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THE ADMINISTRATIVE CONTROL OF ALIENS

THE ADMINISTRATIVE CONTROL OF ALIENS

A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE

by William C. Van Vleck

DEAN OF THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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FOREWORD

THE Legal Research Committee of the Commonwealth Fund continues its series of special studies disclosing the actual workings of selected administrative organs, intended to lead to a better judgment of what administrative law does and to be a guide to what ought yet to be done. The following is a study of the federal statutes and the practice under those statutes affecting the administrative control of aliens and covering both the exclusion process and the expulsion process.

While the study has been conducted under the auspices of the Legal Research Committee and is published by the Commonwealth Fund, the author has been allowed entire freedom and the responsibility for the statements of fact and for the opinions expressed is fully and solely his own.

January, 1932

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INTRODUCTION

THE METHOD OF INVESTIGATION

In gathering the material for this study of the administrative control of immigration there were three steps. The first was an attempt to secure by personal observation as much first-hand knowledge as possible of what went on in the administration of the immigration laws, and a background of ideas as to the problems involved and the personal equations which entered in. To secure this two weeks were spent at the immigrant station at Ellis Island. Here through the coöperation of the immigration officials, every step in the procedure was opened to observation. In the same way hearings before the Board of Review in the department at Washington were attended and conferences had with officials there and with members of the departmental personnel. The second step was a close, detailed study and analysis of the records of administrative cases on file in the department. The records of one thousand such cases were studied, five hundred exclusion cases and five hundred cases of the use of the expulsion process. In the latter group, in order to secure a study of five hundred cases which had been fully completed, the records of six hundred and thirty-three cases were read. This was necessary since some of the cases examined had not reached the stage of a hearing and a decision. The records in both classes of cases were brought out of the file room by a member of the office personnel in piles in which the file numbers ran in numerical sequences. The clerk picked out the piles of records from the files in accordance with requests that cases of a certain general class were desired, such as public charge cases or anarchist cases. The manner in which the records were delivered for study indicated that there had been no attempt to select them either to reveal or to conceal. The variations among them—from routine clear cases where there seemed to be no issue to be contested to close cases where much feeling was ob-

servable in the record—demonstrated this also. So did the fact that the cases included those where the administrative officers conducted themselves with fairness and intelligence, those where they exhibited prejudice, haste, and stupidity, and those where they were neither very good nor very bad. These records were analyzed as closely as possible and the details entered on work sheets prepared for that purpose. The details gathered included dates, the administrative officers in the case and the findings and recommendations of each, the kinds of evidence presented and relied on, a brief summary of the facts if they seemed material, whether the aliens were represented by counsel, whether they were detained or released on bail, and comments which, at the time the case was examined, seemed pertinent. The third step was the study of the immigration cases before the Supreme Court and the lower federal courts, of the immigration rules and statutes, and of the reports of the Secretary of Labor and of the Commissioner-General of Immigration.

After the manuscript of this study had been completed, the author secured through the courtesy of the Hon. W. W. Husband, Second Assistant Secretary of Labor, a final checking of the two principal fact-finding chapters by an experienced member of the immigration administrative staff. In this way the latest information as to changes in procedure was secured. Several valuable suggestions were made. Throughout his work in the preparation of this study, the author at all times received the most courteous and coöperative treatment from the immigration officials and officers with whom he came in contact. For this he wishes to make acknowledgment.

CHAPTER I

THE GROWTH OF IMMIGRATION LEGISLATION

PERIOD OF NO NATIONAL RESTRICTIVE LEGISLATION. The first national legislation dealing with the exclusion or the expulsion of aliens was the ill-fated Alien Act of 1798, part of the legislation known familiarly to historians as the Alien and Sedition Acts. This gave the President power to order to leave the country any alien whom he deemed dangerous to the United States. This act was very unpopular and passed out of existence at the end of its two-year term without any serious effort to have it extended. With the exception of this act there was no national legislation on the subject of exclusion or expulsion until the passage of the Act of 1875. The open-door policy was followed consistently by Congress. There was a strong sentiment in favor of permitting and even encouraging the coming of immigrants. In 1819 Congress passed legislation designed to improve conditions on vessels bringing passengers to this country, limiting the number of passengers in proportion to the tonnage of the vessels and requiring that sufficient supplies of food and water be carried. It was also provided that the captains of all vessels bringing passengers from foreign ports must furnish lists of the passengers with certain other information as to each. These laws for the protection of passengers were amended several times in order to improve conditions further. Between 1835 and 1860 considerable anti-alien agitation developed, much of it directed toward Catholic immigration from Ireland. This was fostered by the Native American Party and had its culmination in the Know-Nothing Movement. Some of the features of present legislation were forecasted by a bill presented in Congress as a result of this agitation. For instance, this bill would have required the exclusion of foreign paupers and criminals and the issuing to all immigrants by American consuls of certificates that they were not within the excluded

classes, the last a provision that has a resemblance to the immigration visa of today. The majority opinion, however, was opposed to this legislation and it did not pass. Instead measures tending to encourage immigration were enacted. The coolie act of 1862 was a restrictive act but it aimed at preventing Americans from carrying on a trade in Chinese coolies. By the Act of 1864[1] the office of Commissioner of Immigration was established, and also a Superintendent of Immigration at the port of New York. The duties, however, of these officers were not to enforce restriction of immigration. They were charged with seeing that the passenger acts were obeyed and had some supervision over contracts made by immigrants to pledge their wages after arrival for the amount of their passage money. The Commissioner was to report each year to Congress on the subject of immigration during the preceding year. On the whole, this legislation tended to encourage and not restrict the incoming of aliens from abroad.

Attempts at state action. During this period, however, there was some state legislation on the subject of immigration restriction. Examples of this were statutes of New York, California, and Louisiana, providing among other things for a tax on each immigrant landing at ports in the states. A New York statute required reports to a state officer by the masters of all vessels arriving at the port of New York, giving the name, age, and last legal residence of every person on board. A Massachusetts statute provided for inspection of immigrants by state officers and bonds in the cases of aliens found to be incompetent to earn a living. These were followed by laws levying on each immigrant a tax to be collected by the health commissioner from the master of the vessel bringing them. In the *Passenger Cases,*[2] however, these acts by New York and Massachusetts attempting to levy a tax on incoming immigrants were held unconstitutional by the Supreme Court. Attempts were made to modify

[1] 13 Stat. L. 385.

[2] 7 How. 283.

this legislation to make it appear as an exercise of police power and not an attempt to regulate foreign commerce but the attempt failed as the Supreme Court declared the modified statutes unconstitutional also.[3] This decision marked the end of the attempts at state regulation since the opinion of the court contained a dictum that the whole subject had by the Constitution been confided to Congress.

The Act of 1875. The result of the failure of the attempts at state legislation was that the coming of immigrants was left without any regulation since Congress had done practically nothing in regard to it except to pass rules to govern the carriage of passengers on ocean vessels. The states also found themselves with the burden imposed upon them of taxing their own citizens to pay the expense of caring for arriving aliens who became ill and destitute. This was the decisive factor which led Congress to pass the Act of 1875.[4] It was very narrow in its scope for it excluded only convicts and prostitutes, but it established the policy of national regulation and restriction. Inspection of immigrants was to be made by the collectors of the ports. The act provided that the immigrants should not be landed until this inspection had been completed. If the collector of the port certified to the commander of the ship that an immigrant was within the excluded classes he was not to be permitted to land. The act also recognized the likelihood that the enforcement of the restrictions would result in court action for it provided that if any person certified as excludable should apply for release or other remedy to any proper court or judge, the collector should retain the vessel in port until the case was decided or else permit the landing of the alien on bond. Aliens certified as excludable were not to land "except in obedience to a judicial process issued pursuant to law."

[3] *Henderson* v. *Mayor,* 92 U.S. 259; *Chy Lung* v. *Freeman,* 92 U.S. 275.

[4] 18 Stat. L. 477.

First general immigration law of 1882. The policy once established, other legislation by Congress soon followed. In 1882, the first general immigration law was passed.[5] This levied a head tax of fifty cents on each alien passenger brought to the country. It added to the excludable classes lunatics, idiots, and persons unable to take care of themselves without becoming a public charge. This last was the forerunner of the ground for exclusion, "likely to become a public charge," apparently a simple enough category, but one which has caused much uncertainty and much litigation. The administration of the law was placed under the Secretary of the Treasury. The local administration, however, was to be carried on by state officers to be designated by the governors of the various states involved, with which officers the Secretary of the Treasury was to make the necessary contracts. The act also included the very important provision that the Secretary of the Treasury was empowered to make such rules and regulations "as he shall deem best calculated for carrying out the provisions of this act and the immigration laws of the United States." Thus, early in the history of immigration legislation the power of the administrative officers to make rules was established. The constitutionality of this comparatively mild exercise of the power of Congress over immigration was contested, but the legislation was upheld in the *Head Money Cases.*[6] The specific point at issue was the provision for the head tax.

Contract Labor Law: First expulsion provisions. The next step was the exclusion of contract labor. This came as a result of agitation by labor organizations, which pointed out vigorously the evils arising from the practice of employers of importing laborers or inducing large bodies of them to come in order to make labor as cheap as possible. Acts were passed in 1885 and 1887 forbidding the importation of labor under contract, making such contracts void, and empowering the Secre-

[5] 22 Stat. L. 214.

[6] 112 U.S. 580.

tary of the Treasury to exclude contract laborers. One year later there was added the first legislative provision since the Alien and Sedition Acts for the expulsion of aliens already here. This authorized and directed the Secretary to return within a year after their entry any immigrants landing contrary to the contract labor laws. The constitutionality of this act was upheld by the Supreme Court in *Lees* v. *U.S.*,[7] a case in which a civil suit had been brought to collect the penalty provided for in the act for violations of it.

The further course of legislation on the subject was marked by gradual additions to the excluded classes and extensions of the power to expel aliens already in the country, and additional administrative provisions to secure closer inspection and more effective enforcement. By the Act of 1891[8] the following classes were added to those already excludable: persons suffering from a loathsome or dangerous contagious disease; persons who prior to coming had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude where the offense was not a political one, thus broadening the provisions of the first act on the subject of crimes which had applied only to persons undergoing sentence at the time of migration; paupers, polygamists, and those whose passage money was paid by others or whose migration had been assisted, unless they showed affirmatively that they did not belong to any of the excluded classes. The language of the Act of 1882, "persons unable to take care of themselves without becoming a public charge," was changed to the simpler but less definite expression "persons likely to become a public charge" in which form it still remains in the statute. The act also provided for medical inspection. It also provided for important administrative changes. It created the office of Superintendent of Immigration and provided that the work of inspection should be carried on by officers of the United States instead of local

[7] 150 U.S. 476.

[8] 26 Stat. L. 1084.

officers. When immigrants were denied admission they might appeal to the superintendent whose decision was to be subject to review by the Secretary of the Treasury. In cases where it was deemed advisable, immigration officers were empowered to remove aliens applying for admission to detention quarters while their inspection was being completed. The power to expel, which had formerly been limited to contract laborers, was now extended to all cases of aliens who had entered in violation of the law, but it was to be exercised only within a year after entry.

Act of 1893: Important administrative changes. Two years later Congress again tried its hand at immigration legislation. The changes in the Act of 1893,[9] however, did not add to the excluded classes but aimed at improvement of the administration of the laws then in force. Some of these administrative changes were of the greatest importance, and with a few minor changes are still applicable today. The commanding officers of vessels bringing immigrants to the country were required to deliver to the local immigration officers manifests or lists of the aliens on board with detailed information as to each. Inspectors were to hold all immigrants not clearly entitled to land for the action of boards of special inquiry which were to be composed of four members. A favorable vote of three of these was necessary to entitle the applicant to admission and the one in the minority might appeal to the Superintendent of Immigration in the same way as the rejected immigrant. The manifests were to be verified before an American consular officer at the port of embarkation and must show among other things that the immigrant passengers had been subjected to a physical examination before embarking, and that they did not, so far as the officers of the vessel knew, come within any of the excludable classes. This act was supplemented the next year by provisions added to appropriation bills creating the positions of com-

[9] 27 Stat. L. 569.

missioners of immigration at certain ports of entry and changing the name of the Superintendent of Immigration to Commissioner-General of Immigration. In 1897 a provision for a literacy test passed both houses of Congress, but it was vetoed by President Cleveland.

