Chicago-Kent Law Review

Volume 52
Issue 2 *Seventh Circuit Review*

Article 12

October 1975

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DEPORTATION AS PUNISHMENT: PLENARY POWER RE-EXAMINED

Lieggi v. United States Immigration and Naturalization Service, 389 F.Supp. 12 (N.D. Ill. 1975).

Deportation is an anomaly in an era of judicial concern for the rights of the individual, for through the use of the deportation power Congress may arbitrarily decide the grounds on which aliens are to be allowed to remain in this country, or are to be forced to leave. This decision is routinely made without judicially-imposed limits on congressional power to define excludable classes. In *Lieggi v. United States Immigration and Naturalization Service*,[1] a recently decided district court case currently on appeal to the Seventh Circuit, a writ of habeas corpus was issued upon the finding that deportation of the petitioner, an alien, would constitute cruel and unusual punishment. Although the trial court was led to issue the writ at least partially by the large inequity which would result in that particular case, the opinion presents the Seventh Circuit with an issue of potential impact far beyond the case's limited facts.

This comment will focus on the district court's holding that deportation is punishment in any sense of the word, a holding which breaks with precedent by questioning the nature of the deportation power. To this end, the analysis will state the view of the deportation power held by prior courts and then detail *Lieggi*'s departure from this view. An historical analysis of the origins of the power will be offered as possible support for the trial court decision and for its affirmance on appeal.

THE ALIEN'S RIGHTS AND THE DEPORTATION POWER OF CONGRESS

The rights of a resident alien, while less than those of a citizen, are significant. The alien is protected by the equal protection and due process clauses of the fourteenth amendment, the fifth amendment due process clause,[2] the Bill of Rights,[3] and generally by all of the guarantees of the Constitution not explicitly limited to "citizens."[4] Although aliens have long been

1. 389 F. Supp. 12 (N.D. Ill. 1975), *appeal docketed*, No. 75 1393, 7th Cir., May 5, 1975.

2. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

3. *See* Bridges v. Wixon, 326 U.S. 135 (1945); Bridges v. California, 314 U.S. 252 (1941); Wong Wing v. United States, 163 U.S. 228 (1896) (Petitioner was an alien who was ordered deported and also to serve sixty days imprisonment. Court held that criminal due process standards were required only to extent that sentence other than deportation was imposed).

4. Harisiades v. Shaughnessy, 342 U.S. 580, 586 (1952).

discriminated against by statute in the area of property ownership,[5] recent Supreme Court decisions[6] holding alienage to be a suspect classification for equal protection purposes have enlarged the social and economic rights of aliens, and any unequal treatment in these areas today will only be upheld on a showing of a compelling state interest.

All of the rights and privileges the alien possesses depend on his remaining in this country, however, and in the deportation setting his rights are minute. Deportation, for the purposes of this discussion, is both the power of Congress to define expellable classes, and the expulsion procedure itself. This procedure is administrative,[7] and directed by the Immigration and Naturalization Service. Upon discovery by that agency that an alien may fall within an expellable class,[8] an order to show cause and notice of hearing is issued. The hearing[9] is held before a Special Inquiry Officer and the alien has a statutory right to privately-retained counsel.[10] If a deportation order is issued, procedures are provided for administrative review, and limited judicial review by writ of habeas corpus is available after exhaustion of administrative remedies.[11] Although procedural due process, the right to notice and hearing, is required,[12] the courts have refused to hold invalid any ground for deportation promulgated by Congress. This refusal is based on the view that the power of Congress to fix expellable classes is plenary, and thus beyond the reach of judicial review.

Plenary power has been defined as power that is "full, entire, complete,

5. *E.g.*, Illinois allows resident aliens to buy and own real property within the state, but if the alien has not sold the property, or become naturalized after six years, provision is made for the state's attorney to sell the property. ILL. REV. STAT. ch. 6, §§ 1-6 (1973).

6. *In re* Griffiths, 413 U.S. 717 (1973) (State rule limiting admission to the practice of law to citizens found unconstitutional); Sugarman v. Dougall, 413 U.S. 634 (1973) (Statute limiting employment in civil service jobs to citizens found invalid); Graham v. Richardson, 403 U.S. 365 (1971) (Requirement that aliens reside in the state for a period of time before becoming eligible for welfare benefits found improper).

7. Immigration and Nationality Act, 8 U.S.C. § 1252(b) (1970).

8. The list of expellable classes is extensive, but includes: those who have entered illegally; those likely to be institutionalized because of a mental disease, defect, or deficiency within five years of entry; anarchists, or those who advocate opposition to all organized governments; Communist Party members; drug addicts and those who have violated narcotics laws; managers of houses of prostitution; those who have aided another alien to enter illegally; and possessors of a weapon designed to shoot automatically or semi-automatically, or a sawed-off shotgun; 8 U.S.C. § 1251(a)(1)-(17) (1970).

9. This hearing is governed by 8 U.S.C. § 1252(b) (1970).

10. In addition to permitting privately retained counsel, 8 U.S.C. § 1252(b) (1970) requires reasonable notice of the time and place of the proceedings and an opportunity to examine the evidence against the alien, to present evidence on his own behalf, and to cross-examine the witnesses against him. Also, deportation orders must be based upon reasonable, substantial and probative evidence.

11. 8 U.S.C. § 1252(c) (1970).

12. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). *See also* Yamataya v. Fisher, 189 U.S. 86 (1903) (Administrative officers in excluding aliens must act within the due process clause).

absolute, perfect, and unqualified."[13] As has been seen, however, the power of Congress in the area of deportation is not unqualified, since the courts and statutes have required that minimal standards of procedural due process be observed.[14] Although the courts have long required this modicum of protection, they have never recognized the concommitant requirement of substantive due process; that is, they have never required a showing of a reasonable basis for the exercise of the deportation power. This would seem illogical, since neither the fifth nor the fourteenth amendment contains different standards for the imposition of the two concepts.[15] This dichotomy can be partially explained by an historical analysis of prior cases and statutes on which the plenary status of the deportation power has been based. Upon close examination, it is the view of this author that precedent should not necessarily support a power to deport aliens long resident in this country for acts either which have no connection with their status upon arrival, or which are not a grave threat to the political fabric of this country.[16]

THE HISTORICAL BASIS OF THE POWER TO DEPORT

In any historical discussion of the power to deport, it is necessary to differentiate between exclusion and deportation. The former refers to the ability to refuse entry to aliens seeking it. The second originally referred to the ability to expel aliens who had entered either clandestinely, or fraudulently, but in either case had no right to be in the country. In more modern times, its meaning has been enlarged until today the definition includes the power to remove legally resident aliens because of acts done or status acquired subsequent to entry and totally unrelated to their condition upon entry.[17]

13. Mashunkashey v. Mashunkashey, 191 Okla. 501, 504, 134 P.2d 976, 979 (1942).

14. In Wong Yang Sung v. McGrath, Justice Jackson observed, "The Constitutional requirement of procedural due process derives from the same source as Congress' power to legislate, and when applicable, permeates every valid enactment of that body." 339 U.S. 33, 49 (1950).

15. Procedural due process alone may be largely an illusory protection. As one scholar has said, "[I]f the sole question that may be asked is whether the proper procedures were followed, it would—provided merely that the required forms were observed—make any law, however arbitrary, valid, and proceedings under it done by due process of law." SCHWARTZ, CONSTITUTIONAL LAW, A TEXTBOOK 165 (1972).

16. The view that precedent does not establish a plenary deportation power over aliens in all cases is not original with the author. For a more extensive analysis of the prior cases, see Hesse, *The Constitutional Status of the Lawfully-Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578 (1959) [hereinafter cited as *Pre-1917 Cases*]; Hesse, *The Constitutional Status of the Lawfully-Admitted Permanent Resident Alien: The Post-1917 Cases*, 69 YALE L.J. 261 (1959) [hereinafter cited as *Post-1917 Cases*].

17. 8 U.S.C. § 1251(a)(11) (1970), the statute under which the government attempted to deport Lieggi in the present case, allows narcotics or marijuana convictions to serve as a ground for deportation no matter how long the period of time between the alien's entry into this country and his conviction. Theoretically, an alien who was an infant upon entry could be deported for a conviction occurring in his old age if he had not become a citizen in the interim.

The power to exclude aliens has always been considered plenary. In a recent case, *Kleindienst v. Mandel*,[18] the Court said, "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[19] This breadth of power was based in an early case on a "sovereign powers" concept,[20] but as one commentator has pointed out,[21] this is arguably redundant, as the grant of power can be quite adequately grounded on Congress' power over foreign commerce, treaties, war, and naturalization. Undeniably, the exclusion power is very extensive, and, as a survey of early cases and statutes discloses, exclusion is the progenitor of the modern concept of deportation.

The first deportation statute was based not on exclusion, but on the war power.[22] Under the Act of 1798,[23] the President was empowered in time of war to expel any alien who, in his opinion, was a threat to government security.[24]

After 1800, immigration was allowed to flow unrestricted until 1875 when the first exclusionary statute was passed, forbidding entry to convicts and prostitutes.[25] In 1891, a statute denying entry to idiots, insane persons, and others was added.[26] This law was the basis for a statement by Justice Gray in *Ekiu v. United States*[27] which indicated that the power to deport may be implied from the power to exclude, "Every sovereign nation has power . . . to forbid the entrance of foreigners . . . or to admit them only in such cases and upon such conditions as it may deem fit."[28] No deportation policy of Congress existed at this time which was not based on exclusion.

The year 1882 saw the first exclusionary statute based on race.[29] A knowledge of the procedure created by the Act is important to an understanding of the later cases. The purpose of the statute was to deny entry to

18. 408 U.S. 753 (1972).

19. *Id.* at 766, *citing* Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

20. "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . . ." Nishimura Ekiu v. United States, 142 U.S. 651 (1892).

21. *Pre-1917 Cases*, note 16 *supra*, at 1590-91.

22. U.S. CONST. art. I, § 8.

23. Act of July 6, 1798, ch. 66, 1 Stat. 577.

24. A contemporaneous statute, Act of June 25, 1798, ch. 58, 1 Stat. 570, which gave the President similar powers in peace-time, expired in 1801.

25. Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477.

26. Act of March 3, 1891, ch. 551, 26 Stat. 1084. The statute also excluded those likely to become a public charge, those convicted of crimes involving moral turpitude, those suffering from a loathsome or contagious disease, polygamists, and contract laborers.

27. 142 U.S. 651 (1892).

28. *Id.* at 659.

29. Act of May 6, 1882, ch. 126, 22 Stat. 58, *as amended* Act of May 5, 1892, ch. 60, 27 Stat. 25.

Chinese laborers. To guard against illegal entry, all Chinese already residents were required to obtain "certificates of residence" from the proper government official. A Chinese citizen found in the country without this certificate was presumed to have entered illegally. This presumption could be rebutted by other evidence.[30] With the foregoing as background, an opinion was written which, even today, is cited as an initial delineation of deportation as a plenary power,[31] *Fong Yue Ting v. United States*.[32] The plaintiffs in *Fong Yue Ting* were three Chinese who were discovered without the proper certificates and had been ordered expelled. Although the actual issue before the court, the validity of the procedures employed which served to shift to petitioners the burden on the issue of the right to remain, was narrow, Justice Gray wrote an expansive opinion, holding that the procedures contained in the statute did not offend procedural due process and were not an invalid delegation of power.[33] The holding has proved relatively unimportant. Dicta found in the case, however, has been quoted often in later cases. Justice Gray wrote:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty, or by Act of Congress, and to be executed by the Executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty, or by statute, or is required by the paramount law of the Constitution, to intervene . . . .[34]

