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Constitutional Law -- Rights of Communist Aliens Subject to Deportation

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Constitutional Law

RIGHTS OF COMMUNIST ALIENS SUBJECT TO DEPORTATION

Introduction

A current problem facing our courts today concerns the rights of resident aliens who are subject to deportation from the United States because they are, or have been members of the Communist party. That these aliens have many rights in our country is indisputable since they are allowed to live here and own property, but these rights are subject always to the right of the United States to deport them on showing of sufficient cause. Perhaps the alien entered the United States illegally, or commits a crime involving moral turpitude, or is a person who is an enemy of our form of government. These reasons, with qualifications and other reasons, entitle the Immigration Board to order such aliens deported, and the Attorney General is authorized to carry out the order. An alien who is ordered deported has always had a limited right of appeal to the courts, but the scope of the review has always been limited in these cases.

I

Since the Chinese Exclusion Act of 1888[1] and a supplementary act[2] were passed by Congress, aliens who have been ordered deported and have thereupon been taken into custody, have appealed to the courts of the United States on writs of habeas corpus. The first aliens to appeal orders of deportation in such manner were denied relief by the Supreme Court.[3] An act in 1907[4] providing for the deportation of alien prostitutes also provoked litigation when an alien seized under its provisions and those of an amendment of 1910[5] appealed to the Supreme Court by the traditional remedy of writ of habeas corpus.[6] She too was

1 25 STAT. 504, c. 1064 (1888). This Act was declared constitutional in The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889).

2 27 STAT. 25, c. 60 (1892).

3 Fong Yue Ting v. United States, 149 U.S. 698 (1893).

4 34 STAT. 898, 899, c. 1134 (1907).

5 36 STAT. 263, c. 128 (1910).

6 Bugajewitz v. Adams, 228 U.S. 585 (1913).

denied relief, the Court finding that it was within the power of Congress to provide for deportation when the presence of an alien is detrimental to the welfare of the country. Since these early, successful efforts to set up grounds on which to deport resident aliens, Congress has added to the grounds for deportation. In 1918, Congress deemed it sufficient for deportation if an alien taught or advocated the violent overthrow of the Government or even belonged to an organization so advocating or teaching overthrow of the Government.[7] By subsequent acts in 1950[8] and 1952,[9] past or present membership in the Communist party by an alien was made sufficient reason to deport him. The problems in the modern case of deporting an alien as a Communist are (a) the proof needed to deport the alien, (b) the right of judicial review for the alien and (c) his right to bail pending final order or deportation.

Proof Needed

In 1939, the Supreme Court held[10] that by the act of 1918, providing for deportation of an alien who advocated or belonged to an organization that advocated overthrow of the Government by force or violence, past membership in a forbidden organization could not be grounds for deportation. The evidence must establish present membership in order to deport an unnaturalized resident. Membership in the Communist party had been consistently considered as strong evidence of an alien's advocacy of the forbidden doctrine of overthrowing the Government.

In 1939, after the *Kessler* case,[11] the Communist party "expelled" all aliens solely to protect them from deportation under the *Kessler* doctrine. In answer to this move, Congress in 1940 passed the Alien Registration Act[12] providing that past membership in an organization advocating forceful overthrow of the Government was sufficient grounds for deportation of an alien. Moreover, for the first time, Congress removed all time limits within which the Government had to move against the alien after his membership.

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7 40 STAT. 1012 (1918), 8 U.S.C. §137 (1952) (later repealed by 66 STAT. 279 (1952)). The 1918 Act supplemented the more important Act of 1917. Cf. Note 31, *infra*.

8 64 STAT. 987 (1950), 50 U.S.C. §§781-826 (1952).

9 66 STAT. 163, 8 U.S.C. §§1101-1503 (1952).

10 Kessler v. Strecker, 307 U.S. 22 (1939).

11 *Ibid.*

12 54 STAT. 670, 8 U.S.C. §137 (1940).

The Alien Registration Act was upheld in an attack made on it by three aliens who had been ordered deported for their past communist affiliations.[13] The aliens contended that the act violated the ex post facto provision[14] and the first and fifth amendments of the Constitution. Due process, guaranteed by the fifth amendment, was held not applicable because regulation of entrance and deportation of aliens is a political matter for Congress alone. The first amendment does not protect those who incite and advocate the violent overthrow of the government. Finally, in the tradition of previous cases,[15] the Court ruled that deportation was a civil proceeding, and that the ex post facto provisions in the Constitution applied only to criminal proceedings.