General Act of 1903: Exclusion and expulsion for opinions. In 1903, as a result of the investigations by the Industrial Commission a new general act was passed. The Act of 1903[10] added to the grounds for exclusion epileptics, persons who had had within five years an attack of insanity or who had at any time suffered two or more attacks of insanity, and professional beggars. It also made the significant addition of "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials." Thus exclusion and expulsion on the sole ground of proscribed opinions was for the first time provided for. The word alien was substituted for the word alien immigrant and thus the provisions of the act were extended to cover domiciled aliens returning after a temporary absence from this country. The period in which expulsion might be secured was extended to three years after entry. It was also provided that aliens who became public charges within two years after their entry from causes existing prior to landing should be expelled. This was an extension of a provision of the Act of 1891 that aliens becoming public charges within one year should be deemed to have entered in violation of law. It marks the beginning of the policy of expelling because of facts or conditions occurring or developing subsequent to the alien's entry. On the administrative side several important changes were made. The boards of special inquiry were reduced to three members instead of the four first provided for, and the decision of two was to prevail with a right in a dissenting member to

[10] 32 Stat. L. 1213.

appeal. An administrative fine was provided for to be levied upon transportation companies which had brought over aliens found to be afflicted with a loathsome or dangerous contagious disease, when it appeared to the Secretary of the Treasury that the alien was so afflicted at the time of embarkation and that the existence of the disease might at that time have been detected by a competent medical examination. This fine was to be enforced not by filing suit but by refusing clearance papers to the offending carrier. This extension of administrative power to inflict a fine was sustained by the Supreme Court.[11] Later in the same year the administration of the immigration laws was placed under the newly created Department of Commerce and Labor and the administrative powers transferred to the Secretary of that department. There was also in the act a provision dealing with the procedure for enforcing the power to expel, the first reference to that matter. The offending alien was to be "taken into custody and returned to the country whence he came." This indicated that the proceedings to expel should involve the arrest of the alien, similar to the usual situation in criminal cases. This was different from the procedure provided for in the original Alien and Sedition Acts where the President was to notify the alien to leave and permit voluntary withdrawal with arrest to follow only in case the notice was not obeyed.

Act of 1907. From 1903 to 1907 there was a rapid increase of immigration. In the fiscal year ended June 30, 1905, it reached the total of 1,026,000. This rapid increase caused considerable discussion of the subject of restriction. It was dealt with by the President in his messages to Congress. As a result the law was again overhauled and the Act of 1907[12] resulted. This act added to the excluded classes but did not involve any significant change of policy. The classes added included feeble-minded persons; children under sixteen years of age unaccompanied by

[11] *Oceanic Navigation Co.* v. *Stranahan,* 214 U.S. 320.

[12] 34 Stat. L. 898.

one or both parents, with a provision as to them that the Secretary might exercise discretion; persons afflicted with tuberculosis; and persons suffering from physical or mental defects of such a nature that they might affect the ability of the person so afflicted to earn a living. The provisions as to contract laborers had been stated so broadly that there had been an attempt by the immigration authorities to apply them to members of learned professions, including in one *cause célèbre* the new rector of a prominent New York church called from England, and it was necessary to enact that certain persons were exempt from its operations. This was done in the Act of 1907. Professional actors, artists, lecturers, singers, ministers, professors, and domestic servants were made exceptions to the requirements of the contract labor laws. To the list of persons excluded on the ground of crime were added those who admitted the commission of crime before entry even when there had been no conviction. The commission of the crime was not a sufficient ground. There must have been either conviction or the admission by the alien that he had committed it. The provisions as to the exclusion of persons connected with prostitution were extended to cover persons coming for any other immoral purpose or those importing or attempting to import another for such a purpose. The power to expel on the ground that the alien had become a public charge was extended to cover a three-year period after entry, but the requirement that the causes for the disability must have existed at the time of entry was retained. In 1910 additions were made to the law to prevent more effectively the importation of women and girls for prostitution. In 1913 the administration of the laws was transferred to the newly created Department of Labor.

By the Act of 1907 a commission of three members of the Senate, three members of the House of Representatives, and three other persons was created to make an investigation of the whole subject of immigration and immigration restriction. This commission had by 1911 completed and published a series

of reports comprising forty-two volumes. A general revision of the immigration laws, however, did not come until 1917, when the present basic general act, cited as the Immigration Act of 1917,[13] was passed.

Act of 1917: The present basic act. This act involved some radical changes in policy, all of them tending toward greater strictness. Two of these appeared in additions to the excludable classes. A literacy test was added, under which all aliens over sixteen years of age were required to be able to read in some language. The act had been vetoed by President Wilson because of this provision, but Congress had succeeded in mustering enough votes to pass it over his veto. The policy of excluding the natives of certain defined geographical areas was incorporated into the general act and the so-called "barred zone" in certain portions of Asia and the East Indies was thus established. Other less important additions were made to the list. The Supreme Court had held that in deciding to exclude on the ground that aliens were likely to become a public charge the immigration authorities could not consider the labor and other economic conditions in the section of the country to which the aliens were bound, but must limit their judgment to personal qualities of the aliens.[14] In an attempt to avoid the effect of this decision the drafters of the new act changed the position of the phrase, "likely to become a public charge," from its former place between paupers and professional beggars to a more independent position after the clause dealing with contract laborers.[15] Certain exceptions to the literacy law were incorporated in the statute: persons fleeing from religious persecution and persons who had already had a domicile in this country for five years to which they were returning within six months after a temporary absence.

Drastic increases in power to expel. Much more drastic pro-

[13] 39 Stat. L. 874. [14] *Gegiow* v. *Uhl*, 239 U.S. 3.

[15] *Immigration Laws and Rules of January 1, 1930*, Sen. Rep. 352, 64th Congress, 1st Sess., p. 25, note 5.

visions for the expulsion of aliens already here were placed in the act. In most cases the period after entry within which the power might be exercised was increased to five years. The three-year limit was retained in only one: entry without inspection. In some cases the time limit was removed altogether, so that expulsion might take place at any time after entry prior to naturalization. Anarchists, or persons coming within the terms of the "force or violence" statutes, persons connected with prostitution, and persons who had before entry been convicted of a crime or who admitted that they had committed it, might be deported without time limit. So might persons who had been convicted more than once since entry of a crime involving moral turpitude, and sentenced to imprisonment for not less than a year in each case. For the commission of one such crime with a sentence of not less than one year, there might be expulsion within five years. The provision for the deportation of public charges was also extended to five years after entry, and the former provision that such expulsion should not take place except where the causes of the disability were shown to have existed at the time of landing was practically eliminated by the simple rule that the alien must show affirmatively that the causes did not exist at that time.

Important administrative changes. On the administrative side important changes were made. In both exclusion and expulsion cases the immigration officers were empowered to issue process to compel the attendance of witnesses and the production of papers when that should be necessary for the proper conduct of the investigation of the alien's eligibility to land or to remain, as the case might be. There was added to the statute a provision permitting an alien whose application for admission had been rejected by a board of special inquiry to be represented by counsel in the prosecution of his appeal to the Secretary of Labor. In expulsion cases the decision of the Secretary to deport was expressly made final in an effort to reduce court action in immigration cases to a minimum. In

some cases of aliens otherwise excludable under the statute, the Secretary was given discretionary power to admit. The most important classes thus provided for were aliens returning after a temporary absence to an unrelinquished domicile of not less than seven consecutive years, and those coming for a temporary stay only. The act repealed all the prior immigration acts except a few specified sections and the Chinese Exclusion Acts which were expressly retained in force except as the general provisions of the act for expulsion might be applicable.

Chinese Exclusion Acts. While the general immigration laws were being developed, legislation for the exclusion and expulsion of aliens was being accomplished in another direction, the Chinese Exclusion Acts. In 1868, the Burlingame Treaty with China expressly guaranteed to Chinese subjects such "privileges, immunities and exemptions in respect to travel and residence" in the United States as might be enjoyed by the citizens or subjects of the most favored nations. By 1880, however, the agitation against the immigration of Chinese by the Pacific states had become so strong that it was found desirable to negotiate with China the treaty of that year. By this China consented that the United States might "regulate, limit or suspend" the immigration of Chinese laborers, but "may not absolutely prohibit it." The treaty also provided that the "limitation or suspension shall be reasonable." The Chinese Exclusion Acts of 1882,[16] 1884,[17] and 1888[18] followed. By these acts the immigration of Chinese laborers was prohibited for ten years. Those already in the United States, however, might remain, and in case they desired after a temporary visit to China to return to this country, they might be readmitted upon presenting a certificate issued to them at the port of departure from this country. Chinese of the non-laboring class might enter, but only on certificate from the Chinese government. There was also a provision for expulsion after a judicial hearing before a United

[16] 22 Stat. L. 58. [17] 23 Stat. L. 115. [18] 25 Stat. L. 476, 477.

States judge or commissioner in cases where Chinese persons were found to be unlawfully in the United States. In 1888 the right of Chinese laborers, who had been in the United States when the law of 1882 was passed, to reënter on certificate was revoked except in certain cases.

In 1888 a new treaty with China had been signed by which China agreed to prohibit the emigration of Chinese laborers to the United States for twenty years. The Chinese government failed to ratify this treaty. In 1892[19] the laws for the exclusion of Chinese laborers were extended by Congress for another ten years, and there was added a provision requiring all resident Chinese laborers to secure within one year certificates of residence on penalty of deportation, such certificates to be evidence of their right to remain here. Also the act placed the burden upon Chinese persons charged with being unlawfully within the United States of proving the lawfulness of their residence. The constitutionality of this statute was contested before the Supreme Court. Leading lawyers of the country expressed grave doubts as to its constitutionality and even advised Chinese not to comply with it. The Supreme Court, however, sustained it, with three justices dissenting.[20] In 1902 the Chinese Exclusion Acts were continued indefinitely. Meanwhile in 1900 the administration of these laws had been placed under the administration of the Secretary of Labor. Section 38 of the Immigration Act of 1917 provided that it should not amend the Chinese Exclusion Acts except as provided in section 19 of the act. This section provides for expulsion by administrative action by the Secretary of Labor. This apparently brings the Chinese expulsion cases under the general powers of the Secretary to expel.

War immigration legislation. The World War had a marked effect upon the course of immigration legislation in this country. While it was in progress migration to this country almost

[19] 27 Stat. L. 25.

[20] *Fong Yue Ting* v. *U.S.*, 149 U.S. 698.

ceased. In 1918 it reached its lowest point of 110,618. In May of that year, due to the problems incident to the participation of the United States in the war, additional legislation was passed authorizing the President to prescribe regulations for the entrance and departure of aliens, and making it an offense punishable by fine or imprisonment for aliens to enter or leave in violation of these regulations.[21] Under this legislation the regulations as to passports and visas were drafted and enforced. In March, 1921, this act was extended indefinitely. By the Act of October 16, 1918,[22] amended in 1920,[23] the provisions in the general act for the expulsion of anarchists and persons advocating the overthrow of government by force or violence were restated and expanded, so that belief in or advocacy of the proscribed doctrines, membership in proscribed organizations, and writing or publishing or knowingly having in possession proscribed documents or publications became grounds for expulsion without limit of time after entry. This statute also provided that persons excluded under its provisions should never return to this country and made it a felony for them to attempt to reënter. In 1920 as an aftermath of criminal prosecutions for violations by aliens of acts of war legislation, Congress passed a statute requiring the Secretary of Labor to deport any aliens who might have been so convicted if he found them to be undesirable residents.[24]

The Quota Act of 1921: Numerical restriction. At the close of the war there was a prospect of an immediate rush of immigrants from European countries. In 1921 the number of alien arrivals reached the total of 805,228. At the same time the process of post-war deflation was going on in this country. Prior to the war there had been from time to time agitation for increased restrictions. Much of this was aimed at the increased migrations from the countries of eastern and southern Europe.

[21] 40 Stat. L. 559.
[22] 40 Stat. L. 1912.
[23] 41 Stat. L. 1008.
[24] 41 Stat. L. 593.

This agitation revived at the prospect of further increases. These conditions led to the Act of May 19, 1921,[25] amended May 11, 1922, known as the Quota Law. This legislation marked a complete departure in immigration legislation because it introduced the policy of numerical restriction. It also permitted a larger immigration from certain countries than from others, the countries from which the earlier immigration had come being favored at the expense of those from which large numbers of aliens had come in more recent years. As a result, the countries of northern and western Europe were favored at the expense of those of southern and eastern Europe. By the terms of this new act the total number of aliens of any nationality who might be admitted during a year was limited to 3 per cent of the number of foreign-born persons of that nationality resident in the United States according to the census of 1910. By the subsequent amendment this act was extended to 1924. By the Act of 1922[26] the expulsion provisions of the statute were extended to any aliens convicted of violations of the federal Narcotic Drugs Act of 1909.

Act of 1924: National origins—Consular inspection. In 1924 the subject of immigration again came before Congress for the quota act was due to expire that year. The Act of 1924[27] was passed on May 26, 1924. This continued the quota principle. It substituted, however, the census of 1890 as the source of the basic figures from which the quotas were to be computed, and reduced the number permitted to enter to 2 per cent. It also provided that beginning in 1927 the basis of the computation of the quota of each country should be changed to the number of persons in the country having that "national origin" by birth or ancestry. The number of each nationality admissible during the year should be the number which bore the same ratio to 150,000 as the number of inhabitants in the United States in 1920 having that national origin bore to the total num-

[25] 42 Stat. L. 5; *ibid.*, 540. [26] 42 Stat. L. 596. [27] 43 Stat. L. 153.

ber of inhabitants in that year. In no case was the quota to be less than one hundred. Thus a maximum number of immigrants to be admitted during a year was established.

The Act of 1924 also introduced a number of improvements in the administration of the quota principle, which during the first years of its enforcement had produced numerous anomalies. It also provided for immigration visas to be issued by American consular officers abroad after formal application by prospective immigrants, and directed that such visas should not be issued where the consular officers found the applying immigrants not eligible to enter the United States. Thus the long-discussed system of consular inspection abroad was established. Under the act immigrants were divided into two groups, quota and non-quota, the latter class including, among others, aliens already admitted returning from a temporary visit out of the country, aliens born in Canada and countries of Central and South America, and ministers, professors, and students. The quota limitations were not to apply to these. The act also introduced the distinction between immigrant aliens and non-immigrants. In the latter class were included government officials and their families and temporary visitors for business or pleasure.