On examination, this passage does not in fact recognize a plenary congressional power to deport. Deportation (expulsion) here was a tool by which Congress provided for removal of aliens who were presumed to have entered illegally, or, in other words, exercised its plenary power of exclusion.[35] One commentator, writing in 1959, said of this decision, "*Fong Yue Ting* did not, as seems to have been assumed in recent cases, abrogate the need for Congress to find a rational nexus between proscribed conduct and the regulation of immigration before declaring an act expellable."[36]

Thus the constitutionally-delegated basis for Congress' power to remove resident aliens in *Fong Yue Ting* was its authority over foreign commerce, the basis for its power to refuse aliens admittance. This link, if followed through later cases, becomes more tenuous. Some grounds for deportation today are not necessarily related to the status of the alien on entry.[37]

30. Act of May 5, 1892, ch. 60, § 6, 23 Stat. 115.

31. In fact, the *Lieggi* court cited *Fong Yue Ting* as applicable precedent. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. 12, 16 (N.D. Ill. 1975).

32. 149 U.S. 698 (1893).

33. *Id.* at 732.

34. *Id.* at 713.

35. Justice Jackson, writing for the Court in Harisiades v. Shaughnessy, noted that "until the turn of the century expulsion was used only as an auxiliary remedy to enforce exclusion." 342 U.S. 580, 588 n.15 (1951).

36. *Pre-1917 Cases*, note 16 *supra*, at 1596-97.

37. *See* note 17 *supra*.

A 1913 case, *Bugajewitz v. Adams*,[38] is another opinion frequently mentioned as a major support for a plenary power to deport. *Bugajewitz* dealt with a statute which excluded aliens who were prostitutes.[39] Because of the difficulty in ascertaining who were prostitutes and who were not, the statute provided that an alien practicing prostitution subsequent to entry would be deemed to have practiced it previously, and thus to have entered illegally. Here again, the power to deport was used as an instrument to implement the power to exclude. Justice Holmes, writing for the Court, appeared to have something more in mind when he said: "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."[40] The word "deportation" had not attained the connotations in 1913 that it possesses today, however, and Justice Holmes' dissent in a case decided four years earlier, *Keller v. United States*,[41] makes it very doubtful that he was speaking for a totally unbridled power to deport in *Bugajewitz*:

> For the purpose of excluding those who unlawfully enter this country, Congress has power to retain control over aliens long enough to make sure of the facts. . . . To this end, it may make their admission conditional for three years. . . . If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they came in . . . and, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, it is too long.[42]

While the last sentence above can arguably be said to be an acknowledgement of Congress' authority in the matter, the phrase "long enough to make sure of the facts" indicates that Justice Holmes would not accept such a statute with no time limits whatsoever. Also, the object of the statement is again deportation as a tool of the expulsion power. In summary, *Bugajewitz* is an unsure precedent upon which to base current theories of unlimited deportation power.[43]

The Act of 1917[44] was the first to discard a provision found in all previous legislation, that aliens committing certain acts within certain time periods were thereby deemed to have entered the country illegally. One scholar has pointed out that by this statute: "Congress denied that a causal connection between pre-entry characteristics and post-entry conduct was

38. 228 U.S. 585 (1913).

39. Act of February 20, 1907, ch. 1134, 34 Stat. 898, *as amended* Act of March 26, 1910, ch. 128, 36 Stat. 265.

40. Bugajewitz v. Adams, 228 U.S. at 592 (1913).

41. 213 U.S. 138 (1909).

42. *Id.* at 150.

43. Hesse, noting that Justice Holmes' opinion in *Bugajewitz* has been read as allowing deportation for acts committed after entry, argued that the opinion, when read with the dissent in *Keller*, "indicated that [Holmes] assumed the presence of an erroneously admitted alien [in *Bugajewitz*]." *Pre-1917 Cases*, note 16, *supra*, at 1625.

44. Act of February 5, 1917, ch. 29, § 19, 39 Stat. 874.

necessarily relevant to the exercise of the [deportation] power, and, accordingly, actually divorced ejectment from excludability . . . as a consequence, time limitation periods became accepted as the boundaries of the government's grace, rather than the extent of its powers."[45]

Once this partition between exclusion and deportation was accomplished, a wholly separate deportation power found root, fostered by increasingly expansive drafting by Congress. By ridding statutes of any time limitations, Congress was able to extend its power over aliens for longer periods of time. Today, an alien who has taken no steps toward naturalization can be deported upon doing certain acts no matter how long he has been a resident, and for reasons that have no connection to his status upon entry.[46]

While the historical legitimacy of a plenary power of Congress to decide the grounds on which legally-resident aliens are to be deported is thus in question, the courts have not doubted its validity, no matter how unfair or arbitrary the statute before them might appear. In three cases in the early 1950's, the Supreme Court considered deportation statutes against which the petitioners had raised substantive due process arguments, and refused to apply the asserted fifth amendment due process tests.

The 1950's Cases

All three cases have a common factual attribute, the status for which the petitioners were being deported was Communist Party membership. In the first, *Carlson v. Landon*,[47] Justice Reed, writing for the Court, and citing *Ekiu, Fong Yue Ting,* and *Bugajewitz*, couched the power of Congress in the most expansive language used in an opinion until that time:

> So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.[48]

It is questionable whether close examination of the three cases cited support the statement of Justice Reed. Moreover, later in his opinion, he stated that the threat of Communism is such that Congress would be within its power to deport the petitioners, "according to any theory of reasonableness or arbitrariness."[49] The implication of this statement is, that for Justice Reed at least, due process would have been satisfied if applied. That due process should apply would appear to be the import of a statement found still later, "The power [to expel] is, of course, subject to judicial intervention under

45. *Post-1917 Cases*, note 16 *supra*, at 264.
46. *See* note 17 *supra*.
47. 342 U.S. 524 (1952).
48. *Id.* at 534, *citing* Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Ekiu v. United States, 142 U.S. 651 (1892).
49. 342 U.S. at 536.

the 'paramount law of the Constitution.' "[50] As authority for this statement, Reed again cited *Fong Yue Ting*. Justice Reed's third statement is very difficult to reconcile with his first, for a truly sovereign or plenary power is not limited by judicial review. It has no limits by definition. No matter what the meaning of Justice Reed's opinion, the resut was the same. The statute was sustained, and the alien was deported.

