

Washington Law Review

Volume 28
Number 3 *Washington Legislation—1953*

8-1-1953

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Stimson Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 Wash. L. Rev. & St. B.J. 205 (1953).

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DEPORTATION AS A DENIAL OF SUBSTANTIVE
DUE PROCESS
STIMSON BULLITT*

This article considers the basis and limit of the constitutional power to deport aliens who have become settled residents of the United States.

The Immigration & Nationality Act of 1952¹ has drawn attention to the importance of this problem:² Whether there is a denial of substantive due process of law in the deportation of persons who have lived here long enough to have lost old roots and grown new ones.³

For one who has settled in America the severity of deportation in relation to the behavior for which it now may be the penalty, or an additional penalty, makes it punishment which is cruel though not unusual.⁴ For a new arrival who is turned around and sent back to the place from which he came, deportation is no more than an embarrassing and disappointing return to his former place and station. But the expulsion of a permanent settler means a journey to lands no longer, if ever, known to the uprooted deportee who becomes an alien at his

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¹ 66 STAT. 163 (1952), 8 U.S.C. §§ 1101 *et seq.* (Supp. 1953), commonly known as the McCarran-Walter Act.

² In 1951, the latest year for which figures are available, 13,544 persons were deported, while 673,169 left voluntarily upon threat of deportation proceedings.

³ *Re* distinction see 26 N.Y.U.L. REV. 451 (1951). The Latin derivation of the word "exile" is "ex" out of, and "sal" root.

⁴ Banishment was the customary alternative to a death sentence in Athens and in Rome. 10 ENC. BRIT. 71 (11th ed.); 10 ENC. AMERICANA 638 (1929 ed.), SEAGLE, *THE QUEST FOR LAW*, 233.

"For exile, or transportation is a punishment unknown to the common law; and, whenever it is now inflicted, it is either by the choice of a criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament." 1 BL. COMM. *137.

"Punishment: . . . And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savor of torture or cruelty; a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn, and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, . . . Some, though rarely, occasion a mutilation or dismembering, by cutting off the hands or ears; others fix a lasting stigma on the offender by slitting the nostrils or branding in the hand or face." 4 BL. COMM. *376.

destination, no matter what may be his citizenship.⁵ The penalty has become more harsh than it was in former times. Now a person may not be able to return to where he was born. If he can, he may find a radically altered land.

For the greater part of our history deportation was a device used little if at all because each added pair of hands was so welcome. Except for the controversial act of 1798 which granted the President power to deport aliens whom he deemed "dangerous to the peace and safety of the United States,"⁶ and which was defended as a war measure and lasted for two years, the first statute to expel aliens was enacted in 1888⁷ and provided for expulsion of Chinese contract laborers who had entered illegally. In the last 50 years the limited purpose of implementing the immigration laws has been extended to use the deportation power as a device for punishment, for getting rid of socially undesirable persons and for preserving internal security. Gradually the statutes have extended their scope as well to cover more types of conduct and make expulsion a penalty for less offensive or dangerous types of undesirability than before.⁸

Since 1903, aliens whom Congress deemed dangerous to the national security have been subject to expulsion.⁹ Since 1917, convictions of certain crimes have constituted grounds for deportation. The threshold for departure was lowered in successive steps by the Alien Registration Act of 1940 and the Internal Security Act of 1950. Now the McCarran-Walter Act provides for deportation of aliens whose entry was legal, who could not have been excluded at that time, and who have

⁵ "He is as much our product as though his mother had born him on American soil. He knows no other language, no other people, no other habits, than ours, he will be as much a stranger in Poland as anyone born of ancestors who immigrated in the seventeenth century. However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to anyone, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction." L. Hand for the court, affirming a deportation order, *United States ex rel. Klonis v. Davis*, 13 F. 2d 630 (C.A. 2nd 1926).

"But this alien has grown to manhood here. To root up all these 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." L. Hand in *United States ex rel. Mignozzi v. Day*, 51 F. 2d 1019, 1021 (C.A. 2nd 1931). See § 243 (h), 66 STAT. 216 (1952), 8 U.S.C. § 1253 (h) (Supp. 1953).

⁶ 1 STAT. 570 (1798).

⁷ 25 STAT. 566 (1888).

⁸ See *Harisiades v. Shaughnessy*, 345 U.S. 580, 588, n. 15 (1952) covering development to 1940.

⁹ 32 STAT. 1214 (1903).

been residents for a long period.¹⁰ For most grounds, there is no statute of limitation. A wide discretion has been lodged in the administrators of the Act. For example, among those liable for deportation is a person "who at any time after entry has had a purpose to engage in . . . activities which would be prejudicial to the public interest."¹¹ A substantial number of grounds are retroactive in effect. One who decided to commit the crime of possessing a sawed-off shotgun,¹² or who entered the United States on the basis of marriage to an American citizen and then failed to fulfill her marital agreement "to the satisfaction of the Attorney General,"¹³ could not have known at the time that this course of conduct would later be made the ground for expulsion from the country.

As a policy, banishment is an obsolete expedient.¹⁴ It was established in antiquity when leaders who were thought criminal were too dangerous to be kept in slavery in open association with other citizens and subjects.¹⁵ It was maintained later during the period between the abolition of slavery and the establishment of prisons.¹⁶

Many of the acts, words, associations, conditions and habits which are grounds for deportation are not crimes and are not labeled crimes,¹⁷ but the purposes underlying the deportation statutes are closer to those found in criminal law enforcement rather than in the regulation of foreign commerce. As a penal sanction to rid the community of undesirables, deportation has doubtful value. It is an unreliable deterrent to forbidden conduct. There is no uniformity of misery inflicted, in contrast to the relatively precise measurements of a prison sentence. Conditions of life in other countries vary widely and so do the willingness

¹⁰ § 241 (a) (4-17), 66 STAT. 204 (1952), 8 U.S.C. § 1215 (a) (4-17) (Supp. 1953).