This legislation also contained provisions dealing with administration. In all cases where aliens were attempting to enter the United States the burden of proof should be upon them to establish their right to enter. It also provided for expulsion. Any alien found to have entered the country without complying with its terms was to be expelled and no time limit set for the exercise of this power. In expulsion proceedings under the act the burden of proof was on the alien to show that he entered lawfully.

The provision for the computation of the quotas on the basis of national origins caused considerable adverse discussion. The act created a commission consisting of the Secretary of State, the Secretary of Commerce, and the Secretary of Labor to

determine the quota for each country. There were delays in reaching this determination of the quotas. The date on which the national origin principle was to become effective had to be postponed by Congress on two different occasions. In March, 1929, the quotas were finally announced by the President, and they became effective on July 1. In July, 1926, by Executive Order No. 4476, and again in February, 1928, by Executive Order No. 4813 the President issued detailed regulations in regard to passports and other documents required of aliens.

A marked increase in expulsions. These various acts of legislation after the close of the World War caused a marked reduction in the number of immigrants. Coincident with this reduction in the number of aliens coming in, there has been an even more marked increase in the number sent out by the immigration authorities by the use of the deportation or expulsion process. In 1921 over 800,000 aliens were admitted. That same year only 4,517 were expelled. On the other hand, in 1926 slightly less than 500,000 were admitted while the number expelled increased to 10,904. During the fiscal year ended June 30, 1930, the number admitted had still further decreased while the number of expulsions had increased to 16,631. During the five years from 1921 to 1925 inclusive, 26,427 persons were deported by the Department of Labor under the expulsion provisions of the statutes. During the past five years, 1926 to 1930 inclusive, the number reached 64,123. The reduction in incoming aliens and the system of inspection abroad when the visas are issued have freed the immigration officers for more activity in the administration of the expulsion process. Moreover, more causes for expulsion have been provided and the time limits increased. In 1929 Congress passed a most drastic piece of legislation on the subject.[28] This provided that in all cases where aliens had been expelled by administrative process, that is, arrested and deported, they should not be permitted to return to this country and made their return or attempt to

[28] 45 Stat. L. 1551.

return a felony, punishable by fine or imprisonment or both. This was a departure, for under the former acts persons expelled, except those connected with prostitution, or those deported as "radicals," might later on reapply for admission. Under this last act expulsion means permanent banishment.

Agitation for expulsion—Deportation Act of 1926. During the past two or three years public opinion has been more occupied than at any time before with the subject of expulsion, or deportation, as it is popularly called. The press has paid more attention to the individual cases. The subject is constantly introduced in discussions of methods to improve the enforcement of law. It is often mentioned as one of the means by which conditions as to crime may be improved in some of our larger cities. The increased activity on the part of the officers and the increase in public interest are of recent growth. Provisions for expulsion have been on our statute books since 1891. The process was looked upon as part of the general process of exclusion and it was to be applied only within one year after the alien's entry. There were no marked changes except the increase in the time limit to three years until the Act of 1917. That act introduced measures of much greater severity. Yet until 1926 there was no extensive use of the process and little attention was usually paid to it. The awakening of public interest in it has occurred during the past five years. Coincident with this, the Committee on Immigration and Naturalization of the House of Representatives has sponsored a bill dealing with the whole subject. For the first time the question of the administrative procedure for the exercise of the power has been formally before Congress. So far that body has contented itself with legislating that the aliens "shall be taken into custody upon the warrant of the Secretary and deported." The procedure has been worked out by the department by rules and administrative practices. This bill[29] passed the House as the

[29] H.R. 11489, 69th Congress, 1st Sess., Report No. 991.

Deportation Act of 1926. It increased the causes for expulsion and in many cases the time limit in which the power was to be exercised. In some cases the increase was from five to ten years. It also provided for hearings to be conducted before immigrant inspectors and the transmission of the evidence to the Secretary who under the act was to make his decision entirely on the evidence thus transmitted. This statute, however, did not pass the Senate and has not become law.

Significant changes in immigration policy. Two significant facts appear in the history of immigration legislation. One is the complete about-face which has taken place in the policy of this country as to immigration restriction. The United States started with the policy of the open door, of encouragement of immigration. It especially extended hospitality to persons suffering from political or religious persecutions in other lands. Under the pressure of agitation by particular groups and the public opinion which has been the result, this policy has been abandoned. The result of the process of piecemeal additions in each succeeding act has been a policy of numerical restriction and of exclusion and expulsion on the ground of proscribed political and economic opinions. The World War and the revolution in Russia have tended to hasten this development of more drastic provisions.

The other fact is that the extensive use of the power to expel is a comparatively recent thing. From being a mere incident of the power to exclude as a measure to correct errors made in inspection, it has become one of the chief activities of the immigration service in some of the immigration districts. The more drastic provisions date from the Act of 1917. The extension of the time limit after entry to five years and in some cases indefinitely has brought a great many resident aliens within the control of the administrative officers. Coupled with this has been the practice of giving the laws as broad an interpretation as possible and of regarding accused aliens as guilty until their

innocence has been proved. The power to expel is no longer disregarded as a mere incident of the more important matter of excluding. It is being invoked as an aid to the criminal law and as a protection against proscribed opinions. It is becoming a popular subject of public discussion in the press and in political speeches. Indications point to a much more drastic enforcement of this extensive power to expel.

CHAPTER II

THE LEGAL BACKGROUND. THE ADMINISTRATIVE ORGANIZATION. THE TWO PROCESSES OF ADMINISTRATIVE CONTROL

§1. THE LEGAL BACKGROUND

STATUTES. The basic statutes are the Immigration Act of 1917[1] and the Act of 1924.[2] The former, which was passed after a reëxamination by Congress of the whole subject, repealed the general acts of 1903, 1907, and 1910 with the exception of a few sections. This act provides general tests of admissibility to the country and the procedure for the inspection of applicants for admission. It also gives to the Secretary of Labor the power to expel from the country aliens already here and provides the causes which shall be the ground for such expulsion. The Immigration Act of 1924 provided for a system of consular inspection abroad and detailed provisions for the enforcement of the quota law. In addition to these statutes there is the Act of 1920[3] providing for the exclusion and expulsion of anarchists and others of "radical opinion"; another act of the same year[4] providing for the expulsion of such aliens, convicted and sentenced for violation of certain war legislation, as might be found by the Secretary of Labor to be undesirable residents of the United States; the Act of 1922,[5] providing for the expulsion of aliens convicted of violating the Narcotic Act; and the Act of 1929,[6] making it a felony for an alien expelled from the country to enter or attempt to enter the United States at any time after such expulsion. These various acts did not repeal or amend the Chinese Exclusion Acts except as the Act of 1917 attempted to extend to them the procedure of expulsion by administrative process.

[1] 39 Stat. 874.
[2] 43 Stat. 153.
[3] 40 Stat. 1012, 41 Stat. 1008.
[4] 41 Stat. 593.
[5] 42 Stat. 596.
[6] 45 Stat. 1551.

The Immigration Rules. The acts of 1917 and 1924 provide that the Commissioner-General of Immigration shall, under the direction of the Secretary of Labor, make the rules and regulations necessary for the enforcement of the statutes. The latest revision of these rules, that of January 1, 1930, constitutes a code of thirty rules, most of them with several subdivisions, partly substantive in explanation and interpretation of the provisions of the statutes, and partly relating to procedure. These rules have the force of law when they do not conflict with the statutes or with requirements of the Constitution.

Judicial decisions. The Supreme Court, the circuit courts of appeals, and the district courts of the United States have in numerous decisions developed a body of substantive law in interpretation of the provisions of the statutes and a body of materials as to the procedural requirements of the administrative process.

Departmental records. All cases which come before the Department of Labor at Washington for decision by the Secretary of Labor are in the form of typewritten records. These are placed in the administrative files of the department. These files contain the record of the decisions of the administrative officers. These decisions have not been embodied in a system of reports for publication. Certain cases do not come before the department. These are the cases where aliens are admitted upon examination at the ports of entry or those where aliens who have been excluded by the local officers do not appeal to the Secretary of Labor. In such cases the record is not prepared but remains in the form of shorthand notes in the notebooks of the stenographers, on file in the local immigration offices.

§2. THE ADMINISTRATIVE ORGANIZATION

Departmental and field services. The ultimate source of administrative power is the Secretary of Labor. Subordinate to him are two Assistant Secretaries and two Assistants to the Sec-

retary. These two latter officers were created in 1927, and to them has been delegated the power and duty of rendering the decisions in individual immigration cases. In the department at Washington there is an organization of seven members selected from the department personnel, known as the Secretary's and Commissioner-General's Board of Review.[6a] The general administration of the immigration laws is under the direct jurisdiction of the Commissioner-General of Immigration, and the organization through which he exercises this jurisdiction is a subdivision of the Department of Labor, known as the Bureau of Immigration. This has an administrative and clerical organization at the headquarters in Washington. There is also a large field force, which, at the close of the fiscal year ending June 30, 1930, numbered 2,383.[7] These included commissioners of immigration, assistant commissioners, district directors and assistant district directors, and supervisors. It also included 1,153 immigrant inspectors of whom 123 were inspectors in charge at local stations. It is upon these inspectors that the bulk of the actual work of day-to-day enforcement falls. In addition the personnel includes a force of interpreters, guards, and matrons, and a clerical field force.

Appointment and qualifications of inspectors. Since it is upon the immigrant inspectors that the success or failure of the administration of the immigration laws so largely depends, it becomes important to consider the standards for eligibility to appointment to such positions, the education and previous experience which the rank and file have had, and the provisions for compensation and tenure of office. Inspectors are appointed from lists of eligibles made up as a result of examinations con-

[6a] Since September, 1931, the membership of the Board of Review has been increased to fifteen. This has made possible its division into three parts or smaller boards of five members each. This membership includes members of the department personnel and also inspectors brought in from the field for that purpose.

[7] *Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ending June 30, 1930,* p. 32.

ducted by the United States Civil Service Commission. Two subjects are included: mental tests which are given a rating of forty points, and questions on the immigration laws and rules which are given a rating of sixty points. There is at present no minimum requirement as to general education and no rating provided for on that basis or on the basis of previous experience. The present entering salary is $2,100 a year. For the purpose of promotion, inspectors are divided into five grades, the salary of the highest grade being $3,000. Promotions to the second and third grades are provided for on the basis of one year's satisfactory service in the next lower grade. Promotions to grades four and five are to be upon the recommendation of the Commissioner-General of Immigration at the discretion of the Secretary of Labor.

An analysis of the education of inspectors showed that 34 per cent of those whose personal record cards were studied had completed a high-school course. Four per cent had had legal training. Fifteen per cent had had some college training. As to previous experience, about a third had been employed before appointment as inspectors in the immigration service in other capacities, such as clerks, interpreters, watchmen, guards, or messengers. Another 31 per cent had had service in other departments of the Federal Government, clerks and customs inspectors predominating.

Immigration stations are not confined to the borders or the seaports, but are placed throughout the country. Some are located in Canada. For administrative purposes the territory covered is divided into thirty-five districts, each with a headquarters and an administrative head, either a commissioner or a district director. The geographical limits of each district are defined in the immigration rules.[8]

Contacts with other departments. The work of the immigration service comes in contact with that of two other executive departments of the Federal Government. Medical inspection is

[8] Immigration Rule 30.

under the Public Health Service which is allocated to the Treasury Department, and the issuance of visas is under the jurisdiction of the consular service which is under the State Department. Although two other departments are thus involved, the power to exclude or to expel rests with the Department of Labor. The other departments control the fulfilling of certain conditions on the basis of which the Department of Labor must act.

§3. THE TWO PROCESSES OF ADMINISTRATIVE CONTROL

The administrative control of the office of the Secretary of Labor over aliens includes two processes. One involves the stopping of aliens at the borders of the United States or at our ports of entry, inspecting them as to their right under the law to be admitted, and either admitting them or deporting them. In this discussion this is called the exclusion process. The other is the procedure by which aliens already within the country may be arrested, examined as to their right to remain here, and deported if their presence here is found to be in violation of law. This is called the expulsion process. It is also popularly referred to as deportation. In the immigration service, cases in which aliens are excluded from admission and appeal to the Secretary are called appeal cases, and those in which it is sought to expel are called warrant cases. These two administrative processes involve different kinds of problems and effects. Different methods of procedure have been provided. In some cases the courts have treated them differently.

Differences in administrative problems. In the exclusion cases aliens present themselves at the ports of entry as applicants for admission. At the seacoast ports, they must in most cases be detained at the ports of entry until the question of admissibility is decided. To admit any appreciable number of them to the country on bail would be impracticable. Any lengthy detention of them in the quarters of immigration sta-

tions or on vessels causes hardship to those detained and expense to the transportation companies. At the ports of entry on the Canadian and Mexican borders they are required to return to Canada or Mexico as the case may be, and wait there for the department's decision. In the majority of cases the only evidence available is the testimony of the alien himself and the documents he has brought with him. In only a minority will it be necessary to have any other witnesses, or practicable to secure their presence. The inspectors have to depend to a considerable extent on the impression created upon them by the appearance and manner of the alien. Hundreds, sometimes thousands, present themselves for admission in a single day and their cases must be disposed of promptly. The problem is such that it is better to run the risk of the occasional admission of an alien inadmissible under the law, than to slow up the process of inspection and decision any longer than is necessary. In the exclusion process, therefore, the fundamental necessity is swift, summary action.

