from
unreasonable search and seizure was thus boldly pronounced but its denial
was left almost\textsuperscript{193} totally devoid of sanction by the courts of the time which
continued to apply the common law rule that the admissibility of evidence
was not affected by the illegality of the procedure by which it was obtained.
If the right was to have any meaning at all, the courts decided, its abuse
would have to be met with strong sanctions.\textsuperscript{194} Judge Learned Hand so
well expressed the reason for the sanction which was adopted when he
wrote:

Exclusion is the only practical way of enforcing the Constitutional
privilege. In earlier times the action of trespass against the offending
official may have been protection enough; but that is true no longer.
Only in case the prosecution which itself controls the seizing officials,
knows that it cannot profit by their wrong, will that wrong be sup-
pressed.\textsuperscript{195}

\textsuperscript{189.} Ocon v. Del Guercio, 237 F.2d 177 (9th Cir. 1956).
\textsuperscript{190.} United States v. Rabinowitz, 339 U.S. 56, 60, 70 S. Ct. 430, 432 (1950).
\textsuperscript{192.} Harris v. United States, 331 U.S. 145, 154, 67 S. Ct. 1098, 1103 (1947). "This
court has frequently recognized [that] merely evidentiary materials . . . may not be
seized either under the authority of a search warrant or during the course of a search
incident to arrest. . . ."
\textsuperscript{193.} The wronged person's only remedy was a civil action for damages against
the wrongdoer. United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).
\textsuperscript{194.} An early attempt to set up an exclusion rule is evidenced in Boyd v. United
States, 116 U.S. 616, 6 S. Ct. 524 (1886), where it was held that an order of the court
requiring the claimant of goods to produce an invoice in court to be offered as
evidence against him was an unconstitutional exercise of authority and its admission
as evidence was declared unconstitutional.
\textsuperscript{195.} United States v. Pugliese, 153 F.2d 497, 499 (2d Cir. 1945).
The sanction reached full application in all courts, federal and state, when in 1961, Mr. Justice Clark, speaking for the court in *Mapp v. Ohio*, held that evidence acquired by a search and seizure in violation of the Constitution is inadmissible in a state court. In criminal proceedings the question, whether it is reasonable to search and seize without procuring a search warrant, is decided by the arresting officers. It has been considered "a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment." "The Fourth Amendment and its companion, the exclusionary rule, protect the individual's right of privacy by creating a barrier between the citizen and the police which can be surmounted only by certain prescribed methods."  

What barrier exists to protect the alien's right of privacy from the immigration officer? It is often stated as a general proposition that the rules of evidence do not control in deportation proceedings since they are considered actions of a civil nature. The Code asks only that the evidence be reasonable, substantial, and probative, which would seem to give much leeway as to just what type evidence will be regarded as competent by the court on review. To date there has been no case in which the Supreme Court has passed directly on the admissibility of evidence obtained through illegal search and seizure incident to an administrative arrest. In the few cases in which the charge of illegal seizure has arisen, the fact situations presented seem to justify the courts overruling the contention of illegal search and seizure as not being adequately substantiated.  

In deportation proceedings "the general rule is that defects in the arrest or other preliminary proceedings [which would include the search] are extinguished if the final deportation order is adequately supported." In a judicial review of any administrative hearing in which the general rule was applied, any hope of an alien to raise the question of unlawful search and seizure on judicial review would be negated by the court's strict adherence to the language in *Ocon v. Del Guercio*, which held, "[i]n determining whether substantial evidence exists to support an order of deportation, a court should not substitute its judgment for that of the

196. Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341 (1914) held that the Fourth Amendment prevented the use of illegally seized evidence in a federal prosecution.  
200. Ex parte Zavala, 298 Fed. 544 (N.D. Tex. 1924) held that an officer sitting at a deportation hearing is not bound by any rules of criminal procedure nor is he bound by the rules of evidence as applied by the courts.  
203. GORDON & ROSENFIELD, § 8.12 (b) citing United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54 (1923). "Irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings." *Id.* at 158, 44 S. Ct. at 57.  
immigration authorities." Approaching the problem analytically, it plainly appears that illegal search and seizure is, as one court has put it:

[U]nreasonable and contrary to the spirit [of the Fourth Amendment]; and [objects], procured in that way, cannot be used in evidence against [the alien] from whom they are procured without violating the protection afforded by the [Fourth Amendment] to all persons in this country. It has been said that the manner of obtaining such evidence, whether by force or fraud, does not affect its admissibility; but these constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use.205 [Emphasis added.]

Mr. Justice Brandeis206 has stated by way of dictum, "[i]t may be assumed that evidence obtained by the [Immigration and Naturalization Service] through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." In 1923, this dictum erected the skeleton of a protective barrier to guard aliens' privacy; in 1963, the bones still remain bare. Given the proper case it is felt that the Supreme Court should flesh this skeleton with a hide of mail, providing an aegis to protect the resident alien's constitutionally given right to privacy.

E. Bail

The provisions for bail in a criminal proceeding under the federal system are relatively clear, uncomplicated and virtually a matter of right for the accused.207 The citizen arrested for a non-capital offense will be admitted to bail when adequate assurance is given that he will stand trial and submit to sentence if found guilty.208

The alien who is arrested and charged with a deportable offense is confronted with a discretionary bail system involving elaborate appeals and the necessity of satisfying certain conditions precedent. While the alien is being detained pending a determination of his deportability, it is within the discretion of the Attorney General either to continue custody or to release him on bond or parole.209 Usually the alien will be released on bond or parole, provided he agrees to appear for his hearing, deportation (if ordered) or detention (if required).210 If the alien refuses to comply with these conditions, the Attorney General may continue custody.211 The latter procedure is employed where he deems the alien's release prejudicial to
the interests of national security\footnote{212} which is shown when by his release the alien "would have opportunities to hurt the United States during the pendency of deportation proceedings."\footnote{213} Although the Attorney General's discretion under the Immigration Act\footnote{214} is very broad it is subject to judicial review\footnote{215} and his decision will not be overturned unless the alien can clearly show it to be without reasonable foundation.\footnote{216} The courts will generally uphold the discretion as exercised where it appears that the conditions of the bond or parole reasonably relate to the defense of national security or where they are imposed in the legitimate belief that otherwise the alien will flee. Thus a denial of bond was upheld where the alien was engaged in recent Communist activity,\footnote{217} where the surety was unreliable\footnote{218} or where there was a valid suspicion that the alien would flee.\footnote{219} But, denial of bail when the alien was not a recent Communist,\footnote{220} or refusal of the alien to answer questions about Communist activity at a Congressional hearing\footnote{221} or because the surety was a member of a subversive organization have been held to be an abuse of discretion.\footnote{222} It was likewise an abuse of discretion to deny bail unless the alien agreed to refrain from working for a Communist newspaper.\footnote{223}

The contrast is brought into sharper focus by the following comparison. If two active Communists, one an alien and the other a citizen are arrested for violation of the Immigration Act\footnote{224} and criminal syndicalism\footnote{225} respectively, the citizen will have the right to bail and the alien is given the Attorney General's discretion safeguarded by a series of costly appeals and delays. Yet the violations arise out of similar fact situations,\footnote{226} the prin-

\footnote{212} United States v. Shaughnessy, 194 F.2d 474 (2d Cir. 1952).
\footnote{213} Carlson v. Landon, 342 U.S. 524, 538, 72 S. Ct. 525, 533 (1952), presumably through some type of underground activity.
\footnote{214} Supra note 207.
\footnote{215} Yanish v. Barber, 73 S. Ct. 1105, 1108 (1953).
\footnote{216} Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525 (1952). Although decided prior to the passage of the 1952 Act, the decisions subsequent to Carlson have said that the 1952 Act did not change the existing standard of review. United States v. Esperdy, 202 F.2d 109 (2d Cir. 1953).
\footnote{217} Supra note 210.
\footnote{218} United States v. Flynn, 190 F.2d 672 (2d Cir. 1951) (Surety disregarded his obligation to produce the defendants).
\footnote{219} United States v. Shaughnessy, 194 F.2d 474 (2d Cir. 1952).
\footnote{220} United States v. Esperdy, 108 F. Supp. 640 (S.D.N.Y. 1952) (No Communist activity within the past several years).
\footnote{221} United States v. Shaughnessy, 212 F.2d 128 (2d Cir. 1954).
\footnote{223} Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525 (1952).
\footnote{226} Compare the Immigration and Nationality Act, supra note 278 which makes aliens who "... advocate or teach, or are members of or affiliated with any organization that advocates or teaches opposition to all organized government..." subject to deportation with the following state statutes defining the same acts as criminal: "... advocating, teaching, or aiding and abetting unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change..." Cal. Penal Code § 11400 (1956); "Any person who in public or private speech, writing, printing or
plicants have similar backgrounds and the only meaningful difference is the penalty. The alien is in extremely serious difficulty in facing deportation whereas his citizen comrade is likely to be penalized much less severely. That the resemblance between the offenses should be inversely proportionate to the bail provisions especially in view of the high stakes for the alien is illogical and grossly unjust. When bail is denied to the alien it is usually on the grounds that he is a security risk. It is evident that the citizen in the above example is no less a risk. Government agents can just as readily keep an alien under surveillance as they can a citizen.

While there are other procedural disparities between criminal and deportation proceedings which can be justified, however limply, on the “national security” reasoning it is clear that the alien poses no greater danger than his citizen counterpart. It is this type of analogy that argues most strenuously toward uniformity of bail provisions which, ironically, would raise the alien to the status of a criminal.