¹¹ §§ 212 (a) (27) and 241 (a) (7), 66 STAT. 184, 205 (1952), 8 U.S.C. §§ 1182 (a) (27) and 1251 (a) (7) (Supp. 1953).

¹² 241 (a) (14), 66 STAT. 207 (1952), 8 U.S.C. § 1251 (a) (14) (Supp. 1953).

¹³ § 241 (c), 66 STAT. 208 (1952), 8 U.S.C. § 1251 (c) (Supp. 1953).

¹⁴ *E.g.* In Australia, aliens with 3 years' residence have complete immunity from deportation in peacetime.

¹⁵ Transportation for crime was abolished in England in 1857, but it still survives among some nations, as Russia, this country maintaining penal settlements in Siberia. The tendency today, in keeping with advancing civilization, is toward its utter abolition." 10 ENC. AMERICANA 638 (1929 ed.).

¹⁶ In England, transportation as a punishment was first established by statute in 1597 on the ground that "such rogues as were dangerous to the inferior people should be banished the realm." 39 ELIZ. c. 4 (Vagrancy).

¹⁷ "The British legislature, making a virtue of necessity, discovered that transportation to the colonies was bound to be attended by various inconveniences, particularly by depriving the kingdom of many subjects whose labor might be useful to the community. . . . The result was an act for the establishment of penitentiary houses, dated 1778." 8 ENC. BRIT. 56 (11th ed.).

¹⁷ § 241, 66 STAT. 204 (1952), 8 U.S.C. § 1251 (Supp. 1953).

and capacity for adjustment among persons subject to deportation¹⁸

Deportation is a life sentence. There is no parole board to determine length of stay according to behaviour and prospects for a law-abiding life. The elements of deterrence and protection of society are present, as in modern criminal jurisprudence, but the purpose of rehabilitation and reform is absent, and its place is taken to some extent by the motive of revenge.¹⁹

The Act embodies the policy of expelling persons who are innocent of criminal acts, or ones who have paid their penalty in jail, but who are "evil types." It even expels former evil types, such as those who used to have dangerous associations or speak inflammatory words or have bad habits but have ceased to commit even such venial sins.²⁰ It would furnish grounds for the deportation of Louis Budenz (former Communist leader), Barney Ross and Stanley Ketchell (former narcotic addicts) if they were aliens rather than sons of aliens, despite the fact that they had sworn off their vices. This policy of punishment for a course of conduct or a moral level rather than for criminal acts strays from our traditional objective doctrine of guilt for criminal acts and approaches the subjective procedure of administrative punishment for bad character.²¹ The habitual criminal charge is perhaps the nearest step we have taken toward this theory, and even there the scope is narrow and the penalty is conditioned on specific criminal acts by the defendant.

The United States is not secured by the dispersal abroad of bad men. To send subversives, criminals, public charges and other offensive

¹⁸ "The convicts [in Australia], or at least large numbers of them, had prospered exceedingly. Some had incomes of twenty, thirty, even forty thousand pounds a year. . . . An expedition was sent there [French Guiana], composed of the most evil elements of the Paris population and numbering 14,000, all of whom died. Other failures are recorded, the worst being the scheme of the philanthropist Baron Milius, who in 1923 planned to form a community on the banks of the Mana by the marriage of exiled convicts, and degraded women, which resulted in the most ghastly horrors." 8 ENC. BRIT. 58 (11th ed.).

¹⁹ HOLMES, *THE COMMON LAW* 41 (23rd ed.).

²⁰ § 241(a) 6, 11, 66 STAT. 204 (1952), 8 U.S.C. §1251(a) (6, 11) (Supp. 1953). See text of letter 4/27/53 from Pres. Eisenhower to Sen. Watkins suggesting consideration of certain proposed changes in Immigration & Nationality Act of 1952. N.Y. Times, Apr. 28, 1953.

²¹ Russia provides for banishment of "foreign subjects who are socially dangerous." Decree of the Central Executive Committee and Council of Peoples Commissars, USSR, Nov. 5, 1934, [1935] COLLECTION OF LAWS, USSR, no. 11, art. 84. "It is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but un consummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it." Jackson as Circuit Justice in *Williamson v. United States*, 184 F 2d 280, 282 (C.A. 2nd 1950).

characters to our free allies²² does not substantially alter the risk or burden to our collective security. Some of these persons are regarded by the Attorney General as so dangerous that it is unsafe to release them on bail because of the evil they might do. They can harm us in the same degree almost anywhere in the world. To deport such undesirables merely evades the problem by putting them out of our sight. It is doubtful whether the strength of the free nations is increased by subtracting from the number of Communists in the United States where they are a loathsome but politically negligible minority,²³ while adding to the number in France and Italy where they are a pressing menace.²⁴ Yet to send scalawags across the Iron Curtain, if and when possible, would be a generous manpower contribution because only compatible and competent persons are admitted.²⁵

Of course, the average alien deported under our laws is not the sort of person who wins awards as a man of distinction, or even a good neighbor. In quality he does not compare with Aristides about whom the Athenian citizen who voted for his ostracism made the historic remark that he was tired of hearing about the man's integrity. But to the aliens under American jurisdiction the spirit of our laws assures a standard of justice higher than that which the Greeks saw fit to grant Socrates. We have an obligation to treat such resident aliens on a level of justice close to that dispensed to citizens because, among other reasons, instead of requiring him to become naturalized if he intends to settle here, we have chosen to permit him to remain indefinitely and "to become a full-fledged member of the community in which he lives; to be employed, to own property, to marry and raise a family, to pay

²² "Though this prerogative of exile by conditional pardon is still exercised, it is likely to create ever-growing difficulties, in consequence of the modern view that a state ought not to relieve itself of its worst criminals at the expense of other countries. Our colonies strongly resent the exportation of criminals . . . and this objection is shared and expressed by law in the United States." 6 LAW QUART. REV. 388, 407 (1890).