In 1950 Congress passed the Internal Security Act[16] which, for the first time, expressly designated past or present membership in the Communist party by an alien as sufficient cause in itself for deportation. The Act was held constitutional in *Galvan v. Press*,[17] in which a Mexican, who had entered the United States in 1918, was ordered deported for his past affiliations with the Communist party. The Court held that membership in the Party made sufficient grounds for deportation of an alien, and there need be no proof that the alien knew the aims of the organization. But if one is ordered deported for membership in Communist-front organizations, the Act requires that proof must be given that the alien was not merely duped into joining the organizations.[18]

By the Act of 1950, Congress recognized the subversive and

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

14 U. S. CONST. art. I, §9, cl. 3.

15 Some earlier cases holding this doctrine were Bugajewitz v. Adams, 228 U.S. 585 (1913); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923) (deportation is a civil proceeding and he can be compelled to testify to his alienage.) *Cf.* recent case, United States *ex rel.* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954). (Deportation is a civil action and therefore not cruel and unusual punishment). Compare also the first case of an alien appealing to the courts for review of his deportation. Fong Yue Ting v. United States, 149 U.S. 698 (1893).

16 Note 8, *supra.*

17 347 U.S. 522 (1954).

18 *Id.* at 526-529 (dictum).

19 64 STAT. 987, c. 1024 §2(1) (1950), 50 U.S.C. §781 (1952). "There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is by treachery, deceit, infiltration into other groups (governmental or otherwise), espionage, sabotage, terriorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization."

unlawful character of the Communist party[19] and also that any alien member of the party is by that fact alone subject to deportation as one who advocates overthrowing the government by force and violence.[20] The Act avoids the necessity of repetitious proof of these matters in case after case, and much time is now saved in every such case.[21] Since the passage of this Act, therefore, the United States need prove only that the resident alien is or was at any time a member of the Communist party, and that fact alone, having been established, is reason enough to order his deportation.

Right of Judicial Review

Until 1946, it was generally admitted that the only correct and successful method for an alien to obtain judicial review of his deportation order by the Board of Immigration appeals was by writ of habeas corpus. This method involves hardship for the alien because he must wait until the Attorney General has taken him into custody before he can invoke the habeas corpus remedy.[22] With the passage of the Administrative Procedure Act in 1946,[23] a new method of obtaining judicial review seemed possible. But was the Administrative Procedure Act intended to apply to deportation proceedings? Many lawyers thought it did.[24] In *United States* ex. rel. *Trinler v. Carusi*,[25] the United States Court of Appeals for the Third Circuit held that under the Act an alien was entitled to judicial review of a deportation ruling after the order had been promulgated but before he had been taken into custody. At that time the remedy of habeas corpus was not available to petitioner and the court allowed him to bring the action under a novel form of "Petition for Review."

But the same court[26] later ordered the judgment be vacated and the case remanded with orders to dismiss the cause as abated

20 Deportation is a political matter and it is within the power of Congress to deal with aliens. A provision which makes membership in the Communist party grounds for deportation is not violative of due process. Galvan v. Press, 347 U.S. 522, 531 (1954).

21 See Note, 29 NOTRE DAME LAW. 97 (1953) on the wisdom of the courts taking judicial notice of the aims of the Communist party.

22 There is a discussion of the hardships suffered by the alien in such cases by Orlow, *Deportation Under the Administrative Procedure Act of 1946*, 22 TEMP. L. Q. 74 (1948).

23 60 STAT. 237 (1946), 5 U.S.C. §1001 (Supp. 1952).

24 Orlow, *supra* note 22.

25 166 F.2d 457 (3d Cir. 1948), discussed by Orlow, *supra* note 22.

26 United States *ex rel.* Trinler v. Carusi, 168 F.2d 1014 (3d Cir. 1948). See a discussion of this latter Trinler case in Wolf v. Boyd, 87 F. Supp. 906 (W.D. Wash. 1949).

in accord with an earlier Supreme Court case,[27] which held that the motion must be made to continue the suit against a successor in office within a six months period after appointment.[28] Other courts, however, agreed with the first *Trinler* decision,[29] but the Supreme Court,[30] in a later case, held that deportation orders were immune from direct attack and the only remedy open to an alien was the writ of habeas corpus. Further, the Immigration Act of 1917[31] makes the decision of the Attorney General "final," and this was held to preclude judicial review under the first exception to §10 of the Administrative Procedure Act.

In 1952 Congress replaced the old Immigration Act with the Immigration and Nationality Act.[32] The Supreme Court has recently affirmed, by a split vote, a decision by the United States Court of Appeals for the District of Columbia Circuit, that the new Act provided for judicial review of final deportation orders through suit by the alien either under the Declaratory Judgment Act or the Administrative Procedure Act.[33] The court said:[34]

> Unlike the 1917 Act, §§242(c) and 242(e) of the 1952 Act expressly recognize that there may be "judicial review" of a final order of deportation. Section 242 (c) provides ". . . *or if judicial review is* had . . ."
>
> Judicial review is not synonymous with habeas corpus. Nothing in §242(c) restricts it to habeas corpus. (Emphasis added)

Two other cases are found that agree with this decision.[35] But in *Batista v. Nicolls*,[36] the United States Court of Appeals for the First Circuit has held even more recently that the 1952 Act did not make judicial review available under either the Declaratory Judgment Act or the Administrative Procedure Act. The court

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27 United States *ex rel.* Claussen v. Curran, 276 U.S. 590 (1928).