F. Jurisdiction

1. Of the Tribunal

The Criminal Code of the United States provides that the district courts “shall have original jurisdiction of all offenses against the laws of the United States.” The Immigration and Nationality Service takes jurisdiction of deportation proceedings pursuant to a regulation issued under the authority of the Attorney General who is charged with the administration of the Immigration and Nationality Act.

There is no specific provision that an alien has the right to have the hearing at any forum convenient to him. Theoretically, a California alien could be served into a New York hearing. However, in practice, virtually all hearings are held at the immigration station where the alien requests they be held for his convenience. Courts consider that conducting a hearing at any other situs is within the discretion of the hearing inspectors, and will uphold a challenge of unfairness if such discretion is abused.
2. Service of Process

Basically, the service of process requirements are similar for the citizen in a criminal proceeding and an alien in a deportation proceeding. In the criminal proceeding the warrant is executed by the arrest of the defendant. It is not mandatory that the officer have the warrant at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible.\(^{232}\) Upon request of the attorney for the government a summons instead of a warrant shall issue.\(^{233}\) This summons must be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant’s last known address.\(^{234}\) It is significant that the service of a summons in criminal cases is substantially similar to that in civil cases.\(^{235}\) Provisions are set forth that the officer executing the warrant must make a return of it, and any unexecuted warrant must be returned to the United States Commissioner by whom it was issued and must be cancelled by him.\(^{236}\)

For an alien, the proceedings are commenced by an order to show cause. The Service officer has the duty to serve this, and may do so by either of the following methods: (1) handing the order to show cause to the alien or leaving it at his dwelling house or usual place of abode with some person of suitable age or discretion then residing therein; (2) mailing the order to show cause to the alien at his last known address by certified or registered mail, return receipt requested. The office return receipt or the certificate of the officer attesting to delivery constitutes proof of service.\(^{237}\) It can be seen that due to the civil nature of service of process for the criminal citizen, the protections afforded to the alien in this respect equate those of the citizen.

G. Notice

The warrant or summons issued to the citizen shall describe the offense charged in the complaint.\(^{238}\) It is essential that the complaint set forth with particularity facts alleged to constitute a crime.\(^{239}\) Under the 1952
Act, the alien is entitled to notice, reasonable under the circumstances, of
the nature of the charges against him and of the time and place at which
the proceedings will be held.240 It is suggested that such a statement ob-
viously embodies an essential element of procedural due process.241 Once
a warrant of arrest is served upon an alien which gives him notice that
he will be afforded a hearing on the charges against him, such notice is
sufficient to comply with the requirements of due process.242 Since 1956,
the proceeding has been inaugurated by service of an order to show cause,
which delineates with greater particularity the factual basis of the charges.243
It has been suggested, since more than notice of generalized charges in the
warrant of arrest is required, the modern procedure is comparable to an
indictment in a criminal case or a complaint in a civil case.244

H. Presence

The normal method of proceeding in all criminal cases in the district
courts, whether felony or misdemeanor, will be in the presence of the
defendant.246 Specifically, the Rule is that “[t]he defendant shall be present
at the arraignment, at every stage of the trial including the impaneling of
the jury and the return of the verdict, and at the imposition of sentence. .
. .”246 The Rule adds that, except in capital cases, the defendant may not
defeat the proceedings by voluntarily absenting himself after the trial has
commenced in his presence.247 It is suggested that there is no violation of
due process in imputing to a defendant, a valid waiver of his privilege to
be present and to confront the witnesses, if he voluntarily absents himself
after his trial has commenced.248

In the case of an alien, the 1952 Act provides that he shall have rea-
sonable opportunity to be present. If any alien has been given a reasonable
opportunity to be present and without reasonable cause fails or refuses to
attend or remain in attendance at such proceeding, the special inquiry

241. GORDON & ROSENFIELD, § 56a.
243. GORDON & ROSENFIELD, § 56.
244. Ibid.
245. Barron, supra note 234, at § 2451.
246. Fed. R. Crim. P. 43. The advisory committee for the drafting of the rules
noted that the rule setting forth the necessity of the defendant's presence at arraign-
ment and trial is a restatement of existing law. Diaz v. United States, 223 U.S. 442,
(1892). This principle does not apply to hearings on motions made prior to or after
247. Fed. R. Crim. P. 43, Barron, supra note 234 § 2451. As he points out, the
advisory committee for the Rules brought out that this was also a restatement of
existing case law. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 252 (1911);
United States v. Noble, 294 Fed. 689 (D. Mont. 1923), aff'd, 300 Fed. 689 (9th Cir.
1924); United States v. Barracota, 45 F. Supp. 38 (S.D.N.Y. 1942); United States
248. Barron, supra note 234 § 2451. This rule providing that the accused's voluntary
absence, after trial has been commenced in his presence for an offense not punishable
by death, shall not prevent continuing the trial to and including rendition of verdict,
approves as due process of law the inference of waiver from voluntary absence.
State v. Utecht, 228 Minn. 44, 36 N.W.2d 126 (1949).
officer may proceed to a determination as if the alien were present. In two relatively recent cases before the Board of Immigration appeals, orders of deportation were made notwithstanding the fact that the alien never was present. In Matter of S., the "aliens" argued that as naturalized citizens, the Immigration and Nationalization Service does not have jurisdiction to proceed against them, since to take away such citizenship, the government must go through certain statutory procedures. The government alleged that the "aliens" lost their United States nationality by operation of law. The Board held that "[the aliens] cannot be permitted to defeat the clear mandate of sections 242 and 287 (b) of the Immigration and Nationality Act by refusing to attend a proceeding . . . on the ground that there has not been a judicial revocation of their citizenship and, therefore, no jurisdiction under the Immigration and Nationality Act." In Matter of P.C., notice of the hearing was served twice, and the alien failing to appear, the deportation hearing was conducted in his absence, and the deportation order granted. In both cases, the Board merely stated the statutory provision, and recognizing that notice had been served upon the aliens, proceeded without them. Moreover, situations arise where the alien was present initially at the hearing, but it was carried to completion in his absence. Some courts hold that the examination of witnesses in the absence of both the alien and his counsel without notice to either violates the Immigration Acts, and does not rise to the standards of due process of law to which the alien, as well as all other persons in the United States is entitled. Such a view at least accords with the proposition that the alien must have fair notice before action will be taken without his presence. But, the power to proceed in the absence of the alien is an extreme power, and its very existence seems to contradict considerations of fairness. "The obvious question here is what constitutes 'reasonable opportunity' to attend and 'reasonable cause' for absence." The determination of reasonableness directly affects not only the power to proceed with a hearing, but it may have a vital effect upon the ultimate issue, deportability. An alien may be quite able to refute the substantive charge against him, but be deprived of an opportunity to do so by an erroneous determination of "reasonableness."
I. Impartiality of the Judicial Officer

“Judges are disqualified from sitting in cases in which they have a personal interest, or in which they have acted as counsel, or in which they have a relationship to the parties or an interest in the subject matter.”

Generally, a judge is disqualified from a trial in which he has any bias or prejudice, but the courts try to avoid any frivolous attacks on the judiciary, and any such showing of bias or prejudice may be quite difficult to prove. Also, if the trial judge has any bias or prejudice, a substantial interest in the case, or has been of counsel, he is expected to disqualify himself. But it has been held that for section 455 to come into operation, it is necessary that the trial judge have knowledge that he comes within the statute. No specific cases were found that stated a trial was conducted prejudicially because the judge was both the judge and prosecutor, but it seems such commingling of the two functions would necessarily violate due process.

For a deportation proceeding, Congress has passed a special statute which approves the commingling of the judge and prosecutor. This express congressional approval is found in section 1252(b), which authorizes a special inquiry officer to administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and make determinations, including orders of deportation. But this section will not permit the inquiry officer to conduct the hearing if he participated in the investigative functions of the hearing.


258. United States v. Valenti, 120 F. Supp. 80, 83 (D.N.J. 1954), was a case where the defendant filed an affidavit under 28 U.S.C. § 144 (1949), alleging bias and prejudice on the part of the trial judge. The court stated, “While the statutory provision of Congress providing for the recusation or disqualification of a trial judge by the filing of an affidavit of bias or prejudice is a remedial measure having for its purpose assurance to litigants of a fair and impartial trial before a judge of the United States, it has been well established that the statute is to be given the utmost strict construction in order to safeguard the judiciary from frivolous attacks upon its dignity and integrity, and to avoid interruption of its ordinary and proper functioning.” See also Berger v. United States, 255 U.S. 22, 41 S. Ct. 230 (1921).

259. 28 U.S.C. § 455 (1949): “Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.”

260. Adams v. United States, 302 F.2d 307 (5th Cir. 1962). The case involved a situation where the judge was the United States Attorney for the prosecution of the defendant in a prior liquor case, and that in the present perjury case, the judge was allegedly disqualified because he had either a “substantial interest” or it was a case in which the judge “has been of counsel.” The court said, “Although it is doubtless true that the term ‘substantial interest’ normally refers to a pecuniary or beneficial interest of some kind, we construe the language broadly enough to comprehend the interest that any lawyer has in pushing his case to a successful conclusion. However, for this ‘interest’ to arise, there must, as a minimum, be knowledge on behalf of the judge that the case is one that fits within the category.” 302 F.2d at 310. (Emphasis added.)