²³ Of course it may be that the importance of espionage and sabotage here is equal to or greater than abroad, but these are criminal acts from the commission of which we are given a substantial measure of protection by the penalties which are provided for citizens and aliens alike.

²⁴ The 4000 Americans who voted in the 1948 Italian elections, largely for the purpose of helping to prevent a Communist victory, thereby lost their American citizenship. § 349(a) (5), 66 STAT. 268 (1952), 8 U.S.C. § 1481(a) (5) (Supp. 1953), formerly 54 STAT. 1169 (1940), 8 U.S.C. § 801(e) (1946). This was restored by special legislation. § 402(j), 66 STAT. 278 (1952), 8 U.S.C. § 1435 n. (Supp. 1953), formerly 65 STAT. 191 (1951), 8 U.S.C. § 723 n. (Supp. 1952).

²⁵ See *United States v. Spector*, 343 U.S. 169, 180 (1952).

taxes, to serve in the armed forces, and otherwise to participate in all activities save those reserved for citizens, such as voting."²⁶

Nor should a resident alien be thought reprehensible merely for failure to become naturalized. American citizenship gives much more in personal security and freedom than it takes by the assignment of civic duty. The rights and privileges of an American citizen are now more valuable than was even Roman citizenship when Paul invoked it in his appeal to Caesar.²⁷

It is submitted that the deportation of settled aliens is punishment²⁸ and deprivation of liberty and that it is an unreasonable discrimination against such aliens as a class.

Deportation as punishment was illustrated last year in the cases of *Harisades v. Shaughnessy*²⁹ and *Latva v. Nicolls*.³⁰ Here aliens were ordered deported because they had been Communists although they had not become such until after their settlement in this country and had ceased to be such before deportation proceedings were commenced. In the *Latva* case, the petitioner, after his immigration from Finland at the age of 13, had lived in the United States for 36 years, had an American born wife, had two sons who were honorably discharged veterans of World War II, had belonged to the Communist Party for less than 6 months in 1934 and had paid less than \$1.00 in dues.

The case of *Shaughnessy v. U.S. ex rel. Mezei*³¹ is an example of the proposition that deportation of a settled alien is a deprivation of liberty. In 1897, Ignatz Mezei was born on Gibraltar. He settled in this country in 1923 and for 25 years followed his trade as a carpenter. He married, and his children were brought up in the home which he owns in Buffalo. In 1948 he went abroad to visit his ill mother but was unable to enter

²⁶ REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION 193 (1953). Some states of the United States formerly even used to allow aliens to vote. 2 U.S. CONG. NEWS '52 1658.

²⁷ ACTS 25:16.

²⁸ "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections, where he may have invested his entire property, where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for, if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." President James Madison, 4 ELLIOTT, DEB. 555.

²⁹ Note 8 *supra*. Similar facts and result: *Martinez v. Neely*, 197 F. 2d 462 (C.A. 7th 1952), *Galvan v. Press*, 201 F. 2d 302 (C.A. 9th 1953), *Corona v. Landon*, 111 F. Supp. 191 (S.D. Cal. 1953).

³⁰ 106 F. Supp. 658 (D. Mass. 1952). After this case had received national publicity, the proceedings were arrested by executive decision, a dispensation not of justice but of mercy.

³¹ U.S., 97 L. Ed. (Adv. p. 554) (1953) (5 to 4).

Rumania where she died. The Immigration & Naturalization Service at first refused to grant him a visa for his return from Hungary. After this delay, when he reached New York in January of 1950, the Service barred his entry. He was alleged to be a security risk on the basis of information of a confidential nature, the disclosure of which was asserted to be against the public interest. All efforts to effect re-entry failed. The Second Circuit Court of Appeals affirmed his discharge on habeas corpus,⁸² but the Supreme Court reversed. Confined without bail, he remains on Ellis Island.

It is curious that no judge of either appellate court questioned the refusal by the government to entrust to a Federal Judge (one who a short time before had exercised his ultimate governmental power to sentence two spies to death) information in the possession of staff members of the Service and the office of the United States Attorney.⁸³ So far, Mezei's 25 applications have been rejected by 17 countries and accepted by none.⁸⁴ Since it is unlikely that the Service would tell the governments of 17 countries what it was unwilling to tell a United States Judge *in camera*, their motive presumably was the natural fear of admitting someone so dangerous that the omnipotent U.S.A. itself feared to have him at large.⁸⁵

The courts considered only the procedural question⁸⁶—whether the defendant came under United States jurisdiction⁸⁷ so as to be entitled to a fair hearing without which the 5th Amendment would bar his confinement.⁸⁸ Neither court gave weight, in considering this issue, to the

⁸² United States *ex rel.* Mezei v. Shaughnessy, 195 F. 2d 964 (C.A. 2d 1952).

⁸³ Even where the judge is taken into confidence, the courts face a current problem of whether to convict a man on the basis of information which the government maintains would impair the national security if made public.

⁸⁴ New York Times, Apr. 23, 1953, p. 1. See The Commonwealth, May 8, 1953, p. 111.

⁸⁵ "This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him." Jackson dissenting in Shaughnessy v. United States *ex rel.* Mezei, note 31 *supra* at 562.

⁸⁶ It was taken for granted that the administrative action undertaken met the requirements of substantive due process. Jackson's discussion of substantive due process applied only to confinement, not deportation, and he concluded even there that detention would not violate substantive due process. *Id.* at 563.

