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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 269 (1920).

## Comments

### ROLE OF CONGRESS AND THE FEDERAL JUDICIARY IN THE EXCLUSION OF ALIENS

It has become accepted constitutional doctrine that the power to control immigration is vested in Congress. The source of this power has been held to be:

(1) the "inherent power" of the United States as a sovereign nation<sup>1</sup> and (2) the constitutional provision authorizing Congress to regulate commerce with foreign nations.<sup>2</sup> As to the latter, doubts were early expressed as to whether "commerce" as envisaged by the framers of the Constitution encompassed immigration,<sup>3</sup> and, once conceding that it did,<sup>4</sup> whether immigration was that type of commerce which demanded "one uniform system or plan of regulation" as set out in *Cooley v. Board of Wardens*,<sup>5</sup> so that its control would necessarily be the sole prerogative of Congress.<sup>6</sup> This too was answered affirmatively,<sup>7</sup> and the proposition that control over immigration is within the exclusive domain of Congress is today no longer open to question.<sup>8</sup> Thus Congress, in the exercise of its power, may exclude aliens altogether<sup>9</sup> or prescribe terms and conditions upon which they may enter<sup>10</sup> or remain in<sup>11</sup> the United States. Aliens may be excluded for any reason.<sup>12</sup> Congress, through quota laws, the first of which was enacted in 1921,<sup>13</sup> has excluded aliens on the sole basis of number, without regard to individual merit or qualification. The power to exclude aliens is a power which affects international relations, and thus is vested in the

1. *Mahler v. Eby*, 264 U.S. 32 (1924); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

2. "The Congress shall have Power . . . To regulate commerce with foreign nations . . ." U.S. CONST. art. I, § 8, cl. 3; *Edye v. Robertson*, 112 U.S. 580 (1884); *People of New York v. Compagnie Generale Transatlantique*, 107 U.S. 59 (1883); *Henderson v. Wickham*, 92 U.S. 259 (1875); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

3. *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

4. *Henderson v. Wickham*, *supra* note 2.

5. 53 U.S. (12 How.) 299 (1851).

6. *Henderson v. Wickham*, *supra* note 2.

7. *People of New York v. Compagnie Generale Transatlantique*, *supra* note 2.

8. *Galvan v. Press*, 347 U.S. 522 (1954); *Lloyd Sabauo Società Anonima Per Azioni v. Elting*, 287 U.S. 329 (1932); *Terrace v. Thompson*, 263 U.S. 197 (1923).

9. *United States ex rel. Polymeris v. Trudell*, 284 U.S. 279 (1932); *United States v. Ju Toy*, 198 U.S. 253 (1905); *Yamataya v. Fisher*, 189 U.S. 86 (1903); *Fok Young Yo v. United States*, 185 U.S. 296 (1902); *Li Sing v. United States*, 180 U.S. 486 (1901); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, *supra* note 1; *Nishimura Ekiu v. United States*, *supra* note 1; *Chae Chan Ping v. United States*, *supra* note 1.

10. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States ex rel. Volpe v. Smith*, 289 U.S. 422 (1933); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904).

11. *Carlson v. Landon*, 342 U.S. 524 (1952); *Mahler v. Eby*, 264 U.S. 32 (1924); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *Zakonaite v. Wolf*, 226 U.S. 272 (1912); *Low Wah Suey v. Backus*, 225 U.S. 460 (1912); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

12. *Galvan v. Press*, *supra* note 8 (communist); *Hansen v. Haff*, 291 U.S. 559 (1934) (immoral person); *United States ex rel. Volpe v. Smith*, *supra* note 10 (criminal); *Bugajewitz v. Adams*, *supra* note 11 (prostitute); *Oceanic Steam Navigation Co. v. Stranahan*, *supra* note 10 (diseased person); *United States ex rel. Turner v. Williams*, *supra* note 10 (anarchist); *United States v. Craig*, 28 Fed. 795 (E.D. Mich. 1886) (contract laborers).