262. Ibid. “... no special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions...” (Emphasis added.)

Editors: Resident Aliens and Due Process: Anatomy of a Deportation

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When the problem faced the Supreme Court in *Marcello v. Bonds*, the Court stated the Administrative Procedure Act did not apply when Congress has pre-empted that particular area. The Court interpreted the legislative intent as expressed in the Immigration Act's detailed coverage of hearing provisions to mean "that Congress was setting up a specialized administrative procedure applicable to deportation hearings, drawing liberally on the analogous provisions of the Administrative Procedure Act and adopting them to the particular needs of the deportation process." The Court concluded that the Administrative Procedure Act was intended only as a model for Congress, and in view of the mandatory language of Congress that the procedure set out in the act be the "sole and exclusive procedure for determining the deportability of an alien," that the Immigration Act superseded the hearing provisions of the Administrative Procedure Act. In the light of the *Marcello* holding, it has been virtually impossible to convince a court that the commingling of the judge-prosecutor violates due process and negates a fair hearing. Even though the alien might be confronted with a single judge-prosecutor, he might be able to have the hearing nullified if he can show that the official was either biased or prejudiced in his particular case. Since the *Marcello* decision and the congressional statute expressly authorizing a single judicial officer, the argument that due process is violated by vesting such power within one person, will unhappily fall upon deaf judicial ears despite the very fertile grounds for abuse.

J. Right to Counsel

In the deportation proceeding, the question of an alien's right to counsel becomes important in ascertaining if he has been afforded a "fair hearing" as required by due process. The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." (Emphasis added.) As is manifest, the Sixth Amendment commands "Assistance of Counsel" in criminal proceedings, but does an alien have the same constitutional rights given the accused in a criminal prosecution? To answer this question, the various steps in an alien deportation proceeding, and in a civilian criminal proceeding, where the assistance of counsel is desirable or necessary, are set out as a means of determining the alien's rights in this area.

264. Id. at 308, 75 S. Ct. at 761.
265. Id. at 309, 75 S. Ct. at 761.
266. See Suarez-Seja v. Landon, 237 F.2d 113 (9th Cir. 1956); Marcello v. Ahrens, 212 F.2d 830 (5th Cir. 1954), aff'd, 349 U.S. 302, 75 S. Ct. 757 (1955); Farquharson v. Landon, 217 F.2d 603 (9th Cir. 1954); United States v. Shaughnessy, 197 F.2d 65 (2d Cir. 1952).
1. At Arrest

After an arrest, a considerable time lapse can occur between apprehension and formal arraignment. In an attempt to meet the problem, the Federal Rules of Criminal Procedure have specified in Rules 5(a) and 5(b) a procedural format to be followed by the authorities after an arrest. Even in spite of Rule 5(a), which requires that an arrested person be presented before the Commissioner "without unnecessary delay", there are time lapses.

While a time lapse may occur between the arrest and the arraignment, Rule 5(a) affords some protection to a defendant in a criminal proceeding, in that certain incriminating evidence acquired during this interim may not be received into evidence. In Mallory v. United States, the Supreme Court sketched the format to be used in initiating a federal prosecution. They stated the familiar requirements that an arrest be made with probable cause and not on mere suspicion; the accused should be presented for arraignment "as quickly as possible" after arrest, and that the judicial officer must apprise him of his rights. The accused may be "booked" at police headquarters, but may not be detained there to elicit damaging statements to support the arrest. Elsewhere in their opinion, the Court said:

...police detention of defendants beyond the time when a committing magistrate was readily accessible constituted "wilful disobedience of law." In order adequately to enforce the congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention.

Thus, there is afforded some protection to a citizen, by the "unnecessary delay" rule, but the problem of what is a reasonable time to present the arrested person before the Commissioner is open to conjecture. In United States v. Skeeters, the court declared the prompt taking of a detained person before a Commissioner to be "as important a duty as is the prompt investigation of crime." Citing Upshaw v. United States, the Skeeters court continued, "...a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing

268. See Moreland, Modern Criminal Procedure, 174 (1959). See also, Beaney, Right To Counsel Before Arraignment, 45 Minn. L. Rev. 771, 775-76 (1961).
273. Id. at 57.
magistrate, whether or not the confession is the result of torture, physical or psychological." In *Skeeters* the court indicated that the prisoner should have been taken to the Commissioner by late Monday afternoon, instead of Tuesday, the day the authorities presented him for arraignment.

Once the accused is presented before the Commissioner for arraignment, Rule 5(b) operates. That rule requires, *inter alia*, that he inform the defendant of his right to retain counsel and to afford defendant reasonable time and opportunity to consult counsel. The accused has only the right to retain counsel; no provision is made for assignment of counsel if he is unable to afford counsel at this point. It is quite possible that assignment of counsel at this step will be granted in the near future.

For the alien, there are two applicable statutes which roughly correspond to the criminally accused's Sixth Amendment protections. The Immigration and Nationality Act does not appear to specifically recognize the right to representation of counsel at an interrogation, prior to the deportation hearing. But, it is possible that if an interrogation were unduly prolonged prior to the alien's appearance before an Immigration Service official, the question of fairness in the proceedings might come into question. In *Landon v. Clark*, respondent in an interview admitted she had misrepresented her identity, marital status, and last place of residence in her application for a visa to the United States. When she objected to lack of counsel at this preliminary interview, the court stated, "That appellee was not represented by counsel at the preliminary hearing was immaterial, since she was so represented at subsequent hearings. . . . The record on appeal does not substantiate the charge of unfairness made by the appellee." Another factor for consideration in this area is that the Adminis-

277. FED. R. CRIM. P. 5(b). See also MORELAND, MODERN CRIMINAL PROCEDURE, 174 (1959); BARRON, 4 FEDERAL PRACTICE & PROCEDURE 77 (1951).

Rule 5(b): "The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel, of his right to request the assignment of counsel, and of his right to have a preliminary examination. (Emphasis indicates new matter.)

Advisory Committee's Note: This amendment obligates the commissioner to inform the defendant of his right to request the assignment of counsel. The amendment to Rule 44 gives a defendant unable to obtain counsel the right to have counsel appointed within a reasonable time after he requests such appointment.

279. "In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 66 Stat. 235 (1952), 8 U.S.C. § 1362 (1958).

(2) "[t]he alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 66 Stat. 208 (1952), 8 U.S.C. § 1252(b)(2) (1958).

280. GORDON & ROSENFIELD, § 5.2b.
281. 239 F.2d 631 (1st Cir. 1956).
282. Id. at 636.
trative Procedure Act possibly gives a person a right to demand a right of representation when his appearance is compelled.283

Bearing in mind that in a criminal proceeding, evidence obtained at an interrogation may not be admissible at trial, it is possible that information obtained at the deportation interrogation may be used at the hearing, especially if the alien had counsel at later proceedings. In United States v. Neeley,284 the court stated, “This objection, in substance, is that, under examination before the inspection officer, at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel.”285

Clearly the alien does not have the same protections as the accused in a criminal proceeding under the Federal Rules of Criminal Procedure. The limited protection afforded the alien can be circumvented at the whim of the Immigration Service, unless checked by a judiciary that has only the highest regard for the “vital interests involved and of the need for assuring the fullest protection of basic human rights.”286

Some authority subscribes to the view that the due process clause of the Fifth Amendment comes into play at some point prior to the deportation hearing, since that “clause usually has been regarded as encompassing the right to be represented by counsel,”287 but the precise extent to which this thinking can be translated into any additional protection is unpredictable because in the absence of a specific rule, it is contingent upon the attitude of the particular immigration official.288

2. At Preliminary Hearing

As previously noted, when a prisoner is presented before a commissioner for arraignment, he must be informed of his right to counsel.289 Also, the commissioner must “allow the defendant reasonable time and opportunity to consult counsel” under Rule 5(b). The only limitation to a prisoner’s rights under Rule 5(b) is that he has no right to have counsel assigned at this preliminary hearing before the commissioner.290 However,

283. Supra note 280. See also, 60 Stat. 240 (1946), 5 U.S.C. § 1005(a) (1947), which states, “Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.”
284. 202 F.2d 221 (7th Cir. 1953), cert. denied, 345 U.S. 997, 73 S. Ct. 1139 (1953).
287. Ibid.
after being informed of his right to retain counsel, the prisoner may be able to get the commissioner's preliminary hearing postponed so he can obtain the assistance of counsel. Another consideration is that if the defendant were not able to obtain counsel at the hearing, or arraignment, the question of a "fair trial" might be raised in later proceedings. However, the absence of a "fair trial" will depend largely on the circumstances of the individual case.

At the preliminary hearing, the rights of the alien are not quite as broad as the defendant's in a criminal proceeding. However, under due process, the alien may be able to show that denial of counsel violates the Fifth Amendment. The alien's rights at this hearing correspond to those available at the time of arrest. The "due process" argument would appear to be the most favorable route to take, if the alien's rights have been infringed at such a hearing.

Nearly all the protections afforded the alien in a deportation proceeding come into operation at the deportation hearing itself. As indicated previously, the criminal defendant does have certain rights to counsel between his arrest and actual trial, but the alien appears to have virtually no remedy for an abridgment of the "Assistance of Counsel" mandate prior to the deportation hearing.