⁸⁷ "It was the alien's presence within its territorial jurisdiction that gave the judiciary power to act." Johnson v. Eisentrager, 339 U.S. 763, 771 (1950); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1885).

⁸⁸ See Chin Yow v. United States, 208 U.S. 8, 12 (1908), in which a man excluded as an alien was granted habeas corpus on denial of a hearing to pass on his claim of citizenship. Holmes: "It would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, . . . De facto he is locked up until carried out of the country against his will."

fact that the defendant was in fact a resident alien, despite his recent trip abroad, by reason of the ties developed by his 25 years in the United States. Both courts adopted the fiction that Mezei was in effect knocking at the door as a would-be immigrant.³⁹ The Supreme Court concluded from this that he was not entitled to the protection of the Constitution.⁴⁰ It then adopted a second fiction that the defendant could be indefinitely confined on Ellis Island without losing his status as an outsider asking to be admitted. The Second Circuit distinguished between sending a man in Mezei's position away from the United States and keeping him on Ellis Island. It held that for the former he was entitled to a fair hearing while for the latter he was not. In recognition of the close similarity between the two measures, the Supreme Court applied a uniform rule.

The Second Circuit Court first took the unrealistic but technically correct position that the defendant was an outsider requesting admission. Then it took the realistic but logically questionable position that even such an applicant may be entitled to constitutional protection.

In its decision it used in succession the two meanings of the word "power" in its statement, the purported basis of its decision, that "the power to hold can never be broader than the power to remove or shut out."⁴¹ The first time the Court means authority or right; the second time it means practical capacity. The apparent rationale of the Court was: Confinement should only be a means to an end, which is deportation,⁴² if deportation is practically impossible confinement becomes a substituted end, although deportation is not punishment, confinement is, so it should be protected by procedural safeguards of a fair hearing, to which any person within United States control is entitled.

It might be claimed that the decision would admit a multitude of stateless vagrants if it is based merely on the fact that the defendant

³⁹ The Supreme Court distinguished the case on the facts from *Kwong Hai Chew v. Colding*, U.S., 97 L. Ed. (Adv. p. 348) (1953), decided the month before, where a Chinese seaman who had shipped out from this country on an American ship and had been detained and denied permission to land on return from the voyage was deemed a resident alien and thus entitled to a release from confinement unless he was granted a hearing under the 5th Amendment.

⁴⁰ In this, the Court followed the dissent of Learned Hand below. Accord in holding that a temporarily landed alien is constructively outside the United States so that he cannot invoke the Constitution. The Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86 (1903), *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904), *United States v. Ju Toy*, 198 U.S. 253, 263 (1905), *Knauff v. Shaughnessy*, 338 U.S. 537 (1950). Cf. *Kaplan v. Tod*, 267 U.S. 229, 230 (1925).

⁴¹ *United States ex rel. Mezei v. Shaughnessy*, note 32 *supra* at 967.

⁴² *Id.* at 968.

was here, rather than on the ties developed in prior years of residence.⁴³ Whether or not the Court unconsciously recognized defendant's prior residence as an essential element of the decision, the problem may be expected to arise only when persons such as Mr. Mezei, who have their roots embedded here, seek entry.

The distinction drawn by the Second Circuit Court between deportation and confinement (when it is a substitute, rather than a means, for deportation) rests on the assumption that confinement is more severe punishment than deportation and may not be done on the same conditions. In light of the facts of the case before it the decision takes the absurd position of leaving at large aliens so sinister or offensive that no land will take them, while expelling the more innocuous ones.⁴⁴

Neither court had to pass on the validity of a statute deporting a person for acts not amounting to a crime and for which a citizen suffers no penalty. The Second Circuit Court released the defendant because he had no hearing. The Supreme Court held that the man was merely an excluded outsider who had no claim to constitutional protection. Both the facts of the case and the rationale of the decisions, however, demonstrate the close comparison between the penalties of deportation and of imprisonment.

The unreasonable discrimination against settled aliens as a class is illustrated by a comparison between the cases of *Carlson v. Landon*⁴⁵ and *Stack v. Boyle*.⁴⁶ In the *Carlson* case the Court, in implicit recognition of the equivalence of the power to deport and the power to jail, upheld the decision to hold without bail alien members of the Communist Party pending deportation proceedings. Under the Act the grant of bail in such cases is within the discretion of the Attorney General. The deportation power is used to imprison aliens believed to be dangerous to the nation, although citizens are exempt from such treatment.⁴⁷ In the *Carlson* case the petitioners were neither leaders nor accused of crime. In the *Stack* case, by contrast, citizens who were Communist leaders accused of crime were not only granted bail but also were protected from the imposition of excessive bail under the 8th Amendment, even though there was reason to believe that some of

⁴³ See 66 HARV. L. REV. 643, n. 258 (1953).

⁴⁴ The statute and the Supreme Court's decision take the more consistent positions. An alien ordered deported who is unable to make his way into any other country may, within the discretion of the Attorney General, be confined indefinitely. § 242(c), 66 STAT. 209 (1952), 8 U.S.C. § 1252(c) (Supp. 1953).

⁴⁵ 342 U.S. 524 (1952).

⁴⁶ 342 U.S. 1 (1951).

⁴⁷ It is hard to see how a denial of any bail can conform to the 8th Amendment's prohibition of "excessive bail."

them might leave the country, not a problem in the *Carlson* case. The two cases can be logically reconciled only because they proceed from premises which should not be, but are, different. The same contrasting results take place in the less sensational instances of men who have served their time for certain crimes. Citizens go free, and aliens are sent abroad.

It is unreasonable discrimination for those who as "persons" are entitled to the protection of most of the Constitution, and in established practice are assured freedom of economic activity,⁴⁸ to be coerced to forego the exercise of some of their constitutional social and political rights⁴⁹ by the threat of confinement followed by banishment.