13. Act of May 19, 1921, c. 8, 42 STAT. 5.

political departments of government.<sup>14</sup> It is to be exercised by treaty or act of Congress, and carried out by the executive authority according to the regulations established.<sup>15</sup>

The admission of aliens into the United States is one of several matters dealt with in the current comprehensive federal statute, the "Immigration and Nationality Act of 1952."<sup>16</sup> The act defines an "alien" as any person not a citizen or national of the United States.<sup>17</sup> A national of the United States is defined as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."<sup>18</sup> Thus any person who is neither a United States citizen nor one who owes permanent allegiance to this nation comes under the scope of the term "alien." Aliens desiring to enter the United States are grouped into two basic categories, *immigrants* and *nonimmigrants*.<sup>19</sup> The immigrant class is composed generally of those who seek permanent residence in the United States and who may, if they so desire, and if they meet statutory qualifications, become citizens of the United States.<sup>20</sup> The immigrant class is itself subdivided into two groups, *quota immigrants*<sup>21</sup> (those subject to numerical limitations)<sup>22</sup> and *nonquota immigrants*<sup>23</sup> (those who may enter without regard to numerical limitations). Only a restricted number of quota immigrants may enter the United States each year. Under the quota system, a certain maximum number is proclaimed annually for each "quota area"<sup>24</sup> and only that number of immigrant visas can be issued to quota immigrants chargeable to that area.<sup>25</sup> There are preferred groups which take precedence within the quota allotments. These groups are composed of educated technicians and skilled specialists, their wives and families, parents of adult United States citizens and wives and children of lawfully admitted aliens.<sup>26</sup> Nonquota immigrants include spouses or children of United States citizens, returning alien residents, natives of independent Western Hemisphere nations, former United States citizens who are qualified to reapply for citizenship, certain ministers of religious denominations and active or retired United States alien employees.<sup>27</sup>

Nonimmigrants are those who desire to spend a limited or unlimited period of time in the United States but do not contemplate, and are not entitled to, United

14. *Fong Yue Ting v. United States*, *supra* note 11.

15. *Ibid.*

16. McCarran-Walter Act, c. 477, 66 STAT. 163 (1952), 8 U.S.C. §§ 1101-1503 (1953).

17. 66 STAT. 166 (1952), 8 U.S.C. § 1101(a) (3) (1953).

18. 66 STAT. 169 (1952), 8 U.S.C. § 1101(a) (22) (1953).

19. 66 STAT. 167 (1952), 8 U.S.C. § 1101(a) (15) (1953).

20. Besterman, *Commentary of the Immigration and Nationality Act*, 8 U.S.C.A., *Aliens & Nationality* 18 (1953).

21. 66 STAT. 170 (1952), 8 U.S.C. § 1101(a) (32) (1953).

22. 66 STAT. 176 (1952), 8 U.S.C. § 1151(c) (1953).

23. 66 STAT. 169 (1952), 8 U.S.C. § 1101(a) (27) (1953).

24. 66 STAT. 175-76 (1952), 8 U.S.C. § 1151(a)-(b) (1953).

25. 66 STAT. 176 (1952), 8 U.S.C. § 1151(c) (1953).

26. 66 STAT. 178 (1952), 8 U.S.C. § 1153 (a) (1)-(3) (1953).

27. 66 STAT. 169-70 (1952), 8 U.S.C. § 1101(a) (27) (A)-(G) (1953).