In the expulsion cases the aliens involved are already within the country as part of the population. They can be released on bail, in case of delay, for the investigation and consideration of their cases. There is no pressing need for swift and summary action. Speed is of secondary importance. The problem is to detect and expel those whose expulsion is required under the statutes. It is just as important that innocent persons who are entitled under our laws to remain should not through haste, carelessness, stupidity, or prejudice be unjustly exiled. Careful and thorough investigation of the facts, fair and unprejudiced weighing of the evidence, and accurate and sound judgment are the characteristics which are the most essential. In most cases the facts which are alleged as a ground for expulsion occurred in this country. Witnesses can be secured by proper investigation. Documentary evidence is obtainable. There is no need for snap judgment.

Differences in effects. The exclusion and the expulsion proc-

esses differ also in their effect on those against whom they are brought. The excluded applicant for admission is subjected to much disappointment and sometimes positive hardship. Other members of his family may be admitted and he may be rejected. He may already have made irretrievable changes in his condition in the country which he has left. When he has already secured a residence in this country and acquired connections here, and is returning after a temporary absence abroad or in Canada or Mexico, exclusion will be in many cases a terrible misfortune. A trip of a few hours will subject him to inspection by immigration officers on his return, and may cause him the loss of employment or business and banishment from friends or relatives. In most of the exclusion cases, however, the alien who is rejected is returned to the country which he left only a short time before. Usually he has knowledge of the customs and habits of the people and of the conditions which he must meet and can adjust himself to them. In many cases he has relatives and friends in the country to which he is returned. Usually the loss is not irretrievable.

In the expulsion cases, however, the accused alien is already here and the administrative officers are the aggressors seeking to change the *status quo*. The effects of expulsion may be vastly different than those of exclusion. In fact, they usually are. The case of the alien expelled after perhaps four or five years of residence, often longer, may be deplorable. He has secured employment or established a business, acquired property, made friends, married and become the parent of children born in this country and, therefore, American citizens. He has in many cases been away from his former home so long that he has lost connections with the community there. Suddenly, he is, as it were, torn up by the roots, and banished from business, friends, and family. If he is a poor man his wife and children have not the money to follow him. Even if they have the money and do follow him, this may mean the expatriation of American citizens.

Cases illustrative of hardships of expulsion. Such cases are not fanciful imaginings. Actual cases have time and again illustrated the problem presented by the alien expelled after a long period of residence. A boy, six years of age, was brought to this country from Poland. Eleven years later he was convicted twice of unlawfully entering a building for an unlawful purpose and of malicious mischief, and sentenced for each conviction for more than one year. He was ordered deported thirteen years after his entry to this country.[9] An alien child was brought to this country at the age of two. When he was twenty-eight he was ordered deported because he had been twice convicted and sentenced for a year or more in each case, the first time for burglary and the second for aggravated assault. All the members of his parents' families resided in this country. His nine sisters and brothers were American citizens and he had married a native-born American.[10] Another alien child had been brought to this country by his parents when he was two years old. Twenty years later he was proceeded against for expulsion on the ground that he had been convicted three times of crimes involving moral turpitude and sentenced to a year or more in each case.[11] In another case an alien had been brought here at the age of six months. After a continuous residence of many years he was ordered deported because he had served two terms for burglary, each for more than a year. The application of his counsel for court intervention failed. The words of Circuit Judge Learned Hand in the opinion are significant:

> We think it not improper to say that deportation under the circumstances would be deplorable. Whether the relator came here in arms or at the age of ten, he is as much our product as though his mother had borne him on American soil. He knows no other language, no other habits than ours. He will be as much a stranger in Poland as

[9] *Sirtie* v. *Commissioner of Immigration,* D.C. E.D. N.Y., 6 F. 2d 233.
[10] *Griffo* v. *McCandless,* D.C. E.D. Pa. 28 F. 2d 287.
[11] *Andreacchi* v. *Curran,* D.C. S.D. N.Y. 38 F. 2d 498.

any one 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 civilized peoples.[12]

In still another case a husband and wife had been in this country four months short of five years when the wife was committed to a hospital as an insane patient. The couple had three American-born children. She was ordered deported on the ground that she had become a public charge from causes not affirmatively shown to have arisen subsequent to her entry. *Habeas corpus* proceedings were brought, but the action of the department was sustained.[13] In another similar case the father of two American-born children became insane more than four years after his entry and was ordered deported. In another case an alien was deported on the ground that he was an anarchist and advocated the overthrow of the Government of the United States by force or violence. He had been a resident of this country for ten years; had sent for his wife and had three American-born children. He had purchased a substantial equity in a house in which the family were living and had been a good workman always employed.[14]

These few cases are illustrative of many. The most significant factor is the long time after entry within which the power to expel may be exercised, five years in most cases, an indefinite time in many. In many cases the power is exercised not as a punishment for wrongdoing but as a penalty for misfortune. Even when it is the former it is usually out of all proportion to the offense.

Borderline cases. Some cases come close to the borderline between the exclusion process and the process of expulsion. In one an alien had succeeded in securing entry to the country surreptitiously without being seen by immigration officers. In

[12] *Klonis* v. *Davis*, 2 C.C.A., 13 F. 2d 630.
[13] *Paolantonio* v. *Day*, 2 C.C.A., 22 F. 2d 914.
[14] File No. 55119–18.

a short time he was arrested within four miles of the border.[15] In another an alien had been admitted by a majority vote of a board of special inquiry, and the dissenting inspector had made no mention of an intention to appeal. The alien was discharged and walked out of the immigrant station. Thereafter, the dissenting member of the board gave notice of his intention to appeal. A friend of the alien was sent after him and he was told he was wanted at the station. He returned and was thereupon detained without any further process and on the appeal he was ordered deported.[16] In both cases the use of the expulsion procedure was necessary. Where entry has actually been secured, surreptitiously, by mistake or by fraud, it seems that the officers must use the expulsion process with warrant and hearing. When, however, an alien is "in their presence or view" attempting to come in surreptitiously, they may arrest him without warrant and subject him to an examination as to his right to enter.[17] After, however, expulsion proceedings have been conducted and a warrant of deportation has been issued, further proceedings are not necessary other than the physical act of deportation. If the alien should escape and be apprehended later he can be deported on the outstanding warrant. It is not necessary to start expulsion proceedings all over again.[18]

[15] *Jew Lee* v. *Brough,* D.C. S.D. N.Y., 16 F. 2d 492.
[16] *Ex parte Chin Shue Wee,* D.C.D. Mass., 272 F. 480.
[17] Act of February 27, 1925, 43 Stat. 1049.
[18] *Gin Dock Sue* v. *U.S.,* 9 C.C.A., 245 F. 308.

CHAPTER III

THE EXCLUSION PROCESS

§1. THE CAUSES FOR EXCLUSION

Most of the causes for exclusion are set out in the general immigration act of 1917. Subsequent legislation has enlarged the list.[1] The statutes do not lay down general standards, such as undesirable or dangerous, as tests for exclusion, but specify the reasons in considerable detail. The causes for exclusion may be grouped into four classes: *first,* personal disqualifications such as physical defects, disease, poor economic status, illiteracy, a criminal record, prior arrest and deportation from the United States, moral delinquency, and prohibited political, economic, or social beliefs such as anarchy, belief in the overthrow of government by force and violence, and polygamy; *second,* disqualifications because of the purpose or manner of migration, such as contract laborers, assisted immigrants, persons not provided with proper passports or visas, persons entering from foreign contiguous territory who fail to show that they were brought to that territory by transportation companies which comply with the requirements of the immigration laws, and persons coming for an immoral purpose or securing or attempting to secure the admission of other aliens for such a purpose; *third,* disqualifications because of race, nationality, or the location of the territory from which the aliens have come, such as those from the barred zone; and *fourth,* numerical disqualification, the "quota law," where the immigrant, however personally desirable he may be, is excluded or admitted in accordance with the number of immigrants of his nationality already admitted during the year.

Immigrants and non-immigrants. In the Act of 1917, the

[1] Acts of October 16, 1918; May 10 and June 5, 1920; May 19, 1921; May 11, 1922; and May 26, 1924.

general term, alien, is used and persons who come to this country for a temporary stay for business or pleasure are included within its provisions, as well as immigrants who come for permanent residence. This act does, however, permit the temporary admission of otherwise inadmissible aliens under rules to be made by the Commissioner-General of Immigration under the direction of the Secretary of Labor.[2] Except where such temporary admission is granted the various personal disqualifications of that act apply to all aliens. In the Act of 1924 a distinction is made between immigrants and non-immigrants,[3] and the latter are exempted from the provisions of the quota law and the requirements as to immigrant visas. The requirements as to the admission of non-immigrants are contained in the proviso of the Act of 1917 authorizing temporary admission, the immigration rules,[4] and an executive order of the President of the United States[5] issued under act of Congress,[6] requiring passports and visas of non-immigrants as well as immigrants. The procedural steps in the inspection of non-immigrants are the same as in the case of immigrants. Under the rules the immigration officers are authorized to admit applicants for a fixed period, in no case for more than one year, if otherwise admissible. Thus they must meet the general qualifications of the Act of 1917. The rules also provide that when the officers think it necessary, bond to secure the departure of the applicant may be required. In the case of non-immigrants subject to certain personal disabilities, the rules provide that temporary admission will be granted when permission has been arranged for prior to the alien's departure from abroad.

§2. DISCRETIONARY CASES

Admission of aliens otherwise excludable. In certain cases

[2] Act of 1917, Sec. 3, proviso 9. [3] Act of 1924, Sec. 3.
[4] Immigration Rule 3, subd. H; Rule 9, subd. F; Rule 13, subd. B.
[5] Executive Order 4813, Feb. 21, 1928.
[6] Act of May 22, 1918, and Act of March 2, 1921.

power is given the Secretary of Labor to admit "in his discretion" aliens who come within the classification of immigrants and are found to belong to one of the classes excludable under the statutes. Several such situations are provided for. Skilled labor may be imported in spite of the provisions of the statute forbidding the admission of persons who have already made a contract for employment, when in the discretion of the Secretary, labor of like kind is not to be found in this country.[7] Aliens who are returning after a temporary absence to an unrelinquished domicile in the United States of seven consecutive years may be admitted in the discretion of the Secretary under such conditions as he may impose.[8] Children under sixteen years of age, who are unaccompanied by or are not coming to one or both parents, may be admitted in the Secretary's discretion if they are not likely to become a public charge and are otherwise admissible.[9] The same discretionary power to admit applies to stowaways. In cases where an alien has become liable to exclusion because he has been found likely to become a public charge or has been found to be suffering from a physical disability other than tuberculosis or a loathsome or dangerous contagious disease, the statute gives the Secretary the power to admit on bond in his discretion.[10] The Secretary has the same power in still another class of cases. When aliens have been refused admission to the country and deported for causes provided for in the statutes, they may not apply for admission within one year unless they have obtained permission from the Secretary to make the reapplication within a shorter time. In granting or refusing this permission the Secretary has discretionary power.[11]

Admission for temporary stay. The statutes also give the Secretary power to admit for a temporary stay aliens otherwise inadmissible. It has been said by the courts to be a discretionary

[7] Act of 1917, Sec. 3.
[8] Act of 1917, Sec. 3, proviso 7.
[9] Act of 1917, Sec. 3.
[10] Act of 1917, Sec. 21.
[11] Act of 1917, Sec. 3 and Act of Mar. 4, 1929, 45 Stat. 1551.

power.[12] It gives the Commissioner-General, subject to the direction of the Secretary, the power to make rules for such temporary admission. The proviso of the statute which gives this power does not contain the words "in the discretion of."[13] It would seem that the power is not so much a discretionary power to admit in some cases and not in others, as the power to provide rules which shall govern admission in all cases. Under the rules, the local immigration officers in administering this power may admit only when the aliens are "otherwise admissible." If the applicants do not come within the general qualifications of the statutes the question of admission must be referred to the Secretary, and then apparently becomes a discretionary one. It would seem therefore that the temporary admission of otherwise excludable aliens comes within the discretionary cases.

§3. THE ISSUES INVOLVED

Issues of fact. In many of the cases the application of the rules for exclusion presents clear-cut issues of fact. The question is whether the applicant has been a pauper, a professional beggar or vagrant, whether he has been convicted of a crime or admits the commission of one, whether he has at any time been arrested and deported from the United States under expulsion proceedings, whether an alien woman has been a prostitute. In some cases the issue may be the date or place of birth of the applicant or of his parents, or the date or place of a marriage. Again a case may turn on whether the applicant for admission has had a prior residence in the United States and the length of such residence. Sometimes a sharp difference of testimony may develop in such cases. Again the question may be the amount of money in the bank, the amount of property owned, the income and the home conditions of relatives of

[12] *Compagnie Générale Transatlantique* v. *U.S.*, D.C. S.D. N.Y., 39 F. 2d 654.