The problem is not one of constitutional rights of all aliens or of whether settled aliens have acquired anything in the nature of prescriptive rights but rather the constitutional limits upon the power of government to act in this field.⁵⁰ Of course Congress has power to impose certain conditions on aliens. The question is at what point does the severity of the terms transgress the Constitution. It is submitted that the deportation of a settled alien is a denial of liberty without due process of law and as such a violation of the 5th Amendment.

No attempt will be made here to consider what conditions could or should be imposed on transients or sojourners. If deportation of settlers is barred, there need be no inquiry into the problems of retroactive legislation, double jeopardy, procedural due process⁵¹ and the trial protections of the 6th and 7th Amendments.

Except for *Harisiades v. Shaughnessy*, the substantive due process question has not been squarely considered. *The Chinese Exclusion Case*⁵² and *Fong Yue Ting v. U.S.*⁵³ are the two landmarks from which the later deportation cases draw their authority. In the former, a Chinese contract laborer who had lived in the United States was excluded on his attempted return in 1889 under the act of the preceding year.

⁴⁸ *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948) (fishing), *Yick Wo v. Hopkins*, note 37 *supra* (laundry), *Truax v. Raich*, 239 U.S. 33 (1915) (restaurant employment).

⁴⁹ § 241(a) (6) (A,B,D,F,G), 66 STAT. 204 (1952), 8 U.S.C. § 1251(a) (6) (A,B,D,F,G) (Supp. 1953). The Court has pointed out that aliens are protected by the *1st-Bridges v. California*, 314 U.S. 252 (1941) and *5th Amendments-United States v. Pink*, 315 U.S. 203, 228 (1942), *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951).

⁵⁰ See *Nishimura Eku v. United States*, 142 U.S. 651, 660 (1892), *The Japanese Immigrant Case*, note 40 *supra* at 100; *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934).

⁵¹ Examined in 66 HARV. L. REV. 643 (1953).

⁵² *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

⁵³ 149 U.S. 697 (1893).

The due process question was not raised or considered, and the case did not even concern deportation. The Court rejected petitioner's two grounds of objection: That the exclusion act was invalid because it impaired the prior treaty between the U.S. and China which gave petitioner the right of residence in the U.S., and that Congress lacked the power to exclude aliens who formerly resided in this country. The first contention was met by the statement that, "The treaties were of no greater legal obligation than the Act of Congress. By the Constitution laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other . . . the last expression of the sovereign will must control."

The second contention was answered by quoting from John Marshall in *The Exchange v. McFaddon*: "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."⁵⁴

That is, the Court based the exclusion power on the inherent powers of national sovereignty, declaring that it was absolute as to other nations or as to applicant foreigners. Nothing was said regarding Constitutional limitations on the exercise of such a power.

In the *Fong Yue Ting* case, decided four years later, the Court by 5 to 3 upheld the expulsion of Chinese laborers who were held to have entered the country illegally. At issue was the fairness, as applied to petitioners, of certain evidentiary rules in the expulsion statute which put a heavy burden on the alien to prove the legality of his presence here. The majority recognized that even if aliens have no rights the expulsion power is subject to the limits of the Constitution⁵⁵ but concluded that these limits had not been exceeded by the expulsion of illegally entered sojourners or by the statutory rules of proof. The majority went on, however, to proclaim in repeated dicta that the power to expel was unlimited and that it was as absolute as the exclusion power with which the majority equated it.⁵⁶ It rested its position on the authority of *The Chinese Exclusion Case* and statements by commentators on international law. The ground for dissent was that the evidentiary rules denied the petitioners the procedural due process of a fair hearing to which they were entitled as persons under American

⁵⁴ 7 Cranch 116, 136 (1812).

⁵⁵ *Fong Yue Ting v. United States*, note 53 *supra* at 713.

⁵⁶ *Id.* at 707, 713, 724, 728.

jurisdiction. Yet the dissenting opinions gave an exaggerated significance to the majority dicta by the intensity of their disagreement with them. The impression was created that the case held that the power to expel was absolute.

Succeeding cases, ignoring both the actual decisions of these two and also the expressed recognition in their opinions of the existence of constitutional limits, have treated as controlling these dicta and what the *Fong Yue Ting* majority said *The Chinese Exclusion Case* held. These later cases are not persuasive on the substantive due process question, but their opinions have built up a boot-strap accumulation of dicta⁵⁷ which lacks weight because it neither stems from nor itself represents actual holdings. Due to this sustained series,⁵⁸ the issue of substantive due process has not even been pushed, much less considered, in most recent cases the opinions of which invoke the two authorities with a transient and casual genuflection.

Thus no restriction has been imposed upon the power of Congress to deport.⁵⁹ Even the dissenting opinions have been concerned only with procedural fairness. Among the decisions before *Harrisades v. Shaughnessy*, the case of *Bugajewitz v. Adams*,⁶⁰ upholding the deportation of a prostitute, comes closer than any other to a holding that no restriction can be imposed. Citing *Fong Yue Ting*, the Court said: "Congress has power to order the deportation of aliens whose presence in the country it deems hurtful."⁶¹ In view of the length of her stay (5 years), her lack of family and preoccupation and universality of her profession it

⁵⁷ *Lem Moon Sing v. United States*, 158 U.S. 538, 545 (1895) (exclusion case), *Wong Wing v. United States*, 163 U.S. 228, 231 (1896) (whether alien may be imprisoned by administrative discretion), *Li Sing v. United States*, 180 U.S. 486, 495 (1901) (exclusion case), *Fok Young Yo v. United States*, 185 U.S. 296, 302 (1902) (privilege of transit through U.S. territory), *Japanese Immigrant Case*, note 40 *supra* at 97, *United States ex rel. Turner v. Williams*, note 40 *supra* at 289 (an Irish anarchist, represented by Edgar Lee Masters and Clarence Darrow), *Johannessen v. United States*, 225 U.S. 227 (denaturalization case), *Zakonaite v. Wolfe*, 226 U.S. 272, 275 (1912) (procedural question), *Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) (summary executive deportation from the Philippines), *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913), *Lapina v. Williams*, 232 U.S. 78, 88 (1914) (fraudulent entry), *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (war powers).