3. At Final Hearing

As might be expected, at trial, the accused is afforded a considerable amount of protection, and the right to counsel has been treated as an "essential element of a fair hearing." As was stated in Moore v. State of Michigan, the "case falls within that class in which the intervention of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing." Rule 44 of the Federal Rules of Criminal Procedure the basic principle now accepted throughout the Federal judicial system, that a defendant appearing at arraignment without counsel must be apprised of his right to counsel and is entitled to have counsel appointed to represent him if he is unable to retain counsel, unless he affirmatively waives that right."

291. United States v. Killough, 193 F. Supp. 905, 914-15 (D.D.C. 1961), in which the court said, "Though the rule gives the accused a right to have the preliminary hearing postponed until he has obtained the assistance of counsel . . . ." (Emphasis added.) See also, Rule 5 (b) which states, "The commissioner shall allow the defendant reasonable time and opportunity to consult counsel."

292. Beaney, supra note 268, at 772.

293. Crooker v. California, 357 U.S. 433, 440, 78 S. Ct. 1287, 1292 (1958), "[Petitioner] would have every state denial of a request to contact counsel be an infringement of the constitutional right without regard to the circumstances of the case." See also, Cicenia v. La Gay, 357 U.S. 504, 509-10, 78 S. Ct. 1297, 1300-01 (1958), "petitioner would have us hold that any state denial of a defendant's request to confer with counsel during police questioning violates due process, irrespective of the particular circumstances involved."


297. Id. at 160, 78 S. Ct. 194. See also, Kraft v. United States, 238 F.2d 794 (8th Cir. 1956); "He is entitled to the assistance of counsel at all stages of the proceedings subsequent to the indictment, including those preliminary to his trial." Allen v. United
requires appointment of counsel, if a prisoner appears in court without counsel, cannot obtain counsel, and does not waive this right. Right to representation of counsel is a fundamental right religiously upheld by the Supreme Court, and in the absence of a waiver by the accused, the Court will examine the trial record to determine whether or not the proceedings were fair, and whether or not the “public conscience” is satisfied “that fairness” dominated the “administration of justice.”

Until 1938, there were no specific rulings that counsel had to be appointed to represent a criminal defendant in a trial. In that year, the Supreme Court, in Johnson v. Zerbst stated:

If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost “in the course of the proceedings” due to failure to complete the court . . . by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.

Thus, with Rule 44 and the holding in the Zerbst case, a criminal defendant has the right to the assignment of counsel.

In considering the plight of the alien, it should be remembered that “[t]he resemblance in the situations of a respondent in a deportation hearing and of a defendant in a criminal trial strongly suggests the desirability of and need for representation by counsel in a deportation hearing.” Also the Mallory rationale seems applicable because “[t]he present temper of the United States Supreme Court, as expressed in its recent decisions irresistibly predicts that . . . an attempted abridgement would receive short shrift.” As pointed out heretofore, the statutes and regulations of the

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298. “If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to retain counsel.”

299. “Whatever our decision might have been if the trial court had informed him of his right and conscientiously had undertaken to perform the functions ordinarily entrusted to counsel, we conclude that the opportunity to have counsel in this case was a necessary element of a fair hearing.” Uveges v. Pennsylvania, 335 U.S. 437, 442, 69 S. Ct. 184, 186 (1948).


301. 304 U.S. 458, 58 S. Ct. 1019 (1938).

302. Id. at 467-68, 58 S. Ct. at 1024.

303. See also, Barron, supra note 277, at § 2461; Moreland, supra cit. supra note 277, at 177.


305. Id. at 884.
migration Service assure an alien the right to have counsel represent him at the deportation proceeding.306

Under the administrative regulations, the inquiry officer has an affirmative duty to inform the alien of his right to retain counsel.307 Even though the alien has no right to have counsel appointed, he can obtain a list of authorized attorneys or organizations which will supply representation for the indigent alien.308 Thus, with the affirmative duty to inform the alien of his right to obtain counsel, it would appear the alien must be given a “fair opportunity” to obtain representation. However, if the alien were given such an opportunity, and failed to obtain counsel to represent him, the deportation hearing would probably continue.309 Since the Immigration statutes and administrative regulations do require that the alien be informed of his right to representation, it would be “meaningless if the respondent” did “not have a reasonable opportunity to exercise it because of improper influence or action by government officers insufficient notification of his rights, inadequate comprehension of the language, or because of mental incapacity.”310 With the duties required by the regulations, if the explanation by the inquiry officer were not clear and understandable by the alien, the hearing would in all probability violate due process.311 Section 1252(b) specifically states the alien shall have the privilege of being represented at no expense to the government, thus making appointment of counsel unnecessary under the Congressional statute. Also, in Alves v. Shaughnessy,312 the court decided that even though the alien could not obtain counsel due to lack of monetary resources, “[t]he facts set out an unambiguously clear case in which ‘failure to have counsel, if error, like other errors, may not be prejudicial.’”313 Thus, the present state of the law confers on the alien no right to the appointment of counsel.314

307. 8 C.F.R. § 242.16(a) states: “The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation.”
308. See 8 C.F.R. § 292.2(c), which requires that a “roster of attorneys and of representatives of organizations” be maintained and be kept up to date.
310. Id. at 885-86
311. See generally, Gordon & Rosenfield, at § 1.23a.
313. Id. at 445.
314. See De Bernardo v. Rogers, 254 F.2d 81 (D.C. Cir. 1958): “It is unnecessary to decide whether due process requires that counsel be appointed to represent an indigent defendant in a deportation proceeding, because the facts on which deportation was ordered in this case were not in issue.” Id. at 82.

In re Raimondi, 126 F. Supp. 390, 394 (N.D. Cal. 1954): “The right to counsel in deportation proceedings has been expressly limited by Congress to counsel retained by the person involved, at no cost to the Government... But without deciding whether due process would require that in special circumstances a person should be furnished with counsel if he is without funds to employ one, the Court rests its decision in this case on the fact that here the absence of counsel was not prejudicial.”
Once the alien does obtain counsel, at his own expense, the attorney is given full reign to adequately represent the alien client. The alien can of course waive any right to representation by counsel, but any such waiver must be clear and made intelligently. For the waiver of counsel, there are certain duties imposed upon the inquiry officer to which he must adhere so that the waiver fully meets the requirements of a fair hearing. One such requirement stipulates the alien must be clearly informed of his right to counsel, and the waiver must be made with clear understanding of the right. In determining if the waiver has been made intelligently, the "fundamental yardstick" is whether under all the circumstances, the hearing was fair and the alien had full understanding of all his rights.

K. Application of Evidentiary Rules

An alien may be subject to deportation for basically one of four reasons: (1) an illegal entry, (2) an overstay of a permitted but limited entry, (3) the commission of a deportable offense before entry, and (4) the commission of a deportable offense after entry. For purposes of pursuing procedural techniques and the use of evidence in deportation proceedings the first two may be grouped into one category and the last two may be grouped into another. In the first group the burden of proof is on the alien to show why he should be allowed to remain in the country, and in the latter category the government must prove that the alien has forfeited his right to stay through misconduct.

Regardless of the reason for deportation, the alien is entitled to a fair hearing within the meaning of the due process clause before a special inquiry officer of the Immigration and Naturalization Service to determine whether he is subject to deportation. It follows that it is incumbent upon

315. "Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs." 8 C.F.R. § 292.5(b) (1958).

316. See Bisaillor v. Hogan, 257 F.2d 435 (9th Cir. 1958).

317. See Barrese v. Ryan, 189 F. Supp. 449 (D. Conn. 1960). See also Barrese v. Ryan, 203 F. Supp. 880, 885 (D. Conn. 1962), in which the court stated, "Plaintiff has at best a limited comprehension of the English language, as demonstrated by his testimony before the special inquiry officer as well as before this court. He was not represented by counsel at the time of his testimony before the special inquiry officer relied on by the government. To permit deportation of a man who has been a resident of the United States for nearly a half century to turn upon such testimony, under the circumstances disclosed, would be little short of ludicrous."

318. Gordon, supra note 285, at 892-93; Van Den Berg v. Lehmann, 261 F.2d 828, 829 (6th Cir. 1958), in which the case was remanded "with direction that the proceedings be stayed so that appellant will have the right and opportunity after due notice, to be represented by counsel of his own choice...."


324. Ungar v. Seaman, 4 F.2d 80 (8th Cir. 1924).
the government to establish why the alien should be deported and to support it by sufficient evidence. The standard or quantum of proof required of the government to establish its case against the alien is substantial evidence or a fair preponderance of the evidence.\textsuperscript{325} Federal law provides that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."\textsuperscript{326} Since the hearing is classified as being civil in nature,\textsuperscript{327} such a standard seems to be in conformity with the traditional common law rule applicable to civil litigation.