The second of these cases, *Harisiades v. Shaugnessy*,[51] is probably the most often cited of the three. Again the Court, through Justice Jackson, was asked to find that deportation was not reasonably related to a valid exercise of congressional power and again the Court refused, basing its refusal on a denotation of deportation as a "sovereign" power: "That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."[52] And in connection with political considerations the Court observed, "[A]ny policy towards aliens is vitally interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[53] In *Harisiades*, each of the three petitioners had resided in the country for approximately thirty years, and had ended their Communist Party membership before such affiliation became grounds for deportation.[54] Although the facts made application of the plenary power doctrine particularly harsh, the Court found that the petitioners were nevertheless vulnerable to deportation.

The third case in the series, *Galvan v. Press*,[55] was decided three years later and its holding is basically little more than a restatement of the position of the first two. The case is significant for what may be a note of hesitation in the opinion of Justice Frankfurter:

> In light of the expansion of the concept of substantive due process as a limitation upon the powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the due process clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . but the slate is not clean.[56]

While the result for the alien petitioners in *Galvan* was the same as in the two previous cases—deportation—the above passage is important because it underscores what was for the Court in *Carlson*, *Harisiades*, and *Galvan*, the basic rationale for finding deportation legislation immune to the tests of sub-

50. *Id.* at 537.
51. 342 U.S. 580 (1952).
52. *Id.* at 587-88.
53. *Id.* at 588-89.
54. Ex post facto considerations were found not to apply because deportation is a civil and not criminal proceeding. *Id.* at 594.
55. 347 U.S. 522 (1954).
56. *Id.* at 530-31.

stantive due process, that Congress in finding it necessary to expel avowed Communists was acting on the basis of considerations which were uniquely the concern of Congress, because they were rooted in the concept of "national sovereignty." Although this concept is never clearly defined, it includes powers, recognized at international law, of which every sovereign nation can make use to defend itself. It is a principle of international law, that inherent in national sovereignty, is the power summarily to expel resident aliens.[57]

Justice Gray at one point in *Fong Yue Ting* based the power to exclude aliens on national sovereignty.[58] However, in that case, the concept of sovereignty became less important, since Justice Gray also enumerated express grants of constitutional power, most notably the power to regulate foreign commerce which legitimized the exclusion policy of Congress. When it is the alien, long a resident of the United States, who is the subject of a deportation order, it can no longer be realistically argued that deportation is only an extension of the power to exclude, and thus the basis for its exercise in those contexts falls away. Therefore, in the *Harisiades* triology, the Court, although it never specifically used the term "political question," clearly treated the substantive due process issue as non-justiciable. At one point in the Court's opinion in *Harisiades*, Justice Jackson said, "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. Certainly, however, nothing in the structure of our government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress."[59] One commentator has called this concept of national sovereignty, or political question, "the highest barrier to a fresh consideration of the long-term resident alien's status . . . [in relation to deportation]."[60] That the view of deportation as a function of sovereignty forecloses judicial review in all cases does not necessarily follow. As noted previously, the courts have already extended their influence to the extent of requiring procedural due process. It remains unexplained why the sovereign powers concept which is only implied in the Constitution is superior to the express limitation of the due process clause.

The preceding overview is not intended as an exhaustive survey of precedent in the area of deportation, but is instead an attempt to delineate the origins of the major sources of the plenary power concept, exclusion, and, alternatively, national sovereignty. The cases discussed above form the basis of current opinions in the area.[61] It would be misleading, however, if after

57. *See* RHYNE, INTERNATIONAL LAW 114-16 (1971).
58. 149 U.S. 698, 711 (1893).
59. 342 U.S. at 589-90.
60. *Pre-1917 Cases*, note 16 *supra*, at 1586.
61. *See* Santelises v. Immigration and Naturalization Serv., 491 F.2d 1254 (2d Cir. 1974), *cert. denied*, 417 U.S. 968 (1975); Bufalino v. Immigration and Naturalization Serv., 473 F.2d 728 (3d Cir. 1973), *cert. denied*, 412 U.S. 928 (1974); Ah Chiu Pang v. Immigration and Naturalization Serv., 368 F.2d 637 (3d Cir. 1966), *cert. denied*, 386

defining the sources of the power, mention was not made of the present position of the Supreme Court. The Court has upheld every deportation statute it has examined since 1954, no matter how tenuous the link between the statute and the alien's status on entry, or to the political considerations comprised by national sovereignty. This is illustrated by *Marcello v. Bonds*[62] where petitioner was to be deported because of his conviction under the Marijuana Tax Act.[63] Marcello argued that his deportation was improper for two reasons: that the deportation proceedings were invalid on procedural due process grounds, and that deportation would be violative of the ex post facto clause, since his conviction occurred before such conviction was made grounds for deportation. The first issue is unimportant for present purposes. In raising the second issue, however, petitioner argued that deportation was in fact punishment within the ex post facto provision, an argument which contradicted the Court's holding in *Harisiades*. In that case, the Court held that deportation was a civil proceeding, and thus protections which would apply in criminal proceedings were not necessary. Notably, although the political considerations which figured prominently in the Court's decision in *Carlson*, *Harisiades*, and *Galvan* were not apparent in *Marcello*, the Court refused to differentiate, and held that the rule in those cases was applicable in *Marcello*: "We perceive no special reasons, however, for over-turning our precedents in this matter, and adhere to our [prior] decisions."[64]

On the basis of this view of precedent, it can be seen that while deportation began as an extension of the exclusion power, it has attained a vitality of its own through an application of the concept of national sovereignty. The plenary power which results from these cases would apparently allow Congress to define any act or status of an alien as grounds for deportation, no matter how arbitrary or unreasonable, and the Courts could not find the legislation invalid.