[13] Act of 1917, Sec. 3, proviso 9.

the applicant in this country. In such cases as these, everything hinges on whether witnesses can be believed, or in some cases which witnesses can be believed, or it may depend upon the authenticity and reliability of documents. In some cases the issue is whether the applicant can read and this is settled by giving him a test in the manner prescribed by the statute and the rules.[14] In cases where there is rejection because of a loathsome or dangerous contagious disease, or tuberculosis, or because of some mental or physical defect included within the statute as a ground for exclusion, the decision is made upon the basis of a medical certificate from the medical examiners. Here the real issue is the technical skill, carefulness, and good faith of the medical officers.[15]

Application of standards. In some of the cases, however, the issue is not confined to conflicts of fact. It involves inferences which the officers must draw from these facts. Persons found to be suffering from physical defects which "may affect ability to earn a living" and persons "likely to become a public charge" must be excluded. In such cases, all the numerous factors which may affect the future economic status of an individual are theoretically involved: age, sex, physical condition, character and disposition, prior history, domestic conditions, skill or experience in an occupation, trade, or profession, the amount of money or property he may have, the financial status of relatives in this country, perhaps the labor or financial conditions in the locality to which he is going.[16] As will be pointed out later, "likely to become a public charge" is interpreted by the immigration officers to include the likelihood that the alien may at some time in the future be incarcerated in a station-house, jail, or prison and thus supported at public expense irrespective of his economic status. These tests approach a standard of char-

[14] Immigration Rule 3, subds. K, L, and M.

[15] Act of 1917, Sec. 17, proviso.

[16] See *Gegiow* v. *Uhl*, 239 U.S. 3; *Ex parte Hosaye Sakaguchi*, 9 C.C.A., 277 F. 913; Sen. Rep. 352, 64th Congress, 1st Sess.

acter or capacity. They are less definite and involve more factors, especially as interpreted by the department, than the standard of due care in negligence cases applied to a sequence of events which have already occurred, or the standard of reasonableness or fairness in rate regulation or of skill and ability in the examination of applicants for a license to practice a profession or work at a trade.

Crimes involving moral turpitude. In the application of the rule for the exclusion of aliens who have been convicted of or admit the commission of a crime involving moral turpitude, cases have arisen of convictions of petit larceny, assault and battery, smuggling, violations of the Narcotic Act, violation of a local statute as to insurance matters, and violations of the prohibition laws. The officers have to pass upon cases of acts more recently made crimes, the ethical quality of which has not yet been clearly settled by the development of public opinion. Here the issues are the ethical quality of the act and whether there was a conviction or the alien admits the commission of the act. The guilt or innocence of the alien is not in question. An additional issue is presented, one of foreign law in many cases, that is, whether the act was a crime by the law of the place where it was committed.

"Red" cases. In the "anarchist" or "force or violence" cases, aliens are to be excluded if they themselves are found to believe in or advocate, or to be members of an organization or party which believes in or advocates, among other things, "opposition to all organized government," "the overthrow by force or violence of the Government of the United States or of all forms of law," "or the unlawful damage, injury, or destruction of property," or aliens who "write, publish, or cause to be published," or "who knowingly circulate, distribute, print or display or cause to be," or "who knowingly have in their possession for the purpose of circulation," etc., "any written or printed matter" which advocates or teaches proscribed beliefs or pro-

grams of action.[17] Here the issues involve not only the question of what are stated to be the beliefs of the accused alien, or as to what were the specific statements made by him in speeches or writings, or what was the announced platform or program of action of the particular party or organization to which he belongs, but the more difficult problem of attempting to evaluate under the terms of the statute specifically stated beliefs or programs. The words, "force or violence," "government," "all forms of law," and "destruction of property," are sufficiently indefinite to permit a variety of application. Cases may cover the range from anarchy or communism to be secured by armed revolution to more or less radical or sudden economic changes through the pressure of strikes. Potentially there is involved the passing of judgment on controverted public questions. A simpler issue of fact may also be involved where the membership in a party is denied or where knowledge that the printed matter in the possession of the accused was of the kind proscribed is disclaimed. Here the issue depends upon the credibility of witnesses, the authenticity of documents, or the self-consistency of testimony.

Claims of American citizenship. In some of the cases the important issue of whether the applicant is an American citizen is raised. However undesirable the applicant may be personally, if he is a citizen, the immigration officers have no power to exclude him. The issue in such case is narrowed down to a question of when and where the applicant was born, whether, although native born, he has by some conduct such as assuming allegiance to another country abandoned his citizenship, whether although born abroad, he is the son of an American citizen, whether he has secured naturalization, or whether while he was still a minor his father secured naturalization.

[17] Act of 1918, as amended by Act of 1920, 40 Stat. 1012, 41 Stat. 1008.

§4. GENERAL OUTLINE OF THE PROCEDURE FOR EXCLUSION

The procedure for exclusion is set out at length and with considerable detail in the statutes. It may be divided into six steps: *first,* the application to the consular officers of the United States, in the country from which the alien is coming, for an immigration visa; *second,* an examination by the officers of the transportation company made necessary by the statutory requirement that manifests be prepared giving specified information as to aliens brought for admission; *third,* a medical examination, both physical and mental, conducted at the port of entry by medical officers of the United States Public Health Service; *fourth,* a preliminary examination by immigrant inspectors as to the qualifications of the alien for entry on grounds other than those covered in the medical inspection; *fifth,* a hearing before a board of special inquiry; and *sixth,* an appeal to the Secretary of Labor. Not all steps are necessary in every case. When the alien has passed the medical examination and the preliminary examination or "primary inspection" by the immigration inspector, he is admitted. The hearing before the board of special inquiry is necessary only where the primary inspection has thrown doubt on the eligibility of the alien to enter, and the appeal to the Secretary is necessary only where the board of special inquiry has decided against the alien, or where one member of the board dissents from the decision of the other two to admit. In the case of citizens of Canada, Newfoundland, Mexico, Panama, Cuba, Haiti and the Dominican Republic, and certain British and French territories, coming temporarily as non-immigrants, no passports or visas are required. The provisions of the statute as to manifests apply only to cases of arrival of aliens by water at ports of the United States. Provision has been made for preëxamination in Canada as to the right of aliens to enter from that country. These preexaminations before United States immigration officers include both the primary inspection and the hearing before the board

of special inquiry. They do not preclude the officers at the ports of entry from putting the alien who has been thus preëxamined through another inspection if they deem it necessary.[18]

§5. THE IMMIGRATION VISA

The application for a visa. The details of the information which the application for an immigration visa must contain are prescribed by the statute.[19] They include name, age, race, sex, matrimonial status, personal description, information as to the purpose for which the alien is coming to the United States and his final destination here, and information as to his prior record. With the application must be included various official documents such as birth certificate, personal record, military record. The application must be signed by the applicant in the presence of the consular officer and also sworn to before him. He is empowered to administer the oath for this purpose.

Issuance of visas. The statute limits the number of visas which the officers may grant to the number which may be provided for under the regulations for the administration of the quota law.[20] It also provides that no visa shall be issued if the facts stated in the application show that the alien is inadmissible under the laws, or if the officer knows or has reason to believe that the alien is inadmissible. The statute provides that the consular officer "may . . . issue to such immigrant an immigration visa."[21] The word "may" in the Act of 1917, in the provision for the release under bond of aliens arrested for expulsion proceedings,[22] has been construed by the courts to require the release if adequate bond is offered and to justify their interference if there is an unreasonable and arbitrary refusal to grant it.[23] The question of whether a similar interpretation can be given the

[18] Immigration Rule 4, subd. A. [19] Act of 1924, Sec. 7.
[20] Act of 1924, Sec. 2. [21] *Ibid.* [22] Act of 1917, Sec. 20.
[23] *Prentiss* v. *Manoogian,* 6 C.C.A., 16 F. 2d 422.

word "may" in the section providing for the issuance of visas in the Act of 1924 may not be answered since in two cases courts have held that they will not interfere with the action of the officers of the State Department in refusing a visa, and that the only relief is through diplomatic channels.[24] Apparently, therefore, there is power in the State Department to refuse a visa for reasons which within its discretion seem proper. At least no redress may be had from the courts.[25]

If the application is approved one copy visaed by the officer becomes the immigration visa. This is the first necessary step in the process. The issuance of a visa, however, is not conclusive of the alien's right to be admitted. He is subject to further inspection and possible rejection.

In the case of non-immigrants, which includes aliens visiting the United States temporarily as tourists for business or for pleasure, a passport or a document similar to a passport is required, duly visaed by consular officers. This is provided for by an executive order of the President[26] issued under the authority of an act of Congress.[27] Neither the statute nor the executive order gives the details as to the non-immigrant visas. That matter is left to the regulations of the State Department.

§6. THE MANIFESTS

In the case of aliens arriving by water, manifests must be prepared by the navigation companies. The statute provides that the officers of the company prepare at the time and place of embarkation printed lists or manifests.[28] For this purpose special forms are used, prescribed by the Commissioner-General

[24] *London* v. *Phelps,* 2 C.C.A., 27 F. 2d 288; *Ulrich* v. *Kellogg,* D.C. Ct. of Appeals, 30 F. 2d 984.

[25] See Chapter V, Judicial Review, §4, p. 188.

[26] Executive Order No. 4476, July 12, 1926.

[27] Act of May 22, 1918, 40 Stat. 559, extended March 2, 1921.

[28] Act of 1917, Secs. 12, 13, and 14.

of Immigration. First-cabin, second-cabin, tourist, and steerage passengers are listed on separate sheets of different colored paper. Aliens are to be listed in groups of not more than thirty, as far as possible persons from the same locality being listed together.

The manifests consist of large sheets of paper ruled with horizontal lines and vertical columns. At the top of the vertical columns are printed the various questions or topics of information required, one question or topic to a column. In these columns opposite the name of each alien the officers of the transportation company enter the facts called for by the heading. The information called for includes name, age, sex, conjugal condition, nationality and place of birth, race, final destination. It also includes the name of the person by whom the passage was paid, whether the alien is coming as a result of solicitation or of a contract of employment; whether he has $50 or, if less, the exact amount; whether he has ever been in the United States before and, if so, when and where; whether he was ever deported from the United States, his purpose in coming, and the names and addresses of relatives or friends to whom he may be going. Other items are: calling or occupation; whether the alien can read or write; whether he has ever been in an almshouse or institution for the care of the insane; whether he is a polygamist, an anarchist, or a believer in the overthrow of government by force or violence. Information must also be entered as to health, deformities, height, complexion, and marks of identification. In addition each alien must be given a physical examination.[29] In the case of aliens arriving from foreign contiguous territory the rules provide that the immigration officers who make the inspection shall prepare a manifest containing information similar to that required of the navigation companies.[30]

[29] *Ibid.*, Sec. 13.

[30] Immigration Rule 2, subd. G.

§7. THE MEDICAL EXAMINATION

No attempt has been made to describe and discuss the medical inspection in detail. The statute provides that it shall be conducted by medical officers of the United States Public Health Service, with at least two years of experience in practice. In case such officers are not available, the department may employ civil surgeons with at least four years' experience.[31] Not every alien is given a close personal detailed physical examination. Only those who seem doubtful are detained for the more thorough test. Mental tests are included as well as physical. In cases where the examining physician issues a certificate of insanity or mental deficiency, the alien may appeal to a board of medical officers of the United States Public Health Service, and may at his own expense introduce one expert medical witness.[32] Except as this appeal is provided for in the mental cases, no appeal is allowed from the exclusion order of the board of special inquiry based upon a medical certificate that the alien is afflicted with tuberculosis or a loathsome or dangerous contagious disease. Where the medical officers issue a certificate of a physical defect of any other kind, the board of special inquiry must decide on all the evidence, including the certificate, whether or not the certified defect may affect the ability of the alien to earn a living.[33] It is evident that very great powers are given to the medical officers. The issues involved are those of skill and technical knowledge. The success or failure of the inspection depends on the training, experience, and ability and also the carefulness and sincerity of individual examiners. No other problems of administrative procedure are involved.

§8. PRIMARY INSPECTION

The method of inspection. Primary inspection consists of the questioning of the alien by an immigrant inspector. The statute

[31] Act of 1917, Sec. 16. [32] *Ibid.*
[33] Immigration Rule 15, subd. C, par. 1.

provides that "at the discretion of the Secretary at least two immigrant inspectors shall examine each alien."[34] In practice, it is usually conducted by one inspector. The passport, immigration or non-immigrant visa, and the manifests are the basis of this inspection. Other documents carried by the alien are examined. The inspector then by questions tries to check some of the items in the manifests. The questions follow definite lines: age, birthplace, amount of money, transportation to destination, calling or occupation, the economic condition of relatives or friends to whom the alien is going. Where the visa or the manifest shows facts which raise doubt as to the alien's admissibility, such as conviction of a crime, prior insanity, or some alleged connection with an organization advocating prohibited economic, political, or social beliefs, questions are asked with the purpose of verifying the alleged facts. Sometimes the examining inspector has information already obtained by the station from the Bureau of Immigration at Washington, from a report from some other station, or from other sources such as letters addressed to the local immigration officers. Cases occur where relatives have given such information. Sometimes an enemy may resort to this method. A letter may come from an estranged or deserted spouse, or as a result of a family disagreement. Much also will depend upon the inspector's estimate of the personal appearance and manner of the alien.