The deportation hearing is also classified as an administrative proceeding,\textsuperscript{328} and consequently the common law judicial rules of evidence do not bind the government in fulfilling its standard of proof.\textsuperscript{329} The only limitation to this rule is that the evidentiary rules cannot be disregarded to the extent that the failure to apply such rules would necessarily result in a denial of due process.\textsuperscript{330} But it is well settled that "a hearing does not cease to be fair merely because rules of evidence . . . have not been strictly followed . . . or because some evidence has been improperly received."\textsuperscript{331}

Where the right to deport is based on misconduct, a presumption of innocence exists for the alien, and the burden is upon government to establish the fact of guilt.\textsuperscript{332} The government is allowed great latitude in establishing its case. Any substantial evidence,\textsuperscript{333} provided it is relevant,\textsuperscript{334} is sufficient to establish the government's case even though some or all of the evidence would have been inadmissible under the usual evidentiary requirements. Hearsay evidence is admissible,\textsuperscript{335} but it has been held that it is essential to a fair hearing that the alien have an opportunity to explain or rebut the hearsay evidence.\textsuperscript{336} Where the only evidence to establish the offense was nothing but pure hearsay, the court found that it did not meet the requirement of substantiality as a result of which the hearing was considered unfair.\textsuperscript{337}

\begin{itemize}
  \item \textsuperscript{325} Gordon & Rosenfield, \textsection 5.10b; Matter of H., 3 I. & N. Dec. 411, 444 (1949); Palmer v. Ultimo, 69 F.2d 1 (7th Cir. 1934), where it was said that the burden is on the government to make out a case and the test is whether there is any substantial evidence. Ulmer v. Phillips, 24 F. Supp. 115 (D.C. Mont. 1938); Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958).
  \item \textsuperscript{326} \textsection 242 (b) (4), 66 Stat. 208, 8 U.S.C. \textsection 1252 (b) (4) (1952).
  \item \textsuperscript{327} United States ex rel. Bilokumsky v. Tod, 363 U.S. 149, 44 S. Ct. 54 (1923); Nicoli v. Buggs, 83 F.2d 375 (10th Cir. 1936).
  \item \textsuperscript{328} Kunimori Ohara v. Berkshire, 76 F.2d 204 (9th Cir. 1935); Di Battista v. Hughes, 299 Fed. 99 (3d Cir. 1924).
  \item \textsuperscript{329} 1 Wigmore, Evidence \textsection 4e (3d ed. 1940); Palmer v. Ultimo, 69 F.2d 1 (7th Cir. 1934).
  \item \textsuperscript{330} Supra note 323.
  \item \textsuperscript{331} United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54 (1923).
  \item \textsuperscript{332} Hughes v. Tropello, 296 Fed. 306 (3d Cir. 1924); Werrmann v. Perkins, 79 F.2d 467 (7th Cir. 1935).
  \item \textsuperscript{333} In the Yiannopoulos case, 247 F.2d 655 (7th Cir. 1957), it was said that "substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
  \item \textsuperscript{334} Holz v. Del Guerico, 259 F.2d 84 (9th Cir. 1958).
  \item \textsuperscript{335} Morrell v. Baker, 270 Fed. 577 (2d Cir. 1920); Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir. 1959).
  \item \textsuperscript{336} Lewis v. Johnson, 16 F.2d 180 (1st Cir. 1926); Sercerchi v. Ward, 27 F. Supp. 437 (D.C. Mass. 1939).
  \item \textsuperscript{337} Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir. 1957). The court relied on the words of Mr. Justice Douglas in Bridges v. Wixon, 326 U.S. 135, 156, 65
\end{itemize}
If the alien institutes litigation to stay an order of deportation, the evidentiary rules appear to be even less stringent. The leading case of *Jay v. Boyd*\(^{338}\) held that the Attorney General may consider confidential information outside the record in formulating his discretionary decision. Where the interest and security of the country are at stake, it is not necessary to disclose such information to the alien.\(^{339}\) The existence of these two rules relating to quantum of proof and the means to attain that quantum represent powerful weapons at the disposal of the government in deporting an alien and are significantly contradictory to the general rules applied whenever penal sanctions are to be imposed upon an individual.

In any criminal proceeding the burden is upon the prosecution to establish *beyond a reasonable doubt* that the alleged offense has in fact occurred. Although attempts to define precisely what is meant by “beyond a reasonable doubt” have met with varied success,\(^{340}\) it is obvious that this standard would represent a significant increase over the quality and amount of evidence necessary to meet a standard of “fair preponderance of the evidence.” A state will undergo great expense to convince a jury to a degree of certainty equivalent to that which would be present for ordinarily reasonable and prudent men to act without hesitation in the most important affairs of life,\(^{341}\) in order to sentence someone to a few months in prison. But, where a man may be banished from a country in which he has lived for over fifty years\(^{342}\) and sent to a place where, although not legally, he will in fact be an alien,\(^{343}\) such a punishment may be imposed only on a fair preponderance evidence, which more than likely will be tainted with irrelevant and ordinarily inadmissible evidence. Here, as in other areas thus far examined, responsibility for the oppressive difference in the quality of evidence necessary to convict and necessary to deport is borne by the categorization of the latter proceedings as administrative of civil in character.

Since only an alien can be subject to deportation, alienage is a jurisdictional issue on which the government carries the burden of proof. This is the initial fact to be proven in any hearing. In establishing alienage, it

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\(^{338}\) S. Ct. 1443, 1453 (1945): “[T]he case is different where evidence was improperly received and where *but for* that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing . . . .” (Emphasis added.) And in *McNeil v. Kennedy*, 298 F.2d 323 (D.C. Cir. 1962), it was held improper to issue an order of deportation when alienage was established by unverified or unauthenticated documents.


\(^{340}\) MORGAN, MAQUIRE, & WEINSTEIN, EVIDENCE, 437 (1957).


\(^{343}\) Id. at 437: The court quoted Judge Learned Hand in *Mignozzi v. Day*, 51 F.2d 1019, 1021 (2d Cir. 1931), where he said, “To root up all those associations which we call home, to banish him to be an outcast in a country of whose traditions and habits he knows nothing, and where his alienage is a daily, living fact, not a legal imputation—these are consequences whose warrant we may properly scrutinize with some jealousy, and insist that logic shall not take the place of understanding.”
is only necessary for the government to prove that the accused was born in a foreign country. Once this is shown the person is presumed to be an alien.\textsuperscript{344} In some cases the failure of the accused to testify has been held to constitute evidence tending to prove that he was an alien.\textsuperscript{345} The justification has been that since the proceeding is civil in nature, an unfavorable inference may be drawn from the defendant's failure to testify. As Mr. Justice Brandeis has put it, "Silence is often evidence of the most persuasive character. . . . There was a strong reason why he should have asserted citizenship. . . . [U]nder these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien."\textsuperscript{346} It should be noted that this inference has been used as corroborative evidence and is not sufficient in itself to establish alienage.

Analogous to the government's burden of proving alienage in a deportation proceeding appears to be the necessity of establishing the corpus delicti in a criminal case. But, naturally, in a criminal case the state would be obliged to follow strict evidentiary rules and would not be aided in establishing the corpus delicti by reason of the defendant's failure to testify. In nearly all the states, statutes specifically proscribe comment by the court or by counsel on the failure of the defendant to testify on his own behalf.\textsuperscript{347} In those few jurisdictions where such comment is permitted, it is usually held that the court should explain to the jury that the prosecution has the burden of adding evidence of guilt, independent of the inference from silence.\textsuperscript{348}

Once alienage has been established, the burden is on the alien to prove that he is in the country legally.\textsuperscript{349} The status of the alien is presumed to have continued until the contrary is shown.\textsuperscript{350} Therefore, if the alien fails to produce the proper papers, the establishment of alienage by the government would be sufficient to issue an order of deportation.\textsuperscript{351} Generally, an alien has been unsuccessful in trying to establish citizenship by a mere claim as a witness in his own behalf.\textsuperscript{352} On appeal, the reviewing court will order a judicial inquiry into the claimant's citizenship only when in

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\textsuperscript{344} Rongetti v. Neeley, 207 F.2d 281 (7th Cir. 1953); Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954); Kunimori Ohara v. Berkshire, 76 F.2d 204 (9th Cir. 1935); Chan Nom Gee v. United States, 57 F.2d 646 (9th Cir. 1932).

\textsuperscript{345} United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S. Ct. 54 (1923); Circella v. Sahli, 216 F.2d 33 (7th Cir. 1959).


\textsuperscript{347} Id. at 279.


\textsuperscript{350} Hughes v. Tropello, 296 Fed. 306 (3d Cir. 1924); Bishop v. Watkins, 159 F.2d 505 (2d Cir. 1947); Milutin v. Bouchard, 299 F.2d 50 (3d Cir. 1962); Harris v. Department of Justice, Immigration and Naturalization Division, 161 F. Supp. 59 (E.D. Mich. 1958). The statute provides that if the burden is not sustained, the alien is presumed to be in the country in violation of the law. 8 U.S.C. § 1361.

\textsuperscript{351} Rongetti v. Neeley, 207 F.2d 281 (7th Cir. 1953); Bishop v. Watkins, 159 F.2d 505 (2d Cir. 1947); Barrilla v. Uhl, 27 F. Supp. 747 (S.D.N.Y. 1939).
addition to the claim of citizenship there is some substantial evidence in support of the claim. 353

These first two burdens of proof appear to be reasonable to the encumbered parties. The establishment of alienage by the government is a logical requirement, and the burden on the alien to prove legal entry and residence through the production of visas or the equivalent is not overly oppressive, especially in view of federal law which provides that the alien "shall be entitled to the production of his visa or other entry documents" in order to establish such fact. 354

Technically, in a criminal case the burden of proof can never shift to the defendant because of the presumption of innocence of the defendant. 355 There is nothing even remotely similar to such a presumption in a deportation proceeding. The government's case is obviously reduced to the simplest mechanical presentation of evidence in a proceeding that may result in disastrous consequences to the alien.