States citizenship.<sup>28</sup> Included in this group are ambassadors and similar diplomats accredited by foreign governments recognized *de jure* by the United States, other officials and employees of those governments admitted on the basis of "reciprocity," and the attendants, servants and immediate families of these two groups, visiting foreign businessmen and vacationers, aliens in transit through the United States, alien seamen and airmen, treaty traders, students, United Nations and other world organization officials, skilled persons coming for special purposes and foreign newsmen.<sup>29</sup>

Only those aliens who meet the requirements for admission to this nation are permitted to enter. It must be observed however that not every border-crossing is an "entry" as contemplated by the existing law.<sup>30</sup> It has been held that an alien does not make an "entry" upon his return to this nation from a foreign country when he had no intent to leave the United States.<sup>31</sup> Neither is there an "entry" when an individual returns to the United States after having been removed involuntarily.<sup>32</sup>

Any alien seeking to enter the United States must, unless he qualifies under certain exceptions,<sup>33</sup> have an unexpired visa<sup>34</sup> and passport.<sup>35</sup> Visas are issued by consular officers of the United States.<sup>36</sup> Certain classes of aliens are ineligible to receive visas, hence are precluded from entry.<sup>37</sup> The ineligible types include those

28. Besterman, *supra* note 20, at 18.

29. 66 STAT. 167-69 (1952), 8 U.S.C. § 1101(a) (15) (A)-(1) (1953).

30. 66 STAT. 167 (1952), 8 U.S.C. § 1101a(13) (1953).

31. *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947). In this case, the alien went by sleeping car from Buffalo, N. Y., to Detroit, Mich., the route being through Canada. The alien failed to inquire as to the route when he boarded the train and was asleep during the trip through Canada. Held: No "entry" was made when he arrived at Detroit. The court, L. Hand, J., refused to follow *Ward v. De Barros*, 75 F.2d 34 (1st Cir. 1935) in which, under similar facts, the court determined that an entry was made when the alien re-crossed the United States border. An entry was also held to have been made when an alien returned to the United States after being forced by the shipwreck of an American fishing vessel to spend ten days on Mexican soil, *Taguchi v. Carr*, 62 F.2d 307 (9th Cir. 1932); when an alien, en route to Detroit from New York City, knowingly passed through Canada, even though he did not leave the train, *Zurbrick v. Borg*, 47 F.2d 690 (6th Cir. 1931); and when an alien seaman, after shipping out from New York City, landed in foreign ports before returning to the United States, *United States ex rel. Claussen v. Day*, 279 U.S. 398 (1929) (dictum to the effect that, had alien not set foot on foreign soil, his return to the United States would not have been an entry).

32. *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

33. 8 C.F.R. §§ 211.2 (immigrant), 212.3 (nonimmigrant) (1953).

34. 8 C.F.R. §§ 211.1 (immigrant), 212.1 (nonimmigrant) (1953). Unfortunately neither the United States code nor the code of Federal Regulations defines the term "visa." In BLACK, LAW DICTIONARY 1743 (4th ed. 1951), a visa is defined as "an official endorsement upon a document, passport, commercial book, etc., to certify that it has been examined and found correct or in due form."

35. See note 34 *supra*. In 66 STAT. 170 (1952), 8 U.S.C. § 1101(a) (30) (1953) a passport is defined as "any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country."

36. 66 STAT. 191 (1952), 8 U.S.C. § 1201(a) (1953).

37. 66 STAT. 182-87 (1952), 8 U.S.C. § 1182(a) (1953).

who are feeble-minded or insane, psychopaths, epileptics, drug addicts, chronic alcoholics, tuberculars, lepers, paupers, beggars and vagrants, criminals (other than political offenders), polygamists, prostitutes, laborers for which there is no demand, those likely to become public charges, stowaways, illiterates, anarchists, communists and others.<sup>38</sup> The fact that an alien has obtained a visa is no assurance that he will be permitted to enter. All aliens must present themselves at United States ports,<sup>39</sup> or airports<sup>40</sup> of entry,<sup>41</sup> and, while there, undergo physical and mental examinations administered by medical officers of the United States Public Health Service.<sup>42</sup> They are also investigated to determine whether or not they fulfill the other requirements (such as quota, status, classification) and to ascertain that they do not fall into any of the excludable classes set out above.<sup>43</sup> These inquiries are conducted by officers of the Immigration and Naturalization Service of the Department of Justice, or by an officer of the United States designated by the Attorney General.<sup>44</sup> If the medical report discloses findings sufficient to preclude the alien from admission he can have those findings reviewed by a board of medical officers of the Public Health Service.<sup>45</sup> Findings and rulings of immigration officers are reviewable by the Commissioner of Immigration and Naturalization, district directors of the Service, special inquiry officers, the Assistant Commissioner of the Inspections and Examinations Division of the Service, the Board of Immigration Appeals of the Attorney General's office and by the Attorney General himself.<sup>46</sup> The various procedural requirements as to what types of rulings can be appealed and to which appellate agency they are referred are extensive<sup>47</sup> and no useful purpose can here be served by exploring them in detail. They are fully set out in the Code of Federal Regulations.<sup>48</sup> Suffice it to say that the Attorney General has authority to make the final administrative decision in any particular case if he chooses to do so.<sup>49</sup>