⁵⁸ "By their very vastness, the themes to be translated into law lend themselves too readily to the innocent deceptions of rhetoric." *Poulos v. New Hampshire*,—U.S.—, 97 L. Ed. (Adv. p. 702, 713) (1953).

⁵⁹ Exception. Congress appears to assume that the Bill of Attainder provision applies to deportation. In 1940 a bill (H.R. 9766, 76th Cong., 3rd Sess.) to deport Harry Bridges was passed by the House but got no further, perhaps for the reason that it was expected that the Supreme Court would invalidate it. *See United States v. Lovett*, 328 U.S. 303 (1946).

⁶⁰ Note 57 *supra*.

⁶¹ *Id.* at 591.

is doubtful that she had become a rooted settler. Furthermore, the constitutional issue raised by her counsel and passed upon by the Court was the procedural due process question of whether she was entitled to a judicial trial rather than a mere administrative determination. The reasons for this uniform series of dicta have been the imaginary precedents of *The Chinese Exclusion* and *Fong Yue Ting* cases, the precedents of succeeding opinions based upon the former ones and the rationale of the *Fong Yue Ting* dicta which appealed as well to later members of the Court.⁶²

Until 1904, the expulsion of aliens for any purpose other than to implement immigration policy, that is, to enforce the exclusion laws, had never been considered by the courts or, except for the short-lived statute of 1798, required by Congress. The sweeping language which equated the powers to exclude and to expel⁶³ is more understandable when read in the light of the then exclusive concern with apprehending and deporting aliens who had recently and illegally entered. During those formative years the Court was not called on to consider the problem of the undesirable settled alien whose entry and residence were legal.

Another significant element in the two landmark cases was an insistence on unrestricted power as an attribute of American sovereignty under international law.⁶⁴ This fact does not in itself overcome the self-imposed inhibitions of our own Constitution. The power is recognized by nations as one that exists as between them; Canada may deport some one, but California may not.

A third factor in the dicta was the expressed fear of restricting the

⁶² A rationale used in some of the later cases is that of an implied contract between the immigrant and the natives, whose ancestors preceded him to this country (cf. FDR's salute to the DAR as "fellow immigrants," *Time Magazine*, May 4, 1953), by which terms are imposed on the alien who submits to them as a condition of his residence. *Li Sing v. United States*, note 57 *supra* at 495, *Pearson v. Williams*, 202 U.S. 281, 284 (1906), *Low Wah Suey v. Backus*, 225 U.S. 460, 467 (1912), *Zakonaite v. Wolfe*, note 57 *supra* at 275; *Lapina v. Williams*, note 57 *supra* at 88, *In re Kosopud*, 272 F. 330, 333 (N.D. Ohio 1920), rejected in *United States v. Sui Joy*, 240 F. 392, 393 (C.A. 9th 1917); See 35 *Col. L. Rev.* 321. Aside from the constitutional limits to the conditions which the United States could impose, if such agreements—a conception which smacks of indentured servitude—were to be held to exist, a whole separate system of law could be established. See *Keller v. United States*, 213 U.S. 138, 148 (1909); *Oceanic Steam Navig. Co. v. Stranahan*, 214 U.S. 320, 340 (1909) (This supposition rejected).

⁶³ The two powers in fact tend to equate only in the narrow field of substantive, not procedural, due process for the implementation of immigration laws in respect to sojourners.

⁶⁴ *Nishimura Eku v. United States*, note 50 *supra* at 659; *Fong Yue Ting v. United States*, note 53 *supra*; *Wong Wing v. United States*, note 57 *supra* at 231, *Harisiades v. Shaughnessy*, note 8 *supra*, n. 14 at 588.

country's freedom to act in foreign affairs—fear of interference with the executive and legislative branches in their conduct of war and peace with other nations. In 1893, the Court understandably felt it a simple matter to refrain from interference with the conduct of foreign relations. At that time it was not hard to distinguish between the foreign and domestic functions, and it was possible to discover matters in one sphere which but slightly touched the other. Those days are gone. The foreign and domestic realms have become so mingled that few governmental functions are not ones "affecting international relations."⁶⁵

Furthermore, this matter even then was not exclusively one of foreign affairs. The expulsion power is farther from the conduct of foreign affairs than is the exclusion power, yet even exclusion, though sometimes affected in operation by regulatory treaties, is primarily a domestic concern and motivated by such factors as the labor market and wishes of resident nationality groups as distinguished from matters primarily of international concern such as security and trade.

In other cases the Court has recognized that all matters which bear on personal rights protected by the Constitution are subject to its limitations; official authority is not a license of unfettered discretion simply because it may be largely concerned with foreign relations.⁶⁶

Procedural due process may be confined for examination, but substantive due process seems to mean "justice," and speculation on the meaning of this difficult word⁶⁷ easily carries one away into misty conceptions of fireside philosophy. Substantive due process, in a case not covered by the plain commands of some other provision of the Bill of Rights,⁶⁸ seems to be a kind of constitutional equity which, in comparison to "common law" equity, is based more on rationality and common sense than on morals.

The main ground for a denial of substantive due process in the exercise of the deportation power is the arbitrary preference for the

⁶⁵ The position of the Court in view of these tendencies has become more unrealistic as it continues to cleave to its hands-off attitude. It seems to compare the problem with that of *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which concerned control of arms shipments to warring foreign nations.