DEPORTATION AS A CIVIL PROCEEDING

The view of the deportation power as plenary has led the courts to hold that deportation proceedings are civil and not criminal in nature, and therefore no punishment results. Basically, this is a recognition of the rationale stated by Chief Justice Warren in *Trop v. Dulles*:[65]

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purposes of the statute. If the

U.S. 1037 (1967); Burr v. Immigration and Naturalization Serv., 350 F.2d 87 (9th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966); United States *ex rel.* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 914 (1955).

62. 349 U.S. 302 (1955).

63. INT. REV. CODE OF 1954, § 4744.

64. 349 U.S. at 314.

65. 356 U.S. 86 (1958) (Dealt with issue of denaturalization as punishment for desertion in war-time).

> statute imposes a disability for the purpose of punishment—that is, to reprimand the wrong-doer, to deter others, etc., it has been considered penal. But a statute has been considered non-penal if it imposes a disability, not to punish but to accomplish some other legitimate governmental purpose.[66]

In the past, the Court has found that the purpose of deportation statutes was to aid either in excluding aliens, as in *Fong Yue Ting*, or in removing those aliens who posed a threat to national sovereignty. Thus, deportation has never been considered punishment.

This is not to say, however, that there has been judicial unanimity on the punishment issue. Various jurists have long asserted that, on the basis of the damage caused, deportation should be considered punishment, and the more stringent procedural standards required by the Constitution in criminal trials should be imposed.[67] In 1947, Justice Douglas, writing for the Court in *Fong Haw Tan v. Phelan*[68] and explaining the necessity for construing deportation statutes strictly against the government, observed: "[Deportation] is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[69] Nevertheless, this view has never formed the basis of an opinion, until, *Lieggi v. United States Immigration and Naturalization Service.*

THE DISTRICT COURT OPINION

Andrea Lieggi, born in Italy in 1947, was brought to the United States by his father in 1963. Three years later Andrea's mother and sister arrived, and the family settled in Chicago, where Andrea attended school. Andrea left school before graduation and found employment. In September of 1968, Andrea left home and moved to California. Soon after, he was arrested for selling three marijuana cigarettes to his roommate. In April of 1969, he pled guilty to the charge of "willfully, unlawfully, and feloniously selling, furnishing, or giving away a narcotic, to wit, marijuana."[70] Having spent sixty-nine days in jail before his plea, Andrea was sentenced to three years probation, and was allowed to return to Chicago and rejoin his family. Andrea unsuccessfully instituted appeals in the California Appellate and Supreme Courts. Soon after his return to Chicago, an order to show cause and notice of hearing was issued by the Immigration and Naturalization Service, charging that because of Andrea's conviction, he was subject to deportation under section 1251(a)(11) of the Immigration and Nationality Act.[71] A hearing was held

66. *Id.* at 96.

67. *See, e.g.*, Jordan v. Degeorge, 341 U.S. 223 (1951) (Jackson, J., dissenting); Ng Fung Ho v. White, 259 U.S. 276 (1921) (Brandeis, J.); DiPasquale v. Kannuth, 158 F.2d 878 (2d Cir. 1947) (Hand, J.).

68. 333 U.S. 6 (1947).

69. *Id.* at 10.

70. CAL. HEALTH AND SAFETY CODE § 11531 (West 1971).

71. 8 U.S.C. §§ 1101-1503 (1970). § 1251 states in part:

on January 15, 1970, at which Andrea was represented by counsel. On March 7, the Special Inquiry Officer ordered Andrea's deportation. Andrea attempted to re-open the proceedings; however, all administrative appeals failed.[72] On June 14, 1974, Lieggi filed a petition for a writ of habeas corpus in the District Court for the Northern District of Illinois.

The petition presented four main issues: 1) Whether the court had jurisdiction over the matter through a petition for a writ of habeas corpus; 2) whether Lieggi's California conviction was valid; 3) whether deportation would violate Lieggi's due process rights; and 4) whether deportation amounts to cruel and unusual punishment under the eighth amendment. The court decided the first issue in favor of Lieggi and refused to hear evidence on the second.[73]

The court began its consideration of the third issue by recognizing that previous courts had denied aliens constitutional rights in deportation proceedings, without mentioning that procedural due process is necessary.[74] Nevertheless, the court made it clear that criminal standards of due process should be required, characterizing the holding of prior courts that deportation is not punishment as "fundamentally unbelievable," and asking, "How can deportation be considered anything but punishment? In this case petitioner stood to lose his residence, livelihood, and, most importantly, his family. Certainly if the same thing occurred to a United States Citizen a court would not hesitate to call it punishment—moreover, cruel and unusual punishment."[75] Therefore, the core of the court's argument was that deportation must be punishment because it injures the alien involved, and because it would be considered punishment if it were imposed upon a citizen.[76]

> (a) Any alien in the United States . . . shall, upon order of the Attorney-General, be deported who—
>
> . . . .
>
> (11) is or hereafter at any time after entry . . . has been convicted of a violation of . . . any law or regulation governing or controlling the . . . sale . . . of marihuana . . . .

72. Lieggi attempted to reopen the proceedings under section 1253(h) of the Act which would defer deportation, if the alien could show that he would be persecuted in the country of his destination because of his race, religion, or political opinions.

73. With reference to the first issue, the government argued that since Lieggi was not in actual custody at the time of his petition, jurisdiction was not in the court to grant the writ. The court answered that actual custody was not required, but only a restraint on liberty, citing Jung Woon Kay v. Carr, 88 F.2d 297 (9th Cir. 1937); United States *ex rel.* Wirtz v. Sheehan, 319 F. Supp. 146 (E.D. Wis. 1970). As to the second, the court found itself without jurisdiction to hear a collateral attack of issues that should have been raised on direct appeal. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 15-16.