When an alien has been excluded by administrative officials and has exhausted the administrative appellate process in vain, a problem arises as to whether, and to what extent, he can obtain judicial review of the proceedings in federal tribunals. A pioneer case in this area is *Nishimura Ekiu v. United States*.<sup>50</sup> The alien arrived at the port of San Francisco and was denied entry by the Commissioner because of

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38. *Ibid.*

39. 8 C.F.R. § 231.6 (1953) establishes 391 ports of entry for aliens, organized into 15 districts. These ports are of three types: "A" (which handles all types of aliens), "B" (which handles only aliens who, under certain exceptions set out in 8 C.F.R. §§ 211-12 (1953), do not need visas but only "border-crossing identification cards"), and "C" (which handles only alien seamen and airmen).

40. 8 C.F.R. § 231.7 (1953) establishes 57 airports of entry.

41. 8 C.F.R. § 235.1(a) (1953).

42. 66 STAT. 198 (1952), 8 U.S.C. § 1224 (1953).

43. 66 STAT. 198 (1952), 8 U.S.C. § 1225(a) (1953).

44. *Ibid.*

45. See note 42 *supra*.

46. 8 C.F.R. §§ 235-36 (1953); 66 STAT. 173 (1952), 8 U.S.C. § 1103 (1953).

47. See 8 C.F.R. §§ 6-8, 235-36 (1953).

48. *Ibid.*

49. 66 STAT. 200 (1952), 8 U.S.C. § 1226(c) (1953).

50. 142 U.S. 651 (1892).

failure to meet requirements under the existing immigration statute.<sup>51</sup> She sued out a writ of habeas corpus, claiming that she was being unlawfully detained. Relief was denied by the circuit court and the Supreme Court affirmed on the ground that the question of her right to land had been determined by a duly constituted and competent tribunal (the commissioner) having jurisdiction over the matter, and that the decision was not judicially reviewable. Mr. Justice Gray, writing for the majority,<sup>52</sup> intimated that "due process of law"<sup>53</sup> may assume a different form when applied to an alien seeking entry into the United States than when applied to an individual already within the United States. He stated:

An alien immigrant, prevented from landing by any . . . officer claiming authority to do so . . . and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.<sup>54</sup>

. . . Congress may, if it sees fit . . . authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case . . . he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law . . . is at liberty to re-examine . . . the sufficiency of the evidence on which he acted. . . . As to such persons [alien immigrants] the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.<sup>55</sup>

Thus this early case limits the scope of judicial review in exclusion cases to questions of jurisdiction and authority, and if these matters are resolved in favor of the administrative official no inquiry into the merits of his decision is permitted. The notion that due process of law, in regard to alien immigrants, is whatever Congress chooses to make it has been reasserted in later cases.<sup>56</sup>

This same type of problem was presented in *Gegiow v. Uhl*.<sup>57</sup> The objection was not as to the correctness of the administrative officer's decision on a question of fact, but whether or not in making that decision he had exceeded his authority. Mr. Justice Holmes speaking for the Court, stated that where the statute provided that decisions of immigration officials were to be "conclusive," the courts had no prerogative to review rulings on questions of fact. However, where the decision of the official

51. Act of August 3, 1882, c. 376, 22 STAT. 214.

52. Mr. Justice Brewer dissented without opinion.

53. U.S. CONST. amend. V (" . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law . . .").

54. 142 U.S. at 660, citing *Lau Ou Bew, Petitioner*, 141 U.S. 583 (1891); *Wan Shing v. United States*, 140 U.S. 424 (1891); *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Chew Heong v. United States*, 112 U.S. 536 (1884).