L. Privilege Against Self-Incrimination

The Fifth Amendment of the Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The wording of this constitutional privilege shows that it extends to "persons" and is not restricted to citizens, adults, or minors or any other class. The Supreme Court has held that it is restricted to natural individuals 356 and that one person cannot claim it in order to protect another person. 357 It is clear therefore that the privilege extends beyond citizenry and there is no reason for restricting the privilege when asserted by an alien in a deportation proceeding. The privilege against self-incrimination is available to a defendant in a federal criminal case and it has been interpreted by the Supreme Court so that it may be invoked in a bankruptcy proceeding 358 grand jury proceedings 359 and in Congressional investigations. 360 In McCarthy v. Arndstein, a bankruptcy proceeding, the Court pointed out that the privilege is not to be restricted to the words of the amendment itself. "The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought or to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." 361 Furthermore, in Blau v. United States 362 the privilege was recognized to be available to a witness before a grand jury since the witness could reason-

354. Ibid.
ably fear that criminal charges might be brought as result of answering certain questions concerning her relationship with the Communist Party. The privilege therefore can be invoked where there is a threat that the one who invokes it may be subject to some kind of criminal penalty and not merely during a criminal proceeding in which the one who invokes the privilege is the defendant.

The privilege was incorporated into our Constitution to prevent a recurrence of the evils which arose during the Inquisition and in the Star Chamber. The Court in Brown v. Walker recognized it as "one of the most valuable prerogatives of the citizen." At early common law, a criminal defendant was not competent to testify in his own behalf. Congress by statute has given the criminal defendant competence and also in the same statute buttressed his privilege against self-incrimination by providing that if he should refuse to take the stand no presumption can be raised against him due to such refusal. The Court, in interpreting an earlier version of the same statute, held that a defendant who does not take the stand can have the jury instructed that his failure to take the stand does not raise a presumption against him. The safeguards afforded the criminal defendant against self-incrimination are necessary because of the severe sanctions imposed by law which can result in the loss of personal liberty by confinement or loss of property by way of fines which may be levied. This protection, however, does not isolate the defendant in a vacuum; if he does take the stand in his own behalf a jury may be instructed by the judge that they can consider a defendant's interest in the outcome of the case when weighing his testimony and considering his credibility.

In a deportation proceeding an alien's rights are not as fully protected as are the criminal defendant's rights in a federal court. As has already been indicated the alien does not enjoy a presumption of citizenship in a deportation proceeding. The criminal defendant enjoys the presumption of innocence. If an alien refuses to answer questions concerning the basis of his deportation an inference may be drawn from this refusal. Even where an alien has invoked the privilege under the Fifth Amendment and refused to answer questions relating to place and date of his birth and his citizenship an inference was drawn from his conduct.

368. See section III, L of this Note.
370. Hyun v. Landon, 219 F.2d 404 (9th Cir. 1955), cert. granted, 350 U.S. 816, 76 S. Ct. 70; aff'd per curiam by an equally divided Court, 350 U.S. 990, 76 S. Ct. 541 (1956); Kjar v. Doak, 61 F.2d 566 (7th Cir. 1932).
silence can be used as evidence against him\textsuperscript{372} but some courts have avoided this injustice by finding other evidence sufficient to uphold the decision.\textsuperscript{378}

In \textit{United States v. Murdock}\textsuperscript{374} the Court held that a citizen under investigation by a federal agency cannot invoke the privilege on the ground that his answer may incriminate him under a state law. This result was based on the English rule which does not protect witnesses against incriminating themselves under the laws of another country.\textsuperscript{375} An alien can be compelled to testify by a subpoena\textsuperscript{376} and cannot refuse to answer on the grounds that his answer may incriminate him under state law, but he cannot be compelled to answer questions which would tend to incriminate him under a federal statute due to the Fifth Amendment privilege.\textsuperscript{377} A citizen in like manner may be subpoenaed and the privilege is still available to him.\textsuperscript{378}

The privilege against self-incrimination is by definition not an absolute right and can be waived. The courts are reluctant to find a waiver of the privilege\textsuperscript{379} where a criminal defendant is involved as they are with any express privilege in the Constitution. However, once the accused takes the stand in his own defense he cannot claim the privilege when being cross-examined on his direct testimony. Where a person does answer criminating questions, he cannot later invoke the privilege in order to protect another, or to avoid giving details concerning the criminating matter already freely given.\textsuperscript{380} This points up the personal nature of the privilege in that the protection is against self-incrimination and is not available to protect others. In addition, one cannot invoke the privilege to avoid giving the complete aspects of a particular issue. Where a witness invokes the privilege and during the questioning interposes an answer without invoking the privilege, this will not be held to be a waiver of his previous invocation of the privilege.\textsuperscript{381}

A criminal defendant may answer some questions and then invoke the privilege even though a question may be harmless in and of itself. If it could form a link in a chain which might lead to incrimination it is for the court to decide if the invocation of the privilege is justifiable by examining the circumstances of the case,\textsuperscript{382} and if the linkage is reasonable.\textsuperscript{383} This feature of the privilege is understandable, since the privilege exists to protect a person from being compelled to incriminate himself it most

\textsuperscript{372} United States \textit{ex rel. Zapp} v. District Director, 120 F.2d 762 (2d Cir. 1941).
\textsuperscript{374} 284 U.S. 141, 52 S. Ct. 63 (1931).
\textsuperscript{375} \textit{Id.} at 149, 52 S. Ct. at 64.
\textsuperscript{377} Graham v. United States, 99 F.2d 746 (9th Cir. 1938).
\textsuperscript{381} Empack v. United States, 349 U.S. 190, 75 S. Ct. 687 (1955).
\textsuperscript{383} United States v. Coffey, 408 F.2d 488 (3d Cir. 1969).
naturally should extend to the case where he might be compelled to build a case against himself. This body of law has been carefully constructed by the judiciary ever attentive to the need for protection of the criminal defendant. No such consideration has been given to the plight of the alien. Although an alien may avail himself of the privilege, he must specifically invoke it; a mere refusal to answer will not suffice. An inference may be drawn from such silence even if the question involves the very basis of his deportation.

Deportation is punishment. The fifth amendment privilege must therefore logically extend to and permit an alien to refuse to answer any question, the reply to which could form the basis of deportation or be used against him in a deportation proceeding. If an alien refuses to answer any such question, no unfavorable inference should be drawn.

M. Post-Hearing Remedies

1. Appellate Review

All appellate remedies, with the exception of habeas corpus, are provided for by statute. They are not elements of due process even in the criminal law, where one could more readily see the necessity for review. At common law the right to an appellate review was not absolute nor a necessary part of due process. At present, state and federal statutes provide adequate remedies to review the actions of the lower courts.

These statutory remedies in the realm of criminal procedure are the principal source of post-conviction remedies. Under Rule 33 of the Federal Rules of Criminal Procedure a court may grant a new trial if the interest of justice so requires. Under this rule any error which has resulted in a miscarriage of justice is grounds for a new trial. In the past the courts have granted new trials for want of time to prepare for trial, incompetency of counsel, and denial of a separate trial. A motion based on these grounds must be raised within five days. In addition, a two year statute of limitations permits the defendant to move for a new trial based on newly discovered evidence. Rule 34 provides for an arrest of judgment if the court was without jurisdiction or the information or indictment does not charge an offense and for the writ of certiorari.

However, these remedies did not solve all the problems. Once the time limit had passed and the defendant was no longer in custody his appellate remedies were lost. A court’s decision, though constitutionally unsound, could not be vacated or corrected. This dilemma prompted the adoption of

390. Tabor v. United States, 175 F.2d 553 (4th Cir. 1949).
392. United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).
393. Oddo v. United States, 171 F.2d 854 (2d Cir. 1949).
the common law writ of coram nobis in 1954.\textsuperscript{394} The writ has no time limit or custody requirement. Its purpose generally is to review and correct findings of fact.\textsuperscript{395} Although the writ was not specifically provided for by statute the Court derived its power to take cognizance of motions in the nature of coram nobis from the all-writs section of the Judicial Code.\textsuperscript{396}

There is one appellate remedy, however, provided for and guaranteed by the United States Constitution. This is the celebrated common law writ of habeas corpus.\textsuperscript{397} Although the petitioner must be in custody at the time of application, the uniqueness of the writ comes from the fact that there is no time limit for the application, nor is there any limit to the number of applications a prisoner may make; prior dismissal of that application will not bar a subsequent application and the doctrine of res judicata will not apply.\textsuperscript{398} The federal courts constantly stress the importance, necessity and sanctity of the ancient writ and it appears that the Supreme Court now demands that the states provide for a similar remedy by statute or within their constitution.\textsuperscript{399} Generally the requirements\textsuperscript{400} are that the applicant be in lawful custody and has exhausted all state remedies. Originally, the writ was used largely to test the jurisdiction of the lower court.\textsuperscript{401} This is still true, but today it is more commonly in use to test the validity of the prisoner’s detention on constitutional grounds\textsuperscript{402} and the unlawful restraint of personal liberty.\textsuperscript{403} A timely application is made any time during the criminal process when such an infraction might arise whereby state court proceedings could be stayed until the validity of the detention had been determined.\textsuperscript{404} However most applications come at the end of the proceedings, usually during the term when the sentence is being served.\textsuperscript{405} The reason for this is that the courts are not accustomed to interfere with or to interrupt the judicial processes of the state courts, and then only when exceptional circumstances can be shown.\textsuperscript{406} So, though