No other witnesses than the alien are available except in the case where a group are traveling together when other members of the group may be questioned to check answers already given. As a rule the inspectors are compelled to work rapidly. They develop a routine of questions and a routine of decision. Usually they have fairly well-defined mental pigeonholes into which they place each case. The inspection becomes largely a matter of rules worked out by the inspectors from experience or followed as a matter of custom or administrative routine.

The rule for decision. "Every alien who may not appear to

[34] Act of 1917, Sec. 16.

the examining inspector to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry."[35] This is the rule provided by the statute for the decision of the inspector at primary inspection. The purpose is to sift out the clear cases by a rapid examination of documents, a view of the alien himself, and a few questions. Should there be any doubt in the mind of the inspector, he is required to order the alien detained for the more thorough examination of a board of special inquiry. If he thinks the alien entitled to admission he passes him and the inspection is at an end. The immigrant inspector at primary inspection has full power to admit. He may not, however, exclude. He can only hold for further examination.

§9. THE BOARDS OF SPECIAL INQUIRY

a. *Membership*

The statute contains detailed provisions as to the boards of special inquiry.[36] Each board consists of three members. The boards are appointed by the commissioner of immigration in charge of the local station or by the inspector in charge, but the statute requires that only persons designated by the Commissioner-General of Immigration as qualified for membership shall serve. At the larger ports of entry permanent boards are maintained and the membership may continue the same for some time. At the small stations temporary boards are appointed as they are needed. In most cases the boards are composed of immigrant inspectors. Sometimes, however, especially at small stations, a clerk, stenographer, interpreter, medical examiner, or a customs inspector is called in to complete the membership of a board. This was true in more than 12 per cent of the cases studied.

One member of the board is chairman. Each board has a secretary whose duty it is to make a stenographic report of the

[35] Act of 1917, Sec. 16. [36] *Ibid.*, Sec. 17.

entire proceedings in each case, including the questions asked by the chairman and the answers of the witnesses. All of the testimony is taken *verbatim*. The making of this record is required by the statute.[37] In more than one-half of the cases examined one member of the board acted also as secretary. In the others a secretary was provided whose sole duty was to take the testimony. In many cases interpreters have to be used and the department employs a corps of interpreters.

b. *The Hearing*

The "court" rooms. The hearings before the boards of special inquiry approach nearer to judicial trials than any of the steps in the process of exclusion. At the larger stations they are held in rooms fitted up somewhat like court rooms, with a judges' bench or table separated from the remainder of the room, behind which sit the members of the board. Where the pressure of work is heavy, in the larger stations, seats are placed in the board rooms for the accommodation of aliens who are waiting for their cases to be called. In such cases the hearing has the appearance of a trial in a court room, with judges, attendants, court reporter, witnesses, and spectators. Adjoining the board rooms are witness rooms where persons who come to appear in behalf of detained aliens wait until they are called. It is the practice never to call such witnesses until the aliens for whom they appear have completed their testimony. The statute provides that the hearings before the boards of special inquiry shall be separate and apart from the public, but the alien may have one friend with him.[38] Under this statutory authority the department has passed a rule that the friend or relative if he is a witness must have completed his testimony before he can remain in the former capacity.[39] Usually the alien is not permitted to interview friends or relatives until the primary inspection and the hearing before the board of special inquiry are over.

[37] *Ibid.* [38] *Ibid.* [39] Immigration Rule 12, subd. B.

Presentation of evidence. The procedure during the hearing is as follows. The aliens are called up before the table or bench behind which the members of the board are seated, placed under oath, and subjected to questioning by the chairman of the board. The first part of each examination is routine to put into the record certain basic facts: age, birthplace, port of departure for the United States, destination in this country, amount of money which the alien has with him, trade or calling, and purpose of migration. In many cases the interpreter who has a printed list of questions and the alien carry on a conversation for a few minutes without the intervention of any member of the board. Then the interpreter gives the board the substance of the alien's answers in narrative or exposition form. Then the chairman begins to ask questions usually confining himself to the facts which he thinks are the basis of the detention. Any documents which the alien may have are examined. Then other witnesses are called in and questioned in their turn. During the hearing the chairman of the board has before him a card on which is indicated the causes for which the alien was held at the primary inspection. These are given briefly in the words of the statute, such as "likely to become a public charge." This card also indicates the name, age, sex, nationality, race, and occupation of the alien, the date of his arrival, and his destination. The board has no record of the questions and answers at the primary inspection, nor does it have before it the manifest which was before the inspector at the primary inspection. The whole case is gone over again without reference to the facts developed before except the facts indicated on the card which was made out by the inspector at the primary inspection.

Clerical work by board members. A considerable amount of clerical work goes on during a hearing. As has been stated, all the testimony including both questions and answers is taken down in shorthand. In a little more than one-half of the cases examined this was done by one of the members of the board who acted in the dual capacity of member and secretary. An-

other member has the task of making entries of certain data as to each case on forms provided for that purpose, including a card showing the cause for the detention and the action of the board in each case and a daily report sheet. The time of this member is considerably occupied with these clerical duties. The chairman after each case has been decided has to make out a card on which the action of the board is indicated.

Counsel. No counsel appear for the aliens in these hearings since counsel are not permitted. The immigration rules provide that the friend or relative who under the statute may be present with the alien must "not be employed as counsel or attorney."[40] In most cases the alien is not permitted to retain counsel or to interview him until after an order of exclusion has been entered and a desire to appeal indicated. Since there are no counsel there is no cross-examination of witnesses. All the questions are asked by members of the board, usually the chairman.

Procedure of decision: Notice of appeal. Usually the decision in each case is rendered immediately at the conclusion of the testimony. The chairman secures a nod of approval from the other members of the board or else assumes their approval. The decision of two inspectors is the decision of the board. If the decision is to admit, the alien is ordered released from detention and permitted to depart with his friends or relatives. In some cases further temporary detention is necessary in the interest of the alien as for instance while he is waiting for the departure of a train or the arrival of a relative. If two inspectors vote to admit and one dissents, the latter may give notice of a desire to appeal in which case the alien remains in detention. If the vote is to exclude, the alien is notified that he may appeal to the Secretary of Labor. In the case of an appeal the record of the hearing is transcribed by the secretary. If the alien is admitted the notebook of the secretary is placed in the files but the testimony is not transcribed. If an appeal is made from the decision of the board the alien remains in detention pending

[40] Immigration Rule 11, subd. B.

the decision on the appeal, or if the rejection is at a Canadian or Mexican border port of entry, he is returned to Canada or Mexico to await the action of the department. If the board votes to exclude and the alien makes no appeal, the latter is sent back as soon as possible to the country from which he departed for the United States in accommodations similar to those in which he traveled on his way to this country and at the expense of the transportation company which brought him.

§10. THE EVIDENCE

Oral testimony. In the majority of the cases the hearing is confined to the testimony of the aliens detained for examination and an inspection of the documents they may have with them. In a fourth of the cases studied, however, there were other witnesses, relatives or friends in this country who appeared in the alien's behalf. These witnesses are sworn and examined by the chairman of the board in the same manner as are the aliens themselves. The rules require that these witnesses be not present during the examination of the alien. Usually they have not been permitted before the hearing to interview or communicate with him.

Documentary Evidence: Medical certificates. In addition to the oral testimony given before the board in the formal hearing, documentary evidence of various kinds is often relied upon. In all cases where aliens have been held because the medical examiners failed to pass them the most important evidence before the board of special inquiry is the medical certificate of disease or of physical defect. The statute provides that the decision of the board of special inquiry shall in such cases be based upon this medical certificate.[41] If the disability is tuberculosis or a loathsome or dangerous contagious disease, the certificate is conclusive. If, however, the disability is of another nature, the certificate must be considered with the other factors

[41] Act of 1917, Sec. 17.

in the case. In a number of cases examined where the age of an applicant for admission was in issue the principal evidence relied upon by the immigration officers was a certificate from one of the medical examiners. These certificates stated only the conclusion of the examiner. They did not give the method of examination followed nor the qualifications of the physician. The medical examiner was not called as a witness or questioned.[42] Certificates of physicians and surgeons are usually accepted by immigration authorities in this informal way. In many cases birth certificates, certificates of baptism or of death, and certificates of naturalization are important evidence.

Departmental memoranda. In some cases the evidence includes a report sent to the local immigration station from the officers at another station.[43] An inspector at one station interviews a witness and sends to the station where the hearing is to take place a report giving the substance of the interview. Sometimes the actual questions and answers are given, but more often a summary in the words of the officer is reported.[44] In one case there was a letter to the local immigration station from the inspector in charge at another station. This letter accused the alien in the case of indiscretions and stated, "From documentary evidence X is convinced etc." X was the husband of one of the alien women applying for admission.[45]

Ex Parte Evidence: Affidavits, letters, telegrams. In many cases there are affidavits of relatives or friends of the alien, resident in the United States, especially from those to whom the alien may be going. These often cover the question of the financial ability of these relatives and friends. Sometimes there are affidavits from persons in the country from which the alien has come, such as former employers. In some cases there are letters addressed to the alien or to the immigration officers from private individuals. For example, there was in one case a letter

[42] *Ng Mon Tong* v. *Weedin,* 9 C.C.A., 43 F. 2d 718; *Fong Ong* v. *Day,* D.C. S.D. N.Y. 39 F. 2d 202.

[43] File No. 55236–148. [44] File No. 55355–19. [45] File No. 55234–36.

to the immigration authorities at a port of entry, purporting to come from the husband of a Canadian woman applying for admission, stating that the alleged wife had deserted him.[46] In another case there was a letter from abroad as to the skill of the alien as a musician.[47] In other cases former employers had written letters of recommendation. In some cases there are put into the record letters from the offices of members of Congress. In one case there was a reference to an anonymous letter.[48] Sometimes there is a reference to confidential communications.[49] In some cases there are letters to the immigration officers from alleged husbands and wives of applicants for admission accusing their spouses of indiscretions or of desertion.

Telegrams are often relied on. In one case the action of a board of special inquiry in excluding a Canadian girl as likely to become a public charge was based largely upon telephone conversations between an immigration officer and the girl's former employer, and also with the matron of a police station.[50] Sometimes newspaper clippings are put in evidence.[51]

Facts known to members of the board. Sometimes the immigration officers have in one way or another learned facts about the alien which they think should be grounds for exclusion, even though they may not have been directly testified to in a formal hearing. This is especially likely to occur in cases of applicants from Canada or Mexico, where business difficulties, or family or marital disagreements have come to the attention of the officers through newspaper accounts or through gossip. In one case the record showed questions by the officers based apparently on their own knowledge of the financial difficulties in which the alien had been involved. In another the inspectors evidently had their own opinion as to the alien's character and conduct in certain business matters. One question was, "Isn't it a fact that you owe the X Bank?" The opinion was put into the

[46] File No. 55173–30.
[47] File No. 55350–20.
[48] File No. 55241–29.
[49] File No. 55340–31.
[50] File No. 55234–9.
[51] File No. 55035–7.

record, "All the dealings of —— indicate that he is a crook." The details were not given.[52] In another, one of the inspectors at the hearing refers to reports received by the immigration officers that the relations of an alien woman applying for admission with a certain man had become a scandal in a certain Mexican town.[53] In another case the chairman of a board of special inquiry gave to the other members of the board the substance of what several persons whom he had interviewed had told him about the alien.[54]

Hearsay and opinion evidence. No legal rules of evidence are applied in these cases. Hearsay and opinion evidence are received and relied on. A police matron tells an immigrant inspector what Mr. Blank had said as to the alien, that "the best place for —— was here as he did not believe she was mentally fit."[55] A witness testifies that Mr. X told him that the alien had introduced his, the witness', wife as his own.[56] A witness testifies that his friend knows the alien well and tells what the friend said about him. A letter states that the writer has been advised that the alien is a lawyer. In one case an inspector puts into the record, "The incidents referred to in the former hearing while not susceptible to positive proof are so well established in the minds of the legal fraternity and police department that before the bar of public opinion Blank [the alien] is a convicted swindler."[57]

§11. SPECIAL TYPES OF CASES

a. *Persons Likely to Become a Public Charge*

A miscellaneous file. It has already been pointed out[58] that the immigration officers are often required not only to decide the issues of fact presented by a conflict of testimony, but also

[52] File No. 55241–12.
[53] File No. 55238–13.
[54] File No. 55176–13.
[55] File No. 55234–9.
[56] File No. 55035–43.
[57] File No. 55241–12.
[58] See *supra*, §3, The issues involved, p. 37.

to make inferences from these facts. Cases of this sort arise from the application of the rule for the exclusion of persons likely to become a public charge. As a rule the officers construe "public charge" as including detention in a station-house, jail, or prison under criminal charges, although the alien so detained may have shown ample ability to earn a living. When, therefore, an alien has on some prior occasion been so detained, he is refused admission on the ground that the detention shows him likely to become a public charge. In some cases the officers go further and include under the category cases where the alleged commission of acts violative of the law has exposed the alien to the risk of arrest and imprisonment at the public expense. In some cases this category is stretched to include situations where the issue is disobedience to law, disrespect for and lack of coöperation with the immigration officers, moral unfitness, general undesirability in the minds of the immigration officers, or even the question of whether the aliens in question would not be better off at home. "Likely to become a public charge" is used as a kind of miscellaneous file into which are placed cases where the officers think the alien ought not to enter, but the facts do not come within any specific requirements of the statutes. A statement of some of the cases will illustrate the problems involved.