74. *See* cases cited note 12 *supra.*

75. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 17.

76. To say deportation is punishment without more is to beg the question. As has been pointed out in notes 65, 66 *supra*, and accompanying text, harm which results from a valid non-penal exercise of power is not punishment, and only upon a finding that no reasonable relation to such power exists, can the power be found penal. Impliedly

Upon finding that deportation in fact constitutes punishment, the court cited three recent Supreme Court opinions which indicate that aliens are currently looked upon by that Court with more favor than in the past. The first, *Graham v. Richardson*,[77] was decided in 1971, and ruled that "[c]lassifications on the basis of alienage are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired."[78] The state statutes at issue in *Graham* denied welfare benefits to aliens. The second, *In re Griffiths*,[79] struck down a rule of the Connecticut State Bar which limited admittance to the practice of law to citizens. The last, *Sugarman v. Dougall*,[80] voided a New York law which limited employment in the civil service to citizens.

In referring to these decisions, the court recognized that, since equal protection was a concept found only in the fourteenth amendment, it did not operate directly as a limitation on the federal government, but pointed out, "If . . . alienage is a suspect criterion under the equal protection clause of the fourteenth amendment, then the federal government must adhere to the same standard as do the states."[81] The core of the court's equal protection analysis is found in the next paragraph of its opinion:

> If equal protection is to have any real application to a resident alien, surely it has to mean that an alien cannot be deprived of his Constitutional rights when involved in a deportation proceeding. Under the new decisions a state may not bar aliens from welfare benefits, from state employment or from becoming members of the professions. Yet, if the plenary power of Congress theory is followed, the Federal government can totally abridge all the Constitutional protections and safeguards that a legal resident alien is supposed to enjoy.[82]

While the last sentence is somewhat misleading, in that the alien is not totally unprotected in the deportation setting,[83] the fact remains that a plenary deportation power has meant just that to aliens in the past.[84] Although

the court found deportation in this context unrelated; it is crucial that it did, for, if not, the remainder of the opinion is unsound.

77. 403 U.S. 365 (1971).

78. *Id.* at 372.

79. 413 U.S. 717 (1973).

80. 413 U.S. 634 (1973).

81. Bolling v. Sharpe, 347 U.S. 497, 499 (1954), found the due process clause of the fifth amendment to include the equal protection guarantees of the fourteenth.

82. Lieggi v. United States Immigration and Naturalization Serv. at 18.

83. *See* notes 12, 14 *supra*.

84. This power has had harsh results in the past. For example, in Abel v. United States, 362 U.S. 217 (1960), Abel was arrested on an administrative warrant and held without bail for deportation. While in detention, he was arrested on criminal charges of conspiracy to commit espionage. The charge was based on forged documents found in Abel's possession by immigration authorities during a warrantless search. Admission of the documents was upheld at trial. For other cases holding that criminal due process standards do not attach, because no punishment is inflicted, *see* Zakonaite v. Wolf, 226 U.S. 272 (1922); Ng Fung Ho v. White, 259 U.S. 276 (1921); Bugajewitz v. Adams,

unstated, the basic holding of the court must be seen as a rejection of the plenary power concept. Accepting this, the court's equal protection argument is arguably superfluous. The concept of a plenary deportation power has been considered valid in the past because of a nexus to political questions which the courts, because of the concept of justiciability, were precluded from entering. The *Lieggi* court, on the other hand, implied that no rational relationship exists as far as this provision is concerned, between the particular statute involved and the political considerations of Congress. Therefore, the *Lieggi* court held that equal protection required the imposition of criminal due process standards if no compelling interest could be shown: "Such standards would at least require right of counsel at all significant stages, a presumption of innocence, a right to bail, freedom from cruel and unusual punishment, etc."[85]

In discussing Lieggi's contention that to deport him would be cruel and unusual punishment, the court stressed the particular hardships Lieggi and his family would undergo, if he was returned to Italy,[86] and the relative insignificance of his offense. The court cited published studies, including one by the National Commission on Marijuana and Drug abuse[87] which concluded that private possession[88] of marijuana should not be a criminal offense, to support the proposition that deportation was an overly-severe response to Lieggi's act. In finding deportation cruel and unusual, the court ruled that deportation in this instance was excessive in length and severity, and out of all proportion to the offense charged, and granted Lieggi's release. It should be noted that in granting the writ, the court underscored the weight of the cases on the other side of the issue, but said that granting Lieggi's petition was necessary to avoid an inequitable result, and pointed out, "[t]he recent developments in this once dormant area of the law, [and] the change in legal and social attitudes toward violations of the marijuana laws . . . make the deportation a rather acrimonious act under out contemporary standards of

228 U.S. 585 (1913); Fok Yong Wo v. United States, 185 U.S. 296 (1902); cases cited note 61 *supra.*

85. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 19. As mentioned in note 10 *supra*, privately retained counsel is already allowed by statute. However, the court's opinion would conceivably call for appointed counsel for the indigent, in line with the rule promulgated by the Supreme Court in Gideon v. Wainwright, 372 U.S. 335 (1963). Also, since any deportation order must be based on reasonable, substantial, and probative evidence, the alien in a deportation proceeding already has the advantage of a presumption of innocence, although it is not equal to the reasonable doubt standard required at criminal trials.

86. It is evident from the tenor of the court's opinion that sympathy for Lieggi played an important role in its decision: "Indeed this court would be very reluctant to assess this question [cruel and unusual punishment] were it not for the peculiar factual situation in this case." Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 19.

87. NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, FIRST COMMISSION REPORT 154, n.1 (1970).

88. It should be noted that Lieggi was convicted of the sale of marijuana, not its possession.

decency and equality."[89] It can be argued that the court, in deciding *Lieggi*, was more concerned with the harshness of deporting the petitioner, than with writing an opinion which would serve as the basis for a new view of the law in the area of deportation. Although this may be true, the factors pointed to by the court may indeed serve as the basis for such a view.