⁶⁶ *Missouri v. Holland*, 252 U.S. 416, 433 (1920), *Cherokee Tobacco v. United States*, 11 Wall. 616 (1871), *Thomas v. Gay*, 169 U.S. 264, 271 (1898) *In re Dillon*, 7 Fed. Cas. 710, 711 (1854), *See United States v. Trumbull*, 48 F. 94, 97 (S.D. Cal. 1891).

⁶⁷ BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 183, *NEW HOPES FOR A CHANGING WORLD* 80, *AUTHORITY & THE INDIVIDUAL* 156, *GOSPEL*, ST. JOHN, 18:38; *Rochin v. California*, 342 U.S. 165, 169-172, 176, 177 (1952).

⁶⁸ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), *Beauharnais v. Illinois*, 343 U.S. 250, 269 (1952) (dissent).

natural born among persons all of whom have acquired roots in the United States as a result of permanent residence. This class discrimination without a rational basis is a denial to deep-rooted aliens of the equal protection of our laws.⁶⁹

Although the Court has observed that the Federal Government is not bound by an equal protection clause,⁷⁰ it may nevertheless be suggested that just as the 1st Amendment has come to be held embodied among the elements of due process under the 14th Amendment,⁷¹ so by a reciprocal connection, the Equal Protection clause of the 14th is an element of substantive due process under the 5th.⁷²

Since it is an established constitutional principle that the first eight Amendments do not apply to the acts of the states because they forbid only the abridgement by the United States of the enumerated rights which they contain,⁷³ the extension of the 1st Amendment to limit state power is a more drastic step than to read the Equal Protection clause into the Due Process clause of the 5th.⁷⁴ By the latter, the United States would restrict its own powers and tend to harmonize its amendments. The 14th Amendment authorizes Congress to enact legislation to enforce the prohibition of a state's denial of equal protection. It should follow that it would be inhibited from doing itself what it is expressly authorized to prevent states from doing. The Supreme Court often tests the validity of federal legislation as to discrimination and

⁶⁹ The Equal Protection clause applies to an unreasonable discrimination against aliens as a class. *Yick Wo v. Hopkins*, note 37 *supra*; *Truax v. Raich*, note 48 *supra*; *Takahashi v. Fish & Game Commission*, note 48 *supra*; *Oyama v. California*, 332 U.S. 633 (1948).

⁷⁰ *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584 (1937); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (Both the policy of the Japanese Evacuation and this decision which upheld it were made in the heat of war and since have been generally repudiated.)

⁷¹ *Gitlow v. New York*, 268 U.S. 652, 666, 672 (1925); *Whitney v. California*, 274 U.S. 357, 362, 373 (1927); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233, 243 (1936); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937); *Hague v. C.I.O.*, 307 U.S. 496, 512 (1939); *Minersville School District v. Gobitis*, 310 U.S. 586, 593 (1940); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570 (1942); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *Pennekamp v. Florida*, 328 U.S. 331, 349 (1946); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 210 (1948); *Hughes v. Super. Ct. of Calif.*, 339 U.S. 460, 462 (1950); *Zorach v. Clauson* 343 U.S. 306, 309 (1952); *Burstyn v. Wilson*, 343 U.S. 495, 500 (1952); *Kedroff v. St. Nicholas Cathedral*, — U.S. —, 97 L. Ed. (Adv. p. 95, 100) (1952); *Fowler v. Rhode Island*, — U.S. —, 97 L. Ed. (Adv. p. 491, 493) (1953).

⁷² Accord: *United States v. Yount*, 267 F. 861, 863 (W. D. Penn. 1920); *Sims v. Rives*, 84 F. 2d 871, 878 (C.A. D.C. 1936), cert. den. 298 U.S. 682 (1936); *See Rochin v. Calif.*, note 67 *supra* at 179.

⁷³ *Gaines v. Washington*, 277 U.S. 81 (1928); *Twining v. New Jersey*, 211 U.S. 78 (1908); *Fox v. Ohio*, 5 How. 410 (1847); *Barron v. Baltimore*, 7 Pet. 243 (1833).

⁷⁴ *See Fay v. New York*, 332 U.S. 261, 287 (1947).

classification under the Due Process clause of the 5th Amendment by the same rules of equality that are employed to test the validity of state legislation under the Equal Protection clause of the 14th.⁷⁵

Even if equal protection be not formally recognized as an element of due process under the 5th Amendment there still may be a violation of due process by the discriminatory statutes under discussion. It has been repeatedly held that despite the absence of an equal protection clause to check Congress, discriminatory Federal legislation may be so arbitrary and injurious as to be invalid as a violation of the Due Process clause.⁷⁶

The degree of liberty represented by a chance to remain under jurisdiction which assures the protection of the whole Constitution, plus the lead in the atomic weapons race, is at least comparable in importance to the freedoms guaranteed by the 1st Amendment; it may be that the absence of a presumption of constitutionality should likewise apply to it.⁷⁷

Despite its long and consistent series of decisions in this field the Court has shown itself not unwilling to change its position on a closely related point. In the case of *Girouard v. United States*,⁷⁸ it over-ruled the prior cases⁷⁹ on the question of whether a refusal to swear an oath to bear arms for the United States was a bar to becoming a naturalized citizen. Although this was only a question of statutory construction,

⁷⁵ *District of Columbia v. Brooke*, 214 U.S. 138, 150 (1909), *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937).

⁷⁶ *Detroit Bank v. United States*, note 70 *supra* at 338, *Steward Machine Co. v. Davis*, note 70 *supra* at 585, "Arbitrary discrimination between persons in similar circumstances would violate the due process clause." *Wallace v. Curran*, 95 F 2d 856, 867 (C.A. 4th 1938).