28 Carusi resigned his office and Miller replaced him on August 27, 1947. No attempt was made to substitute Miller until nearly nine months had elapsed.

29 Kristensen v. McGrath, 179 F.2d 796 (D.C. Cir. 1949); Prince v. Commissioner, 185 F.2d 578 (6th Cir. 1950).

30 Heikkila v. Barber, 345 U.S. 229 (1953). The Court in its decision also held that the alien could not appeal under the Declaratory Judgment Act. 49 STAT. 1027 (1935), 28 U.S.C. §2201.

31 39 STAT. 874 (1917), as amended, 8 U.S.C. §1103.

32 66 STAT. 163, 8 U.S.C. §§1101-1503 (1952).

33 Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd. by an equally divided Court* 346 U.S. 929 (1954).

34 *Id.* at 452. (Emphasis added.)

35 Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954); Aguilera-Flores v. Landon, 125 F.Supp. 55 (S.D. Cal. 1954).

36 213 F.2d 20 (1st Cir. 1954).

said that the affirmation of *Rubinstein v. Brownell* by an equally divided court did not make that decision authoritative precedent. The court held that the new Act in retaining the clause that the Attorney General's decision shall be final, affirmed the existing law that the deportation orders were not subject to direct attack.

Batista v. Nicolls can be distinguished from *Rubinstein v. Brownell,* in that in the former case the deportation order was issued before the 1952 Act went into effect, while Rubinstein's order was issued five days after the Act became effective. The distinction, however, did not play an important part in the *Batista* decision.

Right to Bail

Under the National Security Act of 1950 and the subsequent Immigration and Nationality Act of 1952 that replaced the former, the Attorney General is given discretion to determine whether an alien shall be released on bail while his deportation proceedings are being held under the Act. In *Carlson v. Landon,*[37] the Supreme Court interpreting the 1950 Act held that the Attorney General did not abuse his discretion in denying bail to an alien when the reason for the Attorney General denying bail was that the alien was an active member of the Communist party. The Court thought that the evidence was sufficient that the Attorney General was acting in the best interest of the nation and was not arbitrary or capricious in his refusal to grant bail. The Court said:[38]

> . . . [W]e conclude that the discretion as to bail in the Attorney General was certainly broad enough to justify his detention of all these parties without bail as a menace to the public interest. As all alien Communists are deportable, like Anarchists, because of Congress understanding of their attitude toward the use of force and violence in such a constitutional democracy as ours to accomplish their political aims, evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention.

The Court thus affirmed the United States Court of Appeals for the Ninth Circuit and reversed a case in the United States Court of Appeals for the Sixth Circuit that had decided contrary to this decision.[39]

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[37] 342 U.S. 524 (1952).

[38] *Id.* at 541.

[39] Butterfield v. Zydok, 187 F.2d 802 (6th Cir. 1951), *reversed* 342 U.S. 859.

II

In several of the cases cited above the Supreme Court has been evenly split or had only a bare majority of five.[40] The dissenters, in most of these cases, indicate that they consider the treatment of alien members of the Communist party in our courts today as too harsh, and claim that judicial attitude toward this group should be more like that toward citizens in keeping with the humanitarian principles of this country and age.[41] These dissenters often argue on broad moral and philosophical grounds rather than on legal grounds, citing usually very few cases that support their views. Justice Douglas, dissenting in *Harisiades v. Shaughnessy,* inferred that the Alien Registration Act of 1940 was unconstitutional in allowing deportation for past membership in a forbidden organization, said:[42]

> The right to be immune from arbitrary decrees of banishment certainly may be more important to "liberty" than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the "liberty" they enjoy while they live here is indeed illusory. Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

These are thought provoking words indeed, and one can easily picture a huge policeman, with a black band around his arm, interrupting a family prayer to wrest away the sad father from his weeping wife and children. Yet, what were the facts in the *Harisiades* case? The alien had entered this country in 1916 from Greece. Although he made his home here, he evidently never found United States citizenship worth the bother of the naturalization process. On the contrary, he chose to be a Communist party member in 1925 and was active until his expulsion, with other aliens, from the party in 1939 after the *Kessler* decision. His views remained unchanged, however, as he continued his association with members of the party. A warrant for his deportation was issued in 1930, but he was not located until 1946 because of his use of aliases. At the time of trial he still

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40 Rubinstein v. Brownell, *supra,* note 33; Carlson v. Landon, 342 U.S. 524 (1952). *Cf.* also Martinez v. Neely, 197 F.2d 462, *aff'd* 344 U.S. 916 (1953).