The next section of this comment will contrast the court's opinion in *Lieggi* with the prior case law and forecast the treatment the case will receive when considered by the Seventh Circuit Court of Appeals.

DEPORTATION AS PUNISHMENT

The facts surrounding Andrea Lieggi's conviction and the hardships deportation would cause him and his family underscore the reasons why some have long argued for effective judicial recognition of deportation as punishment.[90] Except for his marijuana conviction, Lieggi had no criminal record. He had never been arrested on any other charge. At the time of his hearing, he was employed, and was the sole support of his parents and sister, who are American citizens. Nevertheless, the federal government proposed to uproot him and send him to Italy, where, according to his testimony, he knew no one. He and his family would have suffered enormously. To impede this harm, the court in *Lieggi* has fashioned an opinion containing three separate holdings: 1) to deport an alien is to punish him; 2) to deport an alien without affording him the criminal procedural safeguards guaranteed him by the Constitution offends his right to equal protection, since a citizen faced with the same punishment would be guaranteed such protections; and 3) that deportation in the case of Andrea Lieggi is cruel and unusual punishment.

While it is true that the *Lieggi* court stressed an equal protection analysis, and only commented that, because of the harm done, deportation must be punishment, the holding that deportation is penal is the most important of the opinion, and the one on which the validity of the remainder rests. No prior opinion has found deportation to be punishment, because the power to decide grounds for deportation has been considered plenary, that is, based on considerations and issues that the Constitution has reserved to Congress, not intending that the courts interject their view of the reasonableness of the policy promulgated. To say that the removal of an alien is punishment is to say that the deportation policy in question has no reasonable relation to any valid exercise of the power of Congress. In other words it is to apply the tests of substantive due process, and in so doing, deny the plenary nature of the power. Substantive due process is a phrase which cannot be found in *Lieggi*. To not discuss it begs the question, however, for if Congress has a valid purpose in sending Lieggi to Italy other than to

89. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 21.

90. *See* Bullitt, *Deportation as a Denial of Substantive Due Process*, 8 WASH. L. REV. 205 (1953); Mancini, *Deportation as Cruel and Unusual Punishment After Fur-*

penalize him for an illegal act, the sending cannot be punishment, no matter how much harm is caused.[91] To investigate the purpose of Congress is impossible if the power exercised is plenary. Thus, the *Lieggi* court, in finding deportation punishment, has assaulted the basic nature of the deportation power.

The statute under which the Immigration and Naturalization Service attempted to deport Lieggi differs from most of the other expellable classes delineated by Congress. The others, for the most part,[92] fall into one of two categories: either the act or status of the alien which will precipitate deportation must have occurred within a fixed period of time, usually five years from the entry of the alien into this country, or it must be evident that the alien is a political dissident whose presence threatens the federal government.[93] The former class can arguably be justified as the modern counterpart of the exclusion statute found valid in *Ekiu v. United States*.[94] The latter represents the same policies upheld in *Harisiades*,[95] *Carlson*,[96] and *Galvan*[97] in the 1950's. Section 1251(a)(11),[98] on the other hand, calls for deportation of any alien, who "at any time" after entry is found to be a narcotics addict, or to have violated a narcotics statute. Therefore, the alternative rationales which the Supreme Court has used to justify a plenary deportation power, deportation as an arm of the power to exclude, or as a weapon wielded by the government to defend itself, do not seem to apply to this particular policy.

Whether this discrepancy is what moved the district court in *Lieggi* to break with precedent and find deportation punishment must remain open to speculation, however, since this holding was set out in very conclusionary terms—that since the harm caused the individual would be great, deportation must be punishment. This analysis, alone, is unsatisfactory, since prior courts have allowed deportation to proceed in cases where the result was more inequitable than in the present case.[99] Conversely, this holding is crucial to

man v. Georgia, 3 U. SAN FERNANDO VALLEY L. REV. 27 (1974); Maslow, *Recasting Our Deportation Law; Proposals for Reform*, 56 COL. L. REV. 309 (1956); Note, *Immigration, Aliens, and the Constitution*, 49 N.D. LAWYER 1075 (1974); Comment, 20 U. CHI. L. REV. 547 (1953); Note, 8 VILL. L. REV. 566 (1963); material cited note 67 *supra*.

91. *See* Trop v. Dulles, 356 U.S. 86 (1958).

92. Other classes which have no time limit include: aliens who are managers of houses of prostitution; those convicted of possessing a sawed-off shotgun or automatic weapon; and those convicted more than once of violating alien registration laws. 8 U.S.C. §§ 1251(a)(12), (13), (16) (1970).

93. 8 U.S.C. § 1251(a)(6), (7) (1970).

94. 142 U.S. 651 (1892).

95. 342 U.S. 580 (1952).

96. 342 U.S. 524 (1952).

97. 347 U.S. 522 (1954).

98. 8 U.S.C. § 1251(a)(11) (1970).

99. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

the remainder of the opinion, for punishment cannot be found cruel and unusual until it is first found to be punishment. Therefore, if the district court opinion is to have relevance to future deportation cases, the preliminary holding that deportation is punishment must be seen as based upon a finding that the statute in question violates substantive due process in that it is not rationally related to a power of Congress, other than that of punishment of individuals for illegal acts.

The next section of the opinion, dealing with the lack of criminal due process safeguards in the deportation setting as a violation of equal protection, is misleading. Since a federal statute was in question in *Lieggi*, the equal protection standards of the fourteenth amendment can have no application, at least directly. Instead, the Supreme Court in *Bolling v. Sharpe*[100] has held, "We do not imply that the two [equal protection and due process] are always interchangeable phrases. But . . . discrimination may be so unjustifiable as to be violative of due process."[101] When a federal statute is in question then, it is the fifth amendment due process concept of fairness against which the statute must be measured. Arguably, in *Lieggi*, mention of equal protection is unnecessary, and the statute could instead be looked upon as violating Lieggi's rights, in that he was punished in a proceeding in which he was not accorded those protections made necessary by the Constitution in a criminal trial. The court recognized by implication that an equal protection analysis is not crucial to a resolution of the case when it said, "[O]bviously, none of these cases [*Graham*,[102] *Sugarman*,[103] and *Griffiths*[104]] could be cited as controlling precedent to the problem that is currently before the court."[105] The court noted, however, that equal protection standards are incorporated in fifth amendment due process.