55. 142 U.S. at 660.

56. *Shaughnessy v. United States*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *United States v. Ju Toy*, 198 U.S. 253 (1905).

57. 239 U.S. 3 (1915).

was attacked as an error of law (here that he was exceeding his authority) the question could properly be brought before the court.<sup>58</sup>

Another problem involved in this area is whether or not an alien immigrant is entitled to an administrative hearing, in which he can challenge the government's evidence and rulings, or whether he is obliged to accept administrative orders as final without any opportunity to challenge. In a 1950 case, *United States ex rel. Knauff v. Shaughnessy*,<sup>59</sup> the Supreme Court affirmed a ruling by the Attorney General excluding a native of Germany who sought to enter the United States under the War Brides Act of 1945.<sup>60</sup> The ruling was predicated on the Attorney General's authority to exclude certain classes of individuals if he found that their entry would be prejudicial to the public interest.<sup>61</sup> The exclusion order was issued without a hearing, which, under wartime security regulations, was permissible if the Attorney General determined that the basis of the order was confidential information, the disclosure of which would be prejudicial to the public interest.<sup>62</sup> In an opinion by Mr. Justice Minton it is stated:

... it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.<sup>63</sup>

Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.<sup>64</sup>

The application of this decision was limited in a 1953 case, *Kwong Hai Chew v. Colding*,<sup>65</sup> in which the Court held that the regulations which permitted denial of a hearing in the *Knauff* case did not apply where the alien was a lawful permanent resident of the United States seeking re-entry after serving as chief steward on a vessel of the American registry. The Court, distinguishing the *Knauff* case, pointed out that if an alien is a lawful *resident* of the United States, the fifth amendment<sup>66</sup> protects him against deprivation of life, liberty or property without due process of law.

58. The Acting Commissioner of Immigration excluded a group of illiterate Russian laborers on the ground that they were "likely to become public charges," a basis for exclusion under the existing statute, 34 STAT. 898, 899 (1907) as amended by 36 STAT. 263 (1910). He based this ruling on the fact that the laborers' destination was Portland, Oregon, where conditions were such that they would be unable to find employment. The Supreme Court reversed the order, pointing out that the immigration statute dealt with admission to the United States as a whole, not just Portland. This being true the Acting Commissioner exceeded his authority in decreeing that the labor market of the United States was such that the alien immigrants would likely become public charges.

59. *Supra* note 56.

60. c. 591, 59 STAT. 695 (1945). This act expired on December 28, 1948, subsequent to the time that petitioner first applied for admission (August 14, 1948).

61. 8 C.F.R. § 175.53(a)-(h) (1943).

62. 8 C.F.R. § 175.57(b) (1943).

63. 338 U.S. at 543.

64. *Id.* at 544.

65. 344 U.S. 590 (1953).

66. U.S. CONST. amend. V.



He is thus entitled to notice and hearing, at least before an administrative tribunal.<sup>67</sup> In light of this holding it would appear that once an alien has been a lawful resident of the United States, he may leave this country and, upon seeking to return, is entitled at least to an administrative hearing, and cannot, like a nonresident alien in certain instances, be excluded by the Attorney General without disclosure of the information upon which the order is predicated.