Minor crimes. A Mexican boy had three years before been stopped at the border and held on the charge of having in his possession a package of opium. His defense at the trial had been that he had not known that the package contained the drug. The jury had been unable to agree and he had been discharged. A board of special inquiry voted to exclude him as likely to become a public charge because the occurrence three years before showed he "lacked respect for law and order and was likely to get arrested."[59] He was finally admitted on parole and the admission was later made unconditional. The record of the case shows that the board thought that the boy did

[59] File No. 55176–2.

not have a good reputation and had not been coöperative with the immigration officers. The boy's father lived in this country. Aside from the son's one experience with the law, there was no evidence that he was likely to get into its clutches again. There was no evidence that he was likely to become an object of public charity.

A Polish laborer, resident in this country, had tried to arrange for the surreptitious entry of his wife and child who were in excess of the quota allowance to their country and did not have proper passports. They had been apprehended in the attempt and turned back. He had been prosecuted and fined $50, and sentenced to serve one day in jail. Later, on his return from a visit to Canada, he was ordered excluded as likely to become a public charge. The recommendation of the local officer to the department contained these words: "Indicates he has but little respect for law and therefore exclusion as a person likely to become a public charge is justified." Later he was discharged on writ of *habeas corpus*.[60] In another similar case a Mexican, resident in this country for twenty years, was excluded on his attempt to return from a visit to Mexico as likely to become a public charge because he had brought with him two nephews to work for him. The board said he was subject to prosecution under the contract labor law, and therefore likely to become a public charge.[61] In still another similar case a Mexican, fifty-one years of age, had been resident in the United States for fifteen years. He was held upon his return from a visit to Mexico and ordered excluded as likely to become a public charge because the customs officer found that he was carrying with him a small bottle of mescal. He had supported himself during his fifteen years' residence in this country by working as a laborer and had built a small house. On appeal to the department he was ordered admitted.[62] In another case of the same kind a Mexican

[60] File No. 55234–65. See also *In re Wysback* D.C.D. Mass., 292 F. 761.

[61] File No. 55176–3.

[62] File No. 55176–26.

woman was held by the board of special inquiry as likely to become a public charge because three years before she had been caught trying to smuggle in from Mexico two quarts of liquor which she testified she was bringing in for a relative. She had not been prosecuted for the offense. The theory of the board was that she had shown little respect for law, was likely to come in conflict with constituted authority, and was, therefore, likely to become a public charge. She had property in Mexico sufficient to support her and was applying only for temporary admission. She was admitted on appeal.[63]

Domestic difficulties. A Canadian had resigned his position in a Canadian city and had applied for admission to the United States. He had a certificate of good conduct in his former position and testified that he had $3,000 in the bank. He and his wife had had difficulties and had separated. He was questioned by the board of special inquiry as to these difficulties and gave an explanation. The board voted to exclude him as likely to become a public charge, giving as a reason that "where there was smoke there must be some fire," and that it was barely possible that he was leaving to try to escape payments to his wife under the separation agreement. He was admitted on appeal.[64] In another case the manner in which two aliens answered questions before the board of special inquiry was held by the board to be evidence that they were likely to become a public charge on the theory that they were withholding some facts although they had $400 with them and claimed that they were coming in to buy goods.[65]

General undesirability. A Syrian, twenty-six years of age, had applied for admission from Mexico. He spoke four languages including English, had some knowledge of machinery, had $199 with him, and was going to his uncle. He had left the United States in 1917 for Mexico. He was questioned at the hearing about his leaving the country to avoid military serv-

[63] File No. 55238–36. [64] File No. 55035–47. [65] File No. 55176–19.

ice. The board ordered him excluded as likely to become a public charge, "as poorly supplied with funds and the board doubts his ability and intention of securing employment of a gainful nature."[66] Testimony that a man on the trip across the ocean to this country had gambled and become drunk was held ground for exclusion as likely to become a public charge, although he was finally admitted on appeal to the department.[67] In another case a Canadian had entered without inspection and obtained employment in a store where he was paid $25 a week. He was a war veteran who because of injuries including amputation of one leg above the knee was receiving a pension of $56 a month. He went to Canada on a visit and upon his attempted return at night after he had been drinking, got into an argument with the immigration officers and used abusive language. He was ordered excluded as likely to become a public charge and suffering from a physical defect likely to interfere with his making a living. The recommendation made by the reviewing officers on the appeal is significant of an attitude: "In view of his attitude toward the inspectors and the fact that he previously entered without inspection . . . recommends that the appeal be dismissed," but "permitted to reapply at any time he shows an inclination to coöperate with the service in regard to his admission." He had already obtained employment and his income from this employment and his pension totaled more than $150 a month. His disrespectful attitude and his previous entry without inspection were apparently regarded as the issues in the case.[68] In another case a citizen of Canada had been resident in the United States for five years. He had then gone to Canada on a visit, and was attempting to return. Several witnesses appeared before the board beside the applicant. There was no question as to the financial ability of the applicant. The issue was whether during his residence in this country he had lived with a woman not his wife. He denied this charge but ad-

[66] File No. 55176–5. [67] File No. 55270–142. [68] File No. 55035–57.

mitted that before his first entry he had had similar relations with several women in Canada. He was ordered excluded as likely to become a public charge, but secured his discharge on writ of *habeas corpus*. The department based its action entirely on the question of sexual morals.[69]

Former surreptitious entry. A Mexican woman had lived in the United States for thirty years, ten of them continuously. She went to Mexico to visit a sick relative and applied for readmission with her American-born child. She could not read and was certified as having defective vision. Her last prior entry ten years before had been without inspection. She testified that she had come over the bridge in a streetcar. Since the death of her husband six years before she had been working as a domestic servant, and at one time had had a small grocery store. She had always been able to support herself during her long residence in this country and had a brother here who would help her if necessary. She was ordered excluded as likely to become a public charge, although this order was later modified to allow her admission on filing bond, which she was unable to do. She had lived in this country for ten years continuously without becoming a public charge and during six years had supported her American-born child.[70]

Separation of families. After a period of residence in this country of seven years a man and his wife had gone to Europe to bring over their children. The wife on their return was excluded because she was suffering from trachoma. The husband and father desired to be admitted with the older children in order that he might obtain employment and send money to his wife. He had a son in this country, was a machinist by trade, and had supported himself and his wife here for seven years before his return to Europe. He was excluded as likely to become a public charge, the real ground for the decision being that "separation of a family should not be countenanced by

[69] File No. 55035–43.

[70] File No. 55176–8.

the immigration service."[71] His appeal to the department was denied. In another similar case a family of Hebrews, the father sixty years of age, and five children, twenty, thirteen, nine, seven, and five years of age respectively, were excluded as likely to become a public charge. They were in good health and the father was skilled in a trade. They had very little money but had railroad tickets and were going to relatives who had paid their passage. One of these appeared as a witness in their behalf and testified to facts which showed the relatives willing and able to see that the aliens were taken care of. At the hearing one of the inspectors referred to the fact that another son already in this country had become a public charge but had been released on bond. This fact was referred to in the recommendation of the local officer in charge. The Board of Review included among the reasons given for denying the appeal the fact that the wife and mother of the family had been detained abroad because she was afflicted with a loathsome and contagious disease and "this board is of the opinion that the family should not be separated." The final outcome of the case was that the family was admitted temporarily on bond, and later the mother herself applied for admission, was excluded as likely to become a public charge, but finally admitted and all the bonds canceled.[72] In still another similar case a German woman of forty-five was excluded partly because of defective vision, although she testified that she could see with glasses, and partly because there was doubt as to the physical condition of her husband in Germany, "who might want to join her."[73]

In all of these cases it was evident that the immigration officers thought the aliens should be excluded. In not one of the cases was there evidence to show any serious probability that the applicants would become a financial charge on the public because of inability to make a living. In some, ability to make a living in this country had already been demonstrated by actu-

[71] File No. 55270–137. [72] File No. 55195–17. [73] File No. 55265–40.

ally doing it. The aliens were held to be within the class likely to become a public charge because they could not be brought within any other.

b. *Persons Who Have Committed Crimes*

The cases where exclusion is ordered on the ground of the commission of crime merit some special discussion. The requirement of the statute is that the alien must have been convicted of the crime or must admit that he committed it. It must also involve "moral turpitude," that is, must be morally reprehensible. It has already been pointed out that in many cases where there has been no conviction and no admission of the commission of the crime, its alleged commission is used as evidence to bring the alien under the category, "likely to become a public charge." In other cases the members of the boards sometimes fail to grasp the distinction between a case where there is evidence that a crime was committed and one where there was an admission by the alien that he had committed it or where he had been convicted after a trial. Examples of this kind sometimes occur when the boards feel convinced that they have caught the alien giving untrue testimony in his examination at the hearing. The record in such cases contains a finding that the alien is excluded on the ground that he has committed a crime involving moral turpitude, to wit, perjury in his testimony before the board.[74] There is also considerable confusion of thought as to what is a crime. For instance, the commission of an act of sexual immorality is usually assumed to be the commission of a crime without any reference to the law of the place of the act to see whether in fact this is so. The files are full of cases where exclusion is ordered on the ground that the applicant admitted the commission of a crime involving moral turpitude, that is, adultery or fornication. Nothing is said about whether in fact the act was a crime by the law which governed it and no investigation is made on the subject.

[74] *Palermo* v. *Tod*, 2 C.C.A., 296 F. 345.

c. *Persons Who Are of the Chinese Race*

Citizenship as the usual issue. The Chinese cases are regarded as presenting special problems. Inspectors are specially detailed for the examination of applicants of the Chinese race and different methods are employed. In a great many of these cases the basis of the claim of the applicant for admission is American citizenship. Sometimes it is alleged that the applicant is a citizen because he was born in this country. In other cases the claim of citizenship is based on the allegation that the applicant is the son born in China of a native-born American citizen of Chinese race. Usually the only witnesses are those submitted by the applicant. Where, however, the issue is the fact of birth in this country it is sometimes susceptible of investigation by the immigration officers on their own account. In the case of a child alleged to have been born to an American citizen in China, the facts may usually not be so investigated. In many cases the citizenship of the alleged father is admitted and the question at issue is whether the applicant is in fact his son.

The search for discrepancies. The practice in these cases is to subject the applicant and his witnesses to questioning at great length as to many minute details of the life in China of the applicant and his alleged family. These questions may be as to the number of brothers and sisters, whether the grandparents are alive or dead, and in the latter case the facts as to their burial; details as to other relatives, including marriages, births, deaths, and funerals, and usually involving dates, details as to the home village such as the number of houses in the village or on the street, whether or not there was a bridge over a stream, whether the streets were paved, details as to attendance at school, the kind of school building including questions as to the windows, details as to the stay of the alleged father in China including dates, and numerous other details.[74a] The an-

[74a] *Johnson* v. *Ng Ling Fong,* 1 C.C.A., 17 F. 2d 11; *Go Lun* v. *Nagle,* 9 C.C.A., 22 F. 2d 246; *Johnson* v. *Damon,* 1 C.C.A., 16 F. 2d 65; *Lee Wing Yon* v. *Tillinghast,* 9 C.C.A., 27 F. 2d 580; *Lew Sun Soon* v.

swers to these questions are recorded *verbatim*. Sometimes individual witnesses are recalled and subjected to a second examination on the same details. The testimony of the different witnesses is then compared as is also the testimony of the same witness at different times. The action of the officers is based on the presence or absence of discrepancies or inconsistencies in the testimony. The presence of discrepancies is regarded as impeaching the credibility of witnesses and indicating the concoction of a story to fool the officers. The question involved in cases of this kind which have often come before the courts has been whether these discrepancies were due to differences in observation or memory, or were evidence that false testimony was being given. In these cases the officers are evidently keenly on the lookout for fabricated evidence. The cases often become a kind of contest between them and the witnesses.

d. *Persons Who Claim to be American Citizens*

Summary of the cases studied. It has already been pointed out that in some cases the immigration officers have to decide the supremely important issue of whether the applicant for admission to the country is an American citizen. This issue, however, was raised in only nineteen of the five hundred cases studied. In ten of these cases the boards of special inquiry admitted the claimants upon the completion of the hearing. In one the applicant admitted during the hearing that he had only taken out first papers. In the other eight the board of special inquiry voted to exclude. In three of these cases the department at Washington reversed the action of the board of special inquiry and ordered admission. In the other six, the exclusion order remained in force. In nine of the cases there

Tillinghast, D.C.D. Mass., 27 F. 2d 775; *Nagle* v. *Wong N Gook Hong*, 9 C.C.A., 27 F. 2d 650; *Ng Yerk Ming* v. *Tillinghast*, 1 C.C.A., 28 F. 2d 547; *Moy Fong* v. *Tillinghast*, D.C. Mass., 33 F. 2d 125; *Gung You* v. *Nagle*, 9 C.C.A., 34 F. 2d 848; *Wong Tsick Wye* v. *Nagle*, 9 C.C.A., 33 F. 2d 33.

was no documentary evidence to substantiate the claim, but only oral testimony. In the other cases the evidence relied on consisted of certificates of baptism, birth certificates, and in one case a certificate of naturalization. In all these cases except four, the issue was the time and place of the applicant's birth. In the four, naturalization was in question. These cases were handled just as were the others where the applicants were admitted to be aliens.