\textsuperscript{395.} Ibid.
\textsuperscript{396.} \textit{Id}. at 506, 74 S. Ct. at 250. The all-writs section is found in 28 U.S.C. § 1651 (a).
\textsuperscript{398.} State v. Wall, 187 Minn. 246, 244 N.W. 811 (1932).
\textsuperscript{399.} Young v. Ragen, 337 U.S. 235, 69 S. Ct. 1073 (1949).
\textsuperscript{400.} See 28 U.S.C. § 2241.
\textsuperscript{401.} \textit{Ex parte} Watkins, 28 U.S. 193 (1830); People v. Doyle, 232 N.Y. 96, 133 N.E. 364 (1921).
\textsuperscript{403.} Coffin v. Teichard, 143 F.2d 443 (6th Cir. 1944).
\textsuperscript{405.} For a collection of recent decisions involving time of application, subjects reviewable and requirements for habeas corpus, see the annotations in 28 U.S.C.A. § 2241.
\textsuperscript{406.} Jones v. Perkins, 245 U.S. 390, 38 S. Ct. 166 (1918).
the writ is always available, an interlocutory issuance of it must be justified by the surrounding circumstances.\(^\text{407}\)

In the area of administrative law there appellate review is somewhat analogous. Since deportation proceedings are not considered criminal in nature\(^\text{408}\) and are largely governed by the Immigration and Nationality Act rather than by the Federal Rules of Criminal Procedure, deportation is strictly an administrative process. The methods of review are different despite the similarities of deportation to a criminal proceeding pointed out by the Supreme Court in noting that, "[D]eportation is a drastic measure and at times equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."\(^\text{409}\)

The right to review or to seek review had never been expressly authorized though it was vaguely mentioned in the Act of 1952. By its amendment, however, judicial review is provided for. The courts use this only as a procedural guide and those methods heretofore provided by the courts still prevail.\(^\text{410}\) At one time the only remedy available to an alien was the writ of habeas corpus. Now the right to declaratory judgment has been added.\(^\text{411}\)

The one sharp difference between the criminal and administrative process is that in the latter only final orders are reviewable. But, similar to the criminal cases, the courts will step in where irreparable injury can be shown.\(^\text{412}\) By comparison it will suffice to say that just as in criminal law where the state remedies must be exhausted before redress can be had, in the federal courts all administrative remedies must be tried before these appellate remedies are available. Again the reason for this rule is the same; courts will hesitate before interfering until the administrative processes have been completed.\(^\text{413}\)

Very little can be said about seeking recourse by declaratory judgment. In the absence of clear legislative direction the courts have looked to Rule 57 of the Federal Rules of Civil Procedure.\(^\text{414}\) Generally its purpose is to challenge the finding of deportability,\(^\text{415}\) and the denial of discretionary relief,\(^\text{416}\) but the constitutionality of the deportation can also be questioned. The review, therefore, is much like the review of any administrative ruling

\(^{407}\) Generally the following circumstances are considered: other available remedies, \textit{Re Lincoln}, 202 U.S. 178, 26 S. Ct. 602 (1906); justification for interference with the administration of justice, Hunter \textit{v. Wood}, 209 U.S. 205, 28 S. Ct. 472 (1908); a decision in the prisoner's favor would result in his release rather than a remand to custody, \textit{Re Durrant}, 169 U.S. 39, 18 S. Ct. 291 (1898).


\(^{414}\) Gordon & Rosenfield, § 8.9.


and as will be seen it adds very little to the scope of review given through habeas corpus. As is also true with habeas corpus the deportation order will be stayed pending final outcome on appeal. The vital differences between this method and the common law writ are that custody is not necessary and the doctrine of res judicata is applicable.

The writ of habeas corpus, on the other hand, applies much the same here as it did in the criminal proceeding. The nature and scope of the review cannot change from one proceeding to the next. It is employed in the same manner by alien and prisoner alike. Res judicata is inapplicable, the irrelevancy of time and number of applications remain the same, and it must be the last line of defense for both.

In contrast, the law seems to favor the criminal defendant as far as the number and availability of judicial remedies are concerned. Yet there seems to be a trend in the direction of affording the alien greater protection. However, the sharp contrast cannot be overlooked. Whereas rules of criminal procedure provide for new trials and possible reductions in sentences by appellate courts the alien must be satisfied with remands for such things as abuse of discretion, errors of law or lack of substantial evidence to support the conclusion, or possible release through habeas corpus and, as has been recently decided, once the deportation order is affirmed and the destination of the alien is set it is conclusive and not subject to review.

2. Protecting Deportable Aliens from Physical Persecution

There is one additional post-conviction remedy of the alien that the criminal defendant does not have.

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution. This provision modified the language of the earlier statutes in a manner which shows clearly, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and "opinion" of the Attorney General and his delegate. The courts may not substitute their judgment for his, even though his may be based on confidential information, undisclosed to the alien. However, where the court found that the alien

422. United States v. Neelly, 207 F.2d 281 (7th Cir. 1953).
427. Ibid.
was denied the "full and fair opportunity to present relevant and important evidence in support of his application for suspension of deportation," it overturned the Attorney General's order denying the alien relief.\footnote{Paschalides v. District Director, 143 F. Supp. 310 (S.D.N.Y. 1956).} Such a decision, however, does not appear to limit the discretion of the Attorney General in this matter. Rather it affects the rights of the alien to present all relevant information to the Attorney General before he makes the determination.\footnote{For other cases on the subject of relief from physical persecution see Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961), cert. denied, 366 U.S. 950, 81 S. Ct. 1904; United States ex rel. Contisani v. Holton, 248 F.2d 737 (7th Cir. 1957), cert. denied, 355 U.S. 932, 78 S. Ct. 774; United States ex rel. Namkung v. Boyd, 226 F.2d 385 (9th Cir. 1955); Radi v. Fulilove, 198 F. Supp. 162 (N.D. Cal. 1961); Vardjion v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd, 303 F.2d 279; Granado Alneida v. Murff, 159 F. Supp. 484 (S.D.N.Y. 1958). See also Note, Protecting Deportable Aliens From Physical Persecution; Section 243 (h) of the Immigration and Nationality Act of 1952, 62 YALE L. J. 845 (1953), which takes the position that by possibly eliminating a full hearing on the issue of physical persecution and by granting the Attorney General broad discretion to deport in any event, § 243 (h) may exceed the limits of constitutionality. See Maslow, Recasting Our Deportation Law: Proposals For Reform, 56 COLUM. L. REV. 309, 362 (1956). The author suggests that "no alien should be deported to any country where he may be subjected to racial, religious, or physical persecution. The Immigration and Naturalization Service should be required to make findings on an alien's claim of persecution after a formal hearing before a special inquiry officer, subject to the appeal of the Board of Immigration Appeals and thence to the courts. Decisions on these claims should be made solely upon the evidence adduced at such a hearing."}

While this feature of the Immigration Act appears to represent a departure from the comparatively summary treatment given the alien by giving him one last chance which the criminal defendant does not have, its effectiveness is impaired due to a lack of extensive judicial supervision. In a circumstance where the Attorney General is not satisfied with the alien's claim of physical persecution it is obvious that deportation is the severest of penalties.

3. Detention Between Issuance of the Order and Deportation

The Immigration Act endows the Attorney General with wide discretion in controlling the alien's custody prior to actual deportation. For a period of six months after the deportation order becomes final, the Attorney General is empowered to determine at his discretion whether the deportee is to be detained, or released on bond or conditional parole.\footnote{Immigration and Nationality Act of 1952 § 242 (c), 66 Stat. 208 (1952), 8 U.S.C. § 1252 (c) (1958).} Courts will correct abuses if such discretionary power is not reasonably exercised. Thus, where bail was denied, it was held that since no reasonable expectation of deportation existed within the six month period, denial of bail was arbitrary.\footnote{United States ex rel. Kusman v. District Director, 117 F. Supp. 541 (S.D.N.Y. 1953).} However, on the same matter where the court found that there was no certainty that deportation could not be accomplished within the six-month period, denial of bail was not deemed unreasonable.\footnote{United States ex rel. Blankenstein v. Shaughnessy, 117 F. Supp. 699 (S.D.N.Y. 1953).}
But, for the most part, detention has been invoked in only extreme cases where the alien would be menacing the public safety or security by being free, or where the alien would likely make himself unavailable for deportation once final arrangements were made. Thus where an alien was placed in custody without bond, and the Government could make no positive showing that the alien, if released on bond, would not be available for deportation, the court held that the alien sustained the burden that his detention without bond was without a reasonable foundation.

The Act further provides for a system of supervision over aliens against whom a final order of deportation has been issued and been outstanding for more than six months. The Attorney General has the power to supervise the alien, pending eventual deportation, in the following respects: (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstance, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. This provision was needed because it was felt that after six months have passed without the deportation order being executed, there would be little likelihood that it would ever be accomplished. Consequently, any further detention would have the appearance of a punishment instead of an expulsion. It fills the gap created by the fact that the Attorney General has no authority to continue the alien in custody or to require a bond after the expiration of the six-month period.