It will be observed that all of these cases have dealt with a situation in which the individual seeking admission to the United States was concededly an alien, and made no claim to United States citizenship. In *United States v. Ju Toy*,<sup>68</sup> the petitioner asserted that he was a native born citizen of the United States, returning after a temporary departure. He was allowed an administrative hearing and was denied permission to enter. Mr. Justice Holmes, speaking for the Court, held that a fair hearing is essential where a alien seeking entry claims citizenship, but that the hearing may be *administrative*, and need not be judicial. Later decisions appear to support the rule that where the individual seeking to enter the United States claims citizenship the requirements of due process are satisfied by an administrative hearing, provided that such hearing is "fair."<sup>69</sup>

From a consideration of these cases, certain general principles become discernible which seem to have met with approval in the Supreme Court:

(1) Due process of law, when applied to a nonresident alien seeking admission to the United States, may and usually does assume a different form than that applicable to residents of the United States. This form can be whatever Congress chooses to make it.

(2) While certain classes of aliens may be excluded without the necessity of a hearing, yet when an alien claims to be a citizen of the United States he is entitled at least to an administrative hearing conducted in a fair and impartial manner.

(3) Although no alien has the right to have the administrative proceedings in which he was ordered excluded judicially reviewed on the *merits*, yet he may bring habeas corpus proceedings on the question whether or not he is being unlawfully deprived of his liberty. The court will decide only if the order restraining him was issued by an authorized official pursuant to applicable procedural requirements, and will not inquire into the soundness of the decision itself.

But for a recent decision involving the application of the Administrative Procedure Act<sup>70</sup> in this area, these principles would appear to be recognized up to the present time. However in *Brownell v. Tom We Shung*<sup>71</sup> the Court appeared to

67. 344 U.S. at 596-97.

68. 198 U.S. 253 (1905).

69. *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920); *Chin Yow v. United States*, 208 U.S. 8 (1908).

70. c. 324, 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).

71. 352 U.S. 180 (1956).

enlarge the scope of judicial review in exclusion proceedings. The petitioner, a Chinese alien, claimed admission to the United States under provisions of the War Bride Act of 1945,<sup>72</sup> testifying under oath that he was the blood son of an American citizen. After repeated failures before administrative officials, petitioner sought a declaratory judgment pursuant to section 10 of the Administrative Procedure Act.<sup>73</sup> The government contended that general judicial review was precluded in exclusion cases. However, the Court, through Mr. Justice Clark, stated without citing authority:

Admittedly excluded aliens may test the order of their exclusion by habeas corpus.<sup>74</sup>

It will be observed that it was "the order" which the Court said could be tested, and not merely the authority of the official to issue the order, which would appear to be the traditional view. The holding in this case presumably would permit *all* exclusion orders to be judicially reviewed—a concept wholly foreign to the seemingly well-settled practice. Once establishing the premise that general judicial review of exclusion orders could be obtained by habeas corpus the Court then reasoned that it should also be obtainable through declaratory judgments, since

We do not believe that the constitutional status of the parties requires that the form of judicial action be strait-jacketed.<sup>75</sup>

It was emphasized that such a conclusion was consistent with the 1955 case of *Shaughnessy v. Pedreiro*,<sup>76</sup> which involved judicial review of an administrative order commanding the deportation of a resident alien under certain provisions of the Immigration and Nationality Act of 1952.<sup>77</sup> A divided court,<sup>78</sup> through Mr. Justice Black, held that the legality of such an order could be tested by declaratory judgment pursuant to section 10 of the Administrative Procedure Act.<sup>79</sup> It was pointed out that the purpose of the Administrative Procedure Act was "to remove obstacles to judicial review of agency action,"<sup>80</sup> and that since an individual had to be in custody in order to obtain review by habeas corpus, it would be inconsistent with the intent of Congress to permit review only in this manner. Such a rule would require any alien ordered deported to go to jail in order to obtain judicial review of the order. The Court reasoned that this was an obstacle which Congress intended to remove, and held that by virtue of the Administrative Procedure Act declaratory judgments should be permissible means of reviewing deportation orders.