In delineating the actual safeguards which would be required in future deportation proceedings, the court did not set out an exhaustive list, but said that "at least counsel at all significant stages, some form of judicial approval of searches, a presumption of innocence, a right to bail, and freedom from cruel and unusual punishment are necessary."[106] It is interesting to note that, of this list, Lieggi was allowed counsel at his deportation hearing by statute, that no search was made, and that no bail was required since Lieggi was not in custody. As for the presumption of innocence, there is a specific burden of proof which the government is required by statute to meet in deportation cases. The court could not point to any violations of the stand-

100. 347 U.S. 497 (1954).
101. *Id.* at 499.
102. 403 U.S. 365 (1971).
103. 413 U.S. 634 (1973).
104. 413 U.S. 717 (1973).
105. Lieggi v. United States Immigration and Naturalization Serv., 389 F. Supp. at 18.
106. *Id.* at 19.

ards it had promulgated in Lieggi's case, except for cruel and unusual punishment.

Opinions previous to *Lieggi* are unanimous in holding that deportation is not punishment, and so cannot be cruel and unusual. Courts faced with the issue most often respond with language resembling that found in *Bufalino v. Immigration and Naturalization Service*:[107] "Despite the serious consequences of deportation, deportation statutes are not penal in nature . . . petitioner's argument that his deportation would constitute cruel and unusual punishment is also without merit."[108] The point at which *Lieggi* departs from prior cases, however, is not whether deportation is cruel and unusual punishment, but whether it is punishment in any sense. For this reason, prior cases did not in reality reach the eighth amendment issue. Since no prior court has found deportation to be punishment, this second issue is one of first impression.

The finding of the court that deportation in Lieggi's case would constitute cruel and unusual punishment was based on the view that, "the eighth amendment draws its meaning from the evolving standards of a maturing society," and "that punishments which are excessive in length or severity to the offenses charged may not be imposed." For the former, the court cited *Trop v. Dulles*,[109] and for the latter, *Furman v. Georgia*,[110] and *Robinson v. California*.[111] Although nine separate opinions were written in *Furman*, criteria for a finding of cruel and unusual punishment can be gleaned from the opinion. Justice Douglas spoke of arbitrary application of the penalty,[112] and Justice Brennan created a cumulative test which included such factors as unusually severe punishment, arbitrary application of the punishment, a rejection of the punishment by contemporary society, and the absence of a showing that the punishment serves a penal purpose more effectively than a less severe punishment.[113]

Although arbitrary infliction of punishment played an important part in the finding that the death penalty was cruel and unusual in *Furman*, the court in *Lieggi* did not examine the facts surrounding Lieggi's deportation to ascertain whether arbitrariness existed in his case. Instead, the court found that deportation was a disproportionate punishment when weighed against the crime Lieggi had committed, basing its finding on a report of a national commission which found marijuana harmless, and also on statutes in various states which had decreased penalties for marijuana convictions.[114] The court

107. 473 F.2d 728 (3d Cir. 1973).
108. *Id.* at 739.
109. 356 U.S. 86 (1958).
110. 408 U.S. 238 (1972).
111. 370 U.S. 660 (1962).
112. 408 U.S. at 351.
113. *Id.* at 374.
114. 389 F. Supp. at 20.

balanced these facts against the injury deportation would cause Lieggi and ruled that, on the basis of the facts present, deportation was violative of the eighth amendment.

Although the court did not establish every factor set out in Justice Brennan's opinion in *Furman*, cruel and unusual punishment was established on the facts of the case. To remove Lieggi from his family and to send him to a country in which he has not been for twelve years is totally disproportionate to the crime which he committed. It should be noted, however, that the holding of the case is based on the particular facts found in *Lieggi*. Since by the test utilized in the opinion it is disproportionate punishment which is invalid, application of *Lieggi* in succeeding cases, if the decision is affirmed on appeal, will of necessity occur on a case by case basis. The eighth amendment analysis found in the case may be of secondary importance in the future. For in finding deportation to be punishment, the court has provided the basis for what may be a significant enlargement of aliens' rights in the deportation context, by calling into question the plenary power of Congress.

CONCLUSION

Early in 1976, the Seventh Circuit Court of Appeals will likely render its decision in *Lieggi*. Although an examination of precedent makes a reversal of the district court decision appear likely, three factors militate for its affirmance. First, prior Supreme Court decisions do not stand for the propostion that deportation statutes will be excepted from the standards of substantive due process when the statute in question is not reasonably related to the exclusion power or to political considerations. Second, the statute in *Lieggi* is not so related. Third, recent Supreme Court decisions in *Sugarman v. Dougall, In re Griffiths*, and *Graham v. Richardson* signal a move by the Court supporting equal treatment of resident aliens and citizens in as many cases as possible.

Lieggi is important because it is time that the arbitrary power of Congress to erect deportation categories be ended. A mid-seventies case, *Lieggi*, defines the issues clearly, free from the fears engendered by Communism in the 1950's or the massive immigration of earlier years. That the civil status of the deportation power is illogical has been pointed out many times. The passage below is no less true than when it was written in 1959:

> This [recognition that deportation is punishment] would give the alien the rights which the Constitution accords to "persons" ending the anomalous practice of protecting his property, while allowing the residence on which his life and liberty may truly be said to depend to be taken away at the government's will.[115]

This "anomalous practice" has continued for another sixteen years; perhaps *Lieggi* will finally bring it to an end.

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115. *Post-1917 Cases*, note 16 *supra*, at 295.