Such a system of supervision has been described as a “perpetual parole system” for aliens who cannot be deported. “Not only are they required periodically to give information about their ‘associates and activities’ but they must also ‘conform’ to ‘reasonable written restrictions’ on their conduct imposed by a district direction of the Service or a lesser official.” It is apparent that the Attorney General has a great amount of responsibility in administering the supervisory provisions. For, as Maslow has suggested, “[t]his provision [prima facie] assimilates a deportable alien to a convicted criminal on probation.” And since an alien may be deported although

436. See Shrode v. Rowoldt, 213 F.2d 810 (8th Cir. 1954), where an alien placed on supervisory parole successfully demanded that the bond posted by him be released, because more than six months had passed since the final order of deportation had been submitted.
437. Maslow, supra note 429, at 361.
438. Ibid. Maslow recommends that an alien released pending or during a deportation hearing or because he cannot be deported should not be subject to any conditions upon his lawful activity, except those reasonably designed to insure his appearance when needed.
439. Id. at 362.
he has never committed a crime, such a provision is repugnant to the contemplation in our system of law that no government official shall have the power to forbid lawful conduct.\footnote{Ibid.} If the courts do allow the Attorney General to retain custody over the alien for any purpose other than is reasonably designed to insure his appearance when needed, a change in the law in this respect definitely is required.

The courts have apparently realized such a problem, and have made definite efforts to keep the supervisory power of the Attorney General within the bounds of fairness. In Simonoff v. Murff,\footnote{164 F. Supp. 34 (S.D.N.Y. 1958).} aliens subject to final orders of deportation which had been outstanding for more than six months, were ordered by the District Director not to travel outside of the New York District without reporting to the District Director within forty-eight hours of such departure. The District Court held that “[s]uch a provision certainly appears on its face to be a reasonable one calculated to apprise the Immigration Service of the whereabouts of the [alien], which they must know if an opportunity for deportation arises.”\footnote{Id. at 38.} However, this decision was subsequently reversed,\footnote{Simonoff v. Esperdy, 267 F.2d 705 (2d Cir. 1959).} the court holding that

“the Attorney General's power of supervision under § 242(d) is limited solely to assuring the availability of a deportable alien for deportation when that event should become feasible; and as this supervision may of necessity drag on into a lifetime surveillance, the powers granted by this section must be sparingly exercised. . . . [It is] clear that orders issued under § 242(d) are to be held to these standards by a rather strict court review.”\footnote{267 F.2d 705, 707 (2d Cir. 1959). The court further held that because the district where the alien may go without giving forty-eight hours notice is very limited, it is not surprising that the Service's orders worked substantial hardship and inconvenience on him. "At a very minimum, in the plaintiffs' present circumstances an order of this nature should be limited to notice mailed to the Service immediately prior to a trip and applicable only to trips of some considerable distance or duration". (253 U.S. 194, 200, 77 S. Ct. 779, 782-83 (1957).)

In addition, the Supreme Court has held\footnote{United States v. Witkovich, 353 U.S. 194, 77 S. Ct. 779 (1957). Here, an alien under "supervision" under § 242 (d) was required to answer certain questions such as "Q. Do you subscribe to the Daily Worker?" "Do you know the editor of the 'Narodni Glasnik'?" The lower court held that such questions were not relevant to the aliens' availability for deportation.} that "[n]owhere in § 242 is there any suggestion of a power of broad supervision like unto that over a probationer."\footnote{253 U.S. 194, 200, 77 S. Ct. 779, 782-83 (1957).} Thus, it appears that the courts have almost literally measured up to Maslow's recommendation for executing section 242 (d) fairly. However, the courts must be firm in the approach in the future for this provision to remain unoppressive.
IV.

CONCLUSION

There has been prevalent in this country, even before the signing of the Constitution, a spirit of liberty, of freedom, of dignity of the individual. This spirit was enshrined in, fortified and protected by the Constitution, and its amendments. Deportation as now authorized by the McCarran-Walter Act, in many instances, is contrary to that spirit, imposing punishment, often for the slightest of reasons and without full procedural protections afforded to the basest and most guilt ridden criminal.

It is true that the welfare and internal security of the country must be protected. Those who would do it harm must be punished. But also, must the rights of the individual be protected. To impose an unjust punishment upon a man is as much a breach of this country's principles as the crime itself. The Constitution explicitly prohibits cruel and unusual punishment, as it prohibits double jeopardy. By any standard deportation is a punishment. It should be considered by the courts as a punishment and should be treated as such.

It has not been the purpose of this Note to contend that deportation should be eliminated completely. However, it should be recognized for what it is and the person on whom it is levied or who is in jeopardy of suffering it, should be accorded all the protections which a criminal defendant has, both before and after it is imposed. The country must remain secure, but not make a fetish of security to the extent of depriving individuals of their rights. Great heed should be paid to the words of Justice Jackson when he said: "Security is like liberty in that many are the crimes committed in its name." If such a situation arises, the courts must intervene; it is submitted that the present deportation legislation allows such a situation to exist. That it does exist has been recognized by all the dissenters in deportation cases since the power was first exercised. Perhaps, no more succinct a denunciation of the power as sweepingly exercised today is to be found than in the words of Justice Douglas dissenting in Harisiades v. Shaughnessy:

An alien who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. . . . Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.

448. 342 U.S. 580, 72 S. Ct. 512 (1952). This case upheld the deportation of three aliens for membership in the Communist Party for short periods long before it was made a deportable offense.
449. Id. at 599, 72 S. Ct. at 524.
Let us refer back for a moment to the words of Justice Marshall:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.\(^{450}\) (Emphasis added.)

Surely the end, security and welfare of the nation and its people, is legitimate. It is certainly within the scope of the Constitution. The means are appropriate and plainly adopted to that end, if effectiveness is the sole test of appropriateness. But it is submitted, the nature of deportation, with its disastrous effects upon the individuals involved, its possibilities of double punishment, its cruel and unusual nature, its possibility of imposition for acts which are not criminal, make it inconsistent with the letter and spirit of the Constitution and thus prohibited. Under our system of government the legislative and judicial branches must act to adjust the law. The alien has little chance of influencing the legislature. The greatest pressure which can be brought to bear upon this body is not available to the alien. He has no voice at the polls and no lobby. He stands in the political spectrum on a par with the most unpopular classes. Congress cannot readily be expected to change a law at the urging of such group.

While it is true that the ultimate remedy for our ailing deportation law is a large scale legislative revamping of the Immigration and Nationality Act, it is the judiciary which must take the initiative in indicating their displeasure with the present law and charting the proper course of action for the legislature. More decisions like the recent case of *Rosenberg v. Fleuti*\(^{451}\) will be welcomed. There, one of the provisions of the Immigration and Nationality Act was alleged to be in violation of the “void for vagueness” doctrine. The Ninth Circuit held the questioned provision unconstitutional.\(^{452}\) The Supreme Court, employing the technique of avoiding the constitutional issue if the case can otherwise be decided, appeared to spare the alien from deportation by deciding the case on other grounds. Both the decisions of the Circuit Court and the Supreme Court represent a significant departure from the solid block of deportation law created ten years ago. It is hoped that this type of decision will become the rule rather than the exception. If the judiciary overrules the injustice of our deportation process or continues to indicate its displeasure as was done in the *Rosenberg* cases it will become necessary for Congress to re-examine the objects of the law and tailor a new one consistent with recognized constitutional principles.

When the time for revision finally arrives the legislature should think in terms of a law which is “... neither arbitrary nor discriminatory, [that] will respect the dignity of man, the sanctity of his marriage relation-

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451. 83 S. Ct. 1804 (1963). For a fuller discussion of this case and the “void for vagueness” doctrine as it relates to deportation see section III. A of this Note.
452. 302 F.2d 652 (9th Cir. 1962).
ship and the unity of his family."\(^{453}\) It should be a law which recognizes "the principle of forgiveness and the necessity of procedural fairness."\(^{454}\) More specifically legislative attention should be directed towards the major deficiencies in the present legislation. Any corrective measures which embody the substance of the present proposals will substantially alleviate the crushing effect of the current deportation laws.\(^{455}\)

1. The doctrine that an alien knocking at our gates has no rights or very few has been insensibly extended to the long-time resident alien whose rights and roots in this country approximate those of a citizen. There should be a probationary period after which an alien cannot be deported. It would be difficult to state with exactness the length of such a period without further information, but it should be no longer than the time within which a presumption could be logically entertained that the alien should have been excluded. Thus, a person who commits a crime years after entry could not be ejected on the ground that he was a criminal when he entered, but a person who committed a crime one month after entry could be deported under this proposal.

2. Deportation should be recognized as penal in character and used only as punishment for crime. Because of its drastic effect on the individual, it should only be imposed for serious crimes or for those crimes which are motivated by the alien's allegiance to his homeland, such as espionage.

At any time after the probationary period, the penalty should be imposed only for criminal offenses, never for less than criminal offences. The crime must be such at the time it was committed and an act, innocent when done, should never subsequently become a deportable offence.

Deportation should not be used as an adjunct to criminal law. It should not be the extra punishment for a criminal who has already paid his debt to society. If it is used as penalty for crime it should be the only punishment. If an alien is convicted of a crime in a state court, some procedure should be formulated whereby such an individual would be entitled to another trial in federal court, limited solely to the issue of the advisability of deportation. The principles of double jeopardy would apply to this hearing. Whether to ask for this hearing should be discretionary on the part of the government.

3. The procedural aspects of any deportation hearing should be brought up to the standards now available to a criminal defendant. The rules of evidence and standards of proof should be rigidly adhered to; the full array of constitutional procedural protections should be granted; rights of appeal and post deportation remedies should parallel criminal appeals and remedies. This involves the frank recognition that deportation is punishment; punishment for endangering the national security. Whether labelled a civil or administrative proceeding the trial of a deportable offense must have all the components of the trial of a crime.


\(^{454}\) Ibid.