In deciding the *Pedreiro* case the Court was troubled with the 1953 decision in *Heikkila v. Barber*,<sup>81</sup> which held that a deportation order issued under section 22

72. See note 60 *supra*.

73. 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

74. 352 U.S. at 183.

75. *Ibid.*

76. 349 U.S. 48 (1955).

77. McCarran-Walter Act, c. 477, 66 STAT. 163 (1952), 8 U.S.C. §§ 1101-1503 (1953).

78. Justices Minton, Reed and Burton dissented.

79. 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

80. 349 U.S. at 51.

81. 345 U.S. 229 (1953).

of the Internal Security Act of 1950<sup>82</sup> (making Communist Party membership per se ground for deportation) was reviewable only by habeas corpus. This holding was based on section 19(a) of the Immigration Act of 1917<sup>83</sup> which made the Attorney General's decision in deportation cases "final." It should be emphasized that the Immigration and Nationality Act of 1952<sup>84</sup> had not been enacted at the time that the petitioner began his action, as the Court in both the *Pedreiro*<sup>85</sup> and *Heikkila*<sup>86</sup> cases was careful to point out. The petitioner in this latter case sought "review of agency action" as well as injunctive and declaratory relief,<sup>87</sup> relying on section 10 of the Administrative Procedure Act.<sup>88</sup> This section provides for judicial review of agency action unless the particular statute involved precludes judicial review.<sup>89</sup> Because the traditional form of judicial review under the 1917 statute had been by habeas corpus the Court decided that the statute was one which came under the exception, and any type of review other than by habeas corpus was precluded.

When the *Pedreiro* case came before the Court, the Immigration and Nationality Act of 1952 had replaced the Immigration Act of 1917. A different provision of the Administrative Procedure Act, section 12, became applicable. It provides:

No subsequent legislation shall be held to supersede or modify . . . this Act except to the extent that such legislation shall do so expressly.<sup>90</sup>

The Immigration and Nationality Act of 1952, being "subsequent legislation" (the Administrative Procedure Act was passed in 1946) was clearly subject to this provision. Since section 10(b) of the Administrative Procedure Act<sup>91</sup> specifically enumerated declaratory judgments as a proper form of action, and since the Court could find nothing in the new immigration act which "superseded or modified" section 10(b), the Court held that a declaratory judgment was a proper remedy in securing judicial review of deportation orders. The fact that the 1952 act contained a provision making the administrative action "final" when reviewed by the Attorney General made it necessary for the Court to draw a distinction between the use of that term in the 1917 act and its use in the 1952 act.<sup>92</sup> This the Court was able

82. 64 STAT. 1006 (1950).

83. 39 STAT. 889 (1917) as amended by 54 STAT. 1238 (1940) ("in every case where any person is ordered deported from the United States under provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final").

84. *Supra* note 77.

85. 349 U.S. at 50.

86. 345 U.S. at 232 n. 4.

87. *Id.* at 230.

88. 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

89. *Ibid.*

90. 60 STAT. 244 (1946), 5 U.S.C. § 1011 (1952).

91. 60 STAT. 243 (1946), 5 U.S.C. § 1009(b) (1952).

92. In *Heikkila v. Barber*, *supra* note 81, the Court pointed out that "final" as used in immigration legislation has a history, both in the statutes and in court decisions. It began with § 8 of the Immigration Act of 1891, 26 STAT. 1085, which provided that decisions of inspection officers should be final unless appeal was taken to the superintendent of immigration, whose action was subject to review by the Secretary of the Treasury. In *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), the Court held that by virtue of this provision Congress had entrusted the

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to do; thus the finality provision in the 1952 act was no deterrent to the application of the Administrative Procedure Act.