41 See the dissent of Justice Black in Carlson v. Landon, 342 U.S. 524, 547 (1952).

42 342 U.S. at 600.

professed his Communist beliefs.[43] What had Harisiades and other aliens affected by the Act of 1940 and subsequent Acts done to merit even the hearings they were given before the courts of the country they had not even shown an interest in adopting?

Unlike the dissenters in the *Harisiades* case who thought the lot of Communist aliens too harsh, Congress, with more than three decades of experience with the Immigration Act of 1917, thought the danger from the Communist party to be so great as to warrant a law in 1950 making the very membership by an alien, past or present, in the party sufficient grounds for deportation. Congress, moreover, showed in this law its belief that there was no need to prove the aims of the Communist party when voluminous testimony in previous cases had shown those aims satisfactorily.[44] The Court has been wise in respecting the decision of Congress in determining what proof is necessary to justify the deportation of an alien with subversive affiliations. In passing these laws, Congress has reiterated the traditional law that has consistently held that a sovereign may expel an alien nearly at will.[45] Under this concept of what it could do, Congress has been lenient, moving slowly and only after it felt there was a great need.

Whether Congress actually intended to give an alien judicial review from a deportation order, other than that of habeas corpus, in the Immigration and Nationality Act of 1952 is doubtful. In making such a departure from the past tradition of law in this country, Congress would probably be specific. Although, as the United States Court of Appeals points out in *Rubinstein v. Brownell*, there are some references to judicial review in the 1952 Act that were not present in the 1917 Act, still the 1952 Act goes on to refer to no other judicial review except that of habeas corpus, which is mentioned expressly several times in the Act.[46]

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[43] These facts are given at 342 U.S. at 582. Two other aliens before the Court in the same case do not appear in such bad light as does Harisiades, yet the conduct of the other two shows extreme indifference, at the very least, to the continued existence of the United States Government.

[44] *Cf.* United States v. Dennis, 341 U.S. 494 (1951).

[45] Note 15, *supra*. But note the dissent of Justice Brewer in Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[46] 66 STAT. 204, 8 U.S.C. §1252 (a) and (c) (1952).

[47] 66 STAT. 204, 8 U.S.C. §1252 (a) (1952) provides in part: "Any Court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in *habeas corpus* proceedings that the Attorney General is not proceeding with such reasonable dispatch . . . ." (Emphasis added.)

The reasonable inference to be taken is that Congress meant only habeas corpus when it said judicial review, for the two terms are used together in the same sections nearly simultaneously.[47] Moreover, as the Court points out in *Batista v. Nicolls,* [48] the clause, primary in interpretive importance, that the decision of the Attorney General shall be final, is still present in the 1952 Act.[49] Legislative history of the Act is inconclusive, for definite proposals to limit judicial review to habeas corpus and to extend it *were both defeated.*[50]

On the question of the Attorney General granting bail to alien Communists while their deportation proceedings are pending, one need only look at the provision in the Immigration and Nationality Act of 1952 that makes the granting of such bail discretionary with the Attorney General.[51] As pointed out by the Court in *Carlson v. Landon,*[52] the Attorney General can scarcely be said to be abusing that discretion in deciding after review of documentary proof, that the alien is an active Communist party member, or one equally inimical to the interests of the United States, that the granting of bail would be harmful to the best interests of the United States.

Conclusion

In dealing with the problems involving the rights of Communist aliens in this country, one should always remember that these people *are* aliens and are not legally entitled to enjoy, equally with citizens, all the rights extended by the United States to its citizens. These Communist aliens have chosen at some time to pledge their allegiance to a doctrine opposed to the very existence of the United States Government, which Government, like every government, was founded primarily to safeguard the interests and rights of its citizens. That is its very *raison d'etre.* The words of Mr. Justice Frankfurter are significant:[53] "It is not for this Court to reshape a world order based on politically sovereign states."*

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48 213 F.2d 20 (1st. Cir. 1954).

49 66 STAT. 204, 8 U.S.C. §1252(b) (1952).

50 The legislative history of the Act is discussed in Rubinstein v. Brownell, *supra,* 206 F.2d at 454-55.

51 66 Stat. 204, 8 U.S.C. § 1252 (a) (1952).

52 342 U.S. 524 (1952).

53 Harisiades v. Shaughnessy, *supra,* 342 U.S. at 596 (concurring opinion).

* On April 25, 1955, the Supreme Court held in a 6-3 decision in Pedreiro v. Shaughnessy, cited in note 35, *supra,* that deportation orders may be reviewed by the courts under the Administrative Procedure Act. The Court held that nothing in the Immigration and Nationality Act of 1952 was to the contrary. 23 U.S.L. WEEK 4190 (U.S. Apr. 25, 1955).