⁷⁷ *Re 1st Amendment: Dennis v. United States*, 341 U.S. 494, 526, 559 (1951) (concurring), *United States v. C.I.O.*, 335 U.S. 106, 140 (1948), *Sala v. New York*, 334 U.S. 558, 561 (1948), *Thomas v. Collins*, 323 U.S. 516, 530 (1945), *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944), *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943), *Thornhill v. Alabama*, 310 U.S. 88, 95, 97 (1940), *Schneider v. Irvington*, 308 U.S. 147, 161 (1939), "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. See *Stromberg v. California*, 283 U.S. 359, 369, 370; *Lovell v. Griffin*, 303 U.S. 444, 542." *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).

⁷⁸ 329 U.S. 61 (1946).

⁷⁹ *United States v. Schwimmer*, 279 U.S. 644 (1929), *United States v. Macintosh*, 283 U.S. 605 (1931), *United States v. Bland*, 283 U.S. 636 (1931), in reversing its position the Court also disregarded 16 years of implied approval by Congress.

the Court may see fit as well to shift its stand on this issue of a constitutional validity.⁸⁰

If the Constitution is to be a bar to the deportation of any settled alien, fraudulent entry should be made a crime punished by imprisonment. Whether a person should be deported upon his release from prison would depend upon whether he had become settled at the time of his conviction. Such persons assumed the risk. They entered knowing they were doing wrong and exposing themselves to punishment. The classification is reasonable because they are punished for acts done as aliens so that the penalty is not discriminatory.

The distinction between persons with roots in this country and those without must be arbitrary. To increase the certainty of the law and to ease the burden of responsibility on the courts the line should be drawn by Congress.⁸¹ The courts will have difficulty enough in its application, but in the absence of such a statutory definition they have the obligation to draw the line both in general and in particular. This perplexing problem of evidence of permanent residence might be avoided by a Congressional requirement that all aliens make prompt application for citizenship as a condition of permanent residence and that failure to obtain citizenship subjects one to deportation.

Deportation is a halfway measure applied to persons who have not committed a crime yet are dangerous or offensive or a burden on the

⁸⁰ "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). "Stare decisis certainly does not require a court to perpetuate a wrong for which it was responsible, especially when no rights have accrued in reliance on the error." *Murphy* dissenting in *Cleveland v. United States*, 329 U.S. 14, 28 (1946).

⁸¹ There are dicta which remark on the hardship which deportation often causes: *Fong Yue Ting v. United States*, note 53 *supra* at 740 and 759 (dissents)—court did not disagree on this point; *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), *Mahler v. Eby*, note 57 *supra* at 39; *United States ex rel. Klonis v. Davis*, note 5 *supra*, *United States ex rel. Mignozzi v. Day*, note 5 *supra*; *Bridges v. Wixon*, 326 U.S. 135, 154, 164 (1945) (concurring), *Fiswick v. United States*, 329 U.S. 211, 222, n. 8 (1946); *DiPasquale v. Karnuth*, 158 F. 2d 878, 879 (C.A. 2nd 1947); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Carmichael v. Delaney*, 170 F. 2d 239, 245 (C.A. 9th 1948); *Klapprott v. United States*, 335 U.S. 601, 616 (1949) (concurring); *Schoeps v. Carmichael*, 177 F. 2d 391, 400 (C.A. 9th 1949); *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521, 533 (1950) (dissent); *Harisiades v. Shaughnessy*, note 8 *supra* at 600 (dissent). But there has been no recognition by the Court (as to substantive due process) (*See: The Venus*, 8 Cranch 253 (1814); *The Chinese Exclusion case*, note 52 *supra*; *Fong Yue Ting v. United States*, note 53 *supra*, dissent at 734; *The Japanese Immigrant Case*, note 40 *supra* at 100—all either procedural due process or not concerned with deportation) of a distinction between aliens who have acquired roots here (*See 51 COL. L. REV.* 606, 638 (1951)), and those recent arrivals who have not. (*Cf. Hughes v. Trepello*, 296 F. 306 (C.A. 3rd 1925), where, on the issue of burden of proof, the Court distinguished between those who had entered illegally and those who had done something after arrival to forfeit their right to remain.)

community The interest of liberty as well as justice might be served by other halfway measures—exposure, surveillance, treatment, confinement other than prison—to apply to citizens and aliens alike who fall in this middle ground of subjection to administrative action.

To put citizens and long-resident aliens on an equal basis would not “deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities.”⁸² The United States could demand similar treatment for its citizens on conditions of the exclusion power. This policy was not initiated as a reprisal. Our international bargaining power is more likely to be enhanced than impaired by a measure which tends to dispel the impression abroad that the Statue of Liberty is an ambiguous or hypocritical symbol.⁸³

The doctrine that an alien knocking at our gates has no rights or very few has been insensibly extended to a long-resident alien who has put down roots here.⁸⁴ An alien in this country lives under the shadow or merciless retribution for the sins of his youth and for those of his old age ahead. A blind provinciality expects other nations to accept from us the unwelcome gift of saboteurs, gangsters, prostitutes and beggars whom we ourselves would not have admitted if at the time of their entry we could have discerned their nature and predicted their future conduct. After a man has resided here for awhile he tends to become our responsibility. It is unjust to punish such persons so much more harshly than the natives, and unjust to other countries to inflict upon them those undesirables who are in part a product of American life.

⁸² *Harisiades v. Shaughnessy*, note 8 *supra* at 591.

⁸³ *Re* importance of our practices in this field in their effect on the success of our foreign policy, see REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION & NATURALIZATION 47-55 (1953).

⁸⁴ See O'Brian, *NEW ENCROACHMENTS ON INDIVIDUAL FREEDOM*, 66 HARV. L. REV. 1, 19 (1953).