With the declaratory judgment now a proper proceeding for judicial review of exclusion orders the problem arises whether or not the traditional scope of review in these matters has been enlarged. As has been previously emphasized, the Court in the *Tom We Shung* case asserted that aliens could test "the order" of their exclusion by habeas corpus. If "the order," as the Court spoke of it, encompassed not only questions involving authority and procedure (the only issues open to judicial inquiry under the *Ekiu* rule) but also review as to the correctness of the administrative decisions on substantive matters, then the *Tom We Shung* case has expanded the scope of judicial review in exclusion cases. Whether or not the Court intended to arrive at this result is open to conjecture. The only question before the Court was whether the petitioner had used the proper procedural steps to obtain judicial review. After deciding this issue in his favor the Court did not have to determine whether the use of this form of action permitted by section 10(b) of the Administrative Procedure Act<sup>93</sup> carried with it the comprehensive judicial review specified in section 10(e) of that act.<sup>94</sup>

A lower federal court in a case subsequent to the *Tom We Shung* decision apparently did not feel that judicial review of an exclusion order on the merits was yet available. In *Forbes v. Brownell*<sup>95</sup> a British subject seeking to enter the United States was excluded from admission on grounds that the crime of bigamy, for which he was convicted in Canada, was a crime involving "moral turpitude," which is a basis for exclusion under the 1952 act.<sup>96</sup> The petitioner brought an action for declaratory judgment under section 10(b) of the Administrative Procedure Act.<sup>97</sup> The District Court for the District of Columbia held that it could not inquire whether the petitioner was guilty or innocent, and that the facts leading to his conviction

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final determination of the facts in exclusion cases to administrative officers, and held that this was not a denial of due process in regard to an alien seeking admission to the United States. The Court in the *Heikkila* case asserted that this same construction was applied in cases involving deportation orders. 345 U.S. at 234-35. Thus reading § 19 of the 1917 Immigration Act against this background the Court said that Congress intended to preclude judicial intervention in deportation cases to the fullest extent permitted by the Constitution. This being true, the first exception of the Administrative Procedure Act, 60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952), preventing application of the act where statutes preclude judicial review, was applicable and the act could not be brought into play. In *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955), the Court said that there was some ambiguity in the provision in the Immigration and Nationality Act of 1952, 66 STAT. 200, 8 U.S.C. § 1226(a) (1953) giving the Attorney General the power to make the "final" determination in any proceeding if he chooses to do so. The Court said, "It is more in harmony with the generous review provisions of the Administrative Procedure Act to construe the word 'final' . . . as referring to finality in the administrative procedure rather than as cutting off the right of judicial review in whole or in part." 349 U.S. at 51.

93. *Supra* note 91.

94. 60 STAT. 245 (1946), 5 U.S.C. § 1009(e) (5) (1952).

95. 149 F. Supp. 848 (D.C. 1957).

96. 66 STAT. 182 (1952), 8 U.S.C. § 1182(a) (9) (1953).

97. *Supra* note 91.

were not open to judicial evaluation. The court held that it could decide only whether the crime of bigamy in Canada was one which involved moral turpitude.

Admittedly the Administrative Procedure Act provides a basis for a more comprehensive judicial review of administrative determinations in this area. Section 10(a) states:

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action . . . shall be entitled to judicial review thereof.<sup>98</sup>

Conceding that any alien denied permission to enter the United States would be "adversely affected" or "aggrieved" it would appear that the act authorizes judicial review whether or not he has suffered any legal wrong. This, it seems, makes every exclusion order subject to judicial review. If this is a proper analysis of the act then it in fact enlarges the customary scope of review, at least to the extent of determining whether or not the administrative decision was supported by "substantial evidence,"<sup>99</sup> a matter which was not considered in the original procedure as set out in the *Ekiu* case. Whether the decision in the *Tom We Shung* case has extended the scope of judicial review in exclusion cases past its customary perimeter cannot now be asserted with any degree of certainty. At least one federal court has thought not. However the broad provisions of section 10 of the Administrative Procedure Act provide a strong argument to the contrary.

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98. 60 STAT. 243 (1946), 5 U.S.C. § 1009(a) (1952).

99. See note 94 *supra*.