A detailed discussion of three of these citizenship cases is worth while. They illustrate the nature of the problems involved. They also exhibit the same tendency of the immigration officers, observable in other cases where admittedly aliens are involved, to exclude on suspicion aroused by some discrepancy in testimony, or to exclude because to them exclusion seems a desirable result without keeping to the issues raised by the evidence.

Three citizenship cases. In the first of these cases a family of seven, father, mother, and five children, were ordered excluded on the grounds that two of the children were suffering from ringworm of the scalp, a loathsome, contagious disease, that the father was an alien accompanying the children, and that the others were likely to become a public charge, although one of them was a boy of eighteen. The parents testified that one of the afflicted children was born on a farm in North Dakota during the residence of the family in that state for five years before they had left for Europe, approximately ten years before. The age of the child was given as ten years and therefore she must have been an infant when the family left. The parents had no birth certificate, but testified that at the time of the child's birth no physician was secured and that birth certificates were not required at that time in the locality where they were living. In support of this oral testimony the applicants filed affidavits from six persons who alleged that they had been neighbors of the family when they lived in North Dakota and knew of the birth of a child to the couple, a letter from the brother of the

child's father still a resident of that state to the same effect, and finally an affidavit from a physician to the effect that he had attended the mother a few days after the birth of a child of the same name as the child in question. This evidence the officers disregarded and held to their decision: "Owing to the fact that this is a request to have a child afflicted with ringworm of the scalp admitted as a citizen without cure . . . it goes without question a decision that the child is a citizen should be made only upon the most convincing evidence." The case continued for some time. At one time apparently much feeling developed. The resident brother wrote a letter complaining about the treatment his relatives were receiving. The Board of Review thereupon recommended that the whole family be excluded including the child who was claimed to be a citizen. Finally after several hearings and letters and the appearance of an attorney they were all admitted, but only after the child had been pronounced cured. The detention of the child in the hospital had accomplished a laudable purpose since meantime she had been cured. Yet the evidence of her birth in this country was practically uncontradicted and was ample to justify a decision that the burden of proof that she was a citizen had been sustained. The action of the Board of Review in recommending the exclusion of the whole family, apparently in anger at the letter of complaint, seems without justification.[75]

In another case a family of French Canadians was denied admission although the parents testified that three of their four children had been born in this country during a prior residence here of nineteen years. They had returned to Canada and after five years there were applying for admission. The father was excluded as illiterate and the alleged American-born children as likely to become a public charge. Nothing but birth certificates the officers said would be accepted in this case. Yet there was other evidence to sustain the allegations of citizenship.[76]

[75] File No. 55265–46.

[76] File No. 55035–78.

In a third case a man of Italian race based his claim of citizenship on birth in New Orleans. In support of his claim he submitted a certificate of his baptism in a church in that city. This certificate was verified by a telegram from the present rector of the church. The applicant testified that he had gone to Italy with his parents when he was eight years of age, and that twelve years before his parents had returned to America leaving him in Italy with a friend. His brother, a resident of this country, appeared as a witness. The applicant had at the first examination testified that he had no older brothers whereas the brother who was a witness testified that there were two. When, however, the applicant was brought into the presence of the brother who appeared as a witness, the former had at once recognized the latter. The applicant, however, was questioned no further on this point. He was ordered excluded as an alien coming in excess of the quota and on other grounds, the officers basing their decision on the suspicions aroused by the discrepancies in the testimony of the two brothers. He was, however, released on *habeas corpus,* the court holding that there was not sufficient evidence to justify the officers in disregarding the certificate of baptism.[77]

e. *Discretionary Cases*

Authorized use of discretion. The classes of cases where permanent admission of aliens otherwise excludable is permitted, "in the discretion of the Secretary of Labor" have already been discussed.[78] In such cases the discretion does not lie with the boards of special inquiry. The case must be sent to Washington for decision in the department. The usual practice was to render a decision to exclude. The local officer in charge then made the recommendation for the application of executive discretion. The two most common cases of executive discretion were those

[77] *Palermo* v. *Tod,* 2 C.C.A., 296 F. 345.

[78] See *supra,* §2. Discretionary cases, p. 34.

where aliens were returning from a temporary absence from the country after a continuous domicile here for at least seven years, and those where the officers had held aliens likely to become a public charge but admission was granted under bond. In the first class of cases the principal difficulty was as to the proof of the seven years' domicile in the United States. As to that there were cases where the officers seemed to be actuated by a suspicion that the testimony was false which the evidence did not seem to warrant. The officers higher up seemed, however, willing enough to exercise the discretion provided for in the statute in cases of returning alien residents.

Temporary admission as executive clemency. Except in these specific cases the statute gives to the immigration officers no general power to exercise executive clemency on the ground of hardship or particular merit. In practice, however, the power to grant temporary admission, with or without bond, is often used in lieu of such power to soften some of the hardships of the law. In many such cases of hardship some mitigation is secured by granting admission for six months or a year under bond, or in the custody of a relative, an attorney, or an immigrant aid society.

Aliens on probation. In some cases, however, this power is stretched beyond its apparent purposes to establish what is tantamount to a parole system. Sometimes the word parole is used. The local officers attempt to exercise in this way some of the functions of a probation officer. For instance, in the case of the Mexican boy referred to in the discussion of the public charge cases, the department did not at first vote to admit. It first affirmed the decision to exclude and then authorized admission for one year.[79] In cases where prior misconduct is relied upon as a ground for exclusion this system of "parole" is sometimes used as a means of securing better behavior in the future. In these cases, also, the boards of special inquiry may not exercise the discretion. The case must be passed on to the

[79] File No. 55176–2.

department at Washington. In practice the recommendation is usually made not by the board of special inquiry but by the local officer in charge.

§12. RESPONSIBILITY OF THE BOARDS OF SPECIAL INQUIRY

Duty to decide close cases. The responsibility of the boards of special inquiry is different from that of the inspectors at the primary inspection. The latter have power to admit only in cases where the applicants are "clearly and beyond a doubt entitled to land."[80] In case of doubt they have no power to resolve the doubt and either admit or exclude, but must hold the applicants for the action of the boards. The function, however, of the boards is not to exclude in every doubtful case, but to examine the evidence and by the exercise of judgment render a decision. Although the statute places upon the alien the burden of proving that he is not subject to exclusion,[81] the question of whether this burden has been sustained should be decided by the boards. Their duty is not only to admit the clear cases. They are to be sifted out during the primary inspection. Under the statute the findings of these boards against the applicants for admission are final unless reversed on appeal to the Secretary of Labor. The proceedings before the Secretary, therefore, are appellate. Since no bail is allowed in exclusion cases, aliens rejected at seacoast ports must be detained in the custody of the immigration service while their appeals are being taken to the Secretary and those rejected at border ports of entry compelled to return to Canada or Mexico. A decision by a board of special inquiry against an alien means, therefore, delay, detention, hardship, and expense. It is important that the boards use careful judgment in each case and do not shirk their responsibility by denying admission on the theory that the department at Washington will take care of the doubtful cases and assume the responsibility of reaching a decision. It is also

[80] Act of 1917, Sec. 16.

[81] Act of 1924, Sec. 23.

important that they exercise intelligent judgment on the evidence before them and do not exclude on mere suspicion. It is desirable, therefore, that the work of the boards be examined to see how far they meet their responsibility under the statute to wrestle with doubtful cases or dodge it and "pass the buck" to the department.

"Buck passing." A Canadian woman testified that she had been born in the United States. She had married a Canadian who had become a confirmed drunkard and had deserted her and disappeared. She had supported herself and had also helped a crippled brother-in-law. The medical examination had shown defective vision but this was remedied by glasses. The board of special inquiry ordered her excluded as likely to become a public charge and suffering with a physical defect which might affect her ability to earn a living. The officers higher up at Washington reversed the board and admitted her.[82] A Canadian had lived in the United States for twenty-seven years and was attempting to return after a three days' stay in Canada. He testified that after a long separation from his wife he had heard that she was dead and had remarried. Later he had learned that she was not dead and had herself remarried. He testified that he owned a house and land in this country and a farm in Canada. He could not read. The board of special inquiry held him subject to exclusion on the ground that he had admitted the commission of a criminal offense involving moral turpitude, bigamy, that he was likely to become a public charge, and that he was illiterate. It overlooked or disregarded the evidence which showed good faith on his part in believing his wife dead, the fact that he had showed financial ability to maintain himself and had done so successfully for twenty-seven years, and that he was exempt from the literacy tests as he was returning to a residence of twenty-seven years after an absence of only three days. On appeal to the department this decision was reversed and the man was admitted.[83]

[82] File No. 55268–8.

[83] File No. 55234–66.

A Canadian man and woman had been excluded on a prior application from Canada because it had appeared that before their marriage they had lived together in England as man and wife. They were reapplying after obtaining permission from the immigration authorities to make the new application. The man testified that he had a business in Canada and an equity in a piece of land there worth about $1,500. He also produced a marriage certificate. He testified that they desired admission for a short visit only in order that they might do some shopping and his wife might consult a physician. The board of special inquiry excluded him as likely to become a public charge. On appeal he was admitted.[84] An old woman living on a farm in this country wrote to her granddaughter in the old country that she had been left alone on the farm and needed help, and asked her granddaughter and the latter's husband to come and live with her and bring their three small children. She offered in her letter to have the husband work on the farm and promised him $50 a month and all expenses. The husband and wife had paid all the expenses of their passage and had with them $130. The board of special inquiry excluded them on the ground that the husband was a contract laborer and the wife and children likely to become a public charge. On appeal to the department this decision was reversed.[85] A Mexican boy had been admitted with his mother when he was eight years old and had resided in Texas for sixteen years. There was evidence that this residence had been continuous and had not been interrupted by a visit to Mexico during that time. His wife testified that she had been born in Texas and presented a certificate of baptism in that state. The man testified that he owned in Texas two acres of land with a house on it. Neither the man nor the woman could read. They had been on a visit to Mexico to see a sick niece, and were returning within a little more than a month. The wife's mother appeared before the board and testified that the applicants had not been out of Texas for eleven years to her own

[84] File No. 55035–34.

[85] File No. 55234–23.

knowledge. There was a medical certificate that the man was of poor physique. The board of special inquiry voted to exclude them both as illiterate although the evidence clearly showed that they were exempt from the literacy test as aliens returning within six months after residing continuously in the United States for five years. It also voted to exclude the man as suffering from a physical defect likely to interfere with his making a living and both the husband and wife as likely to become public charges. Both were admitted on appeal.[86]

Exclusion on suspicion. A Hungarian couple who had been resident in the United States for nearly twenty years had gone to Europe on a visit, taking their children with them. On their return they claimed that the children had been born in this country and presented certificates of their baptism which indicated their birth here. The man could not read. The board of special inquiry ordered them all excluded, the man as illiterate, and the wife and children as likely to become a public charge. On appeal they were all admitted, the children as citizens and the adults as returning residents.[87] A Canadian woman, thirty-eight years of age, was ordered excluded as admitting the commission of a crime involving moral turpitude and as likely to become a public charge. She testified that she had been in this country before and had supported herself by working in a restaurant. She was divorced from her husband. She admitted that her eleven-year-old child, then with her mother, was not the child of her former husband and that it had been born two years before her marriage. She submitted several letters of good character. The record contained a reference to an anonymous letter charging her with certain offenses, but stated that she had not seen this letter. There was no evidence that the father of the child was married and the evidence was that it was born before the marriage of the mother. The anonymous letter referred to was not in the record. The department sustained the

[86] File No. 55238–47.

[87] File No. 55270–124.

appeal and ordered her admitted.[88] A Lithuanian woman claimed that one of her sons, a boy of thirteen, coming with her had been born in New Jersey during her former stay in this country. In addition to her own testimony there was an affidavit from her husband to the same effect and a certificate of baptism. Her husband was a resident of this country, but did not appear before the board as a witness. The discrepancy in the evidence was her testimony that she had come to this country in 1910 and left three years later, whereas the certificate of baptism showed the birth of the child in 1908. When this discrepancy was called to her attention she stated that she had made a mistake and could not remember dates. The boy was excluded as likely to become a public charge, but the department admitted the whole family on appeal.[89] A young woman of twenty-eight applied for admission with her sister who was already a permanent resident of the United States and the wife of a naturalized citizen, and was returning from a trip abroad. The alien had with her her child nine years of age. She testified that she had come without her husband because she had wanted to accompany her sister, and that her husband would join her here as soon as he could sell their property in the old country. The board of special inquiry excluded her largely on the ground that her husband was not with her. The recommendation of the officer in charge indicated that "no satisfactory reason had been given for his failure to accompany her and that he might be inadmissible." On appeal she was admitted.[90] A Canadian woman, twenty-six years of age, accompanied by her eight-year-old daughter, was going, she testified, to her brother and sister in Chicago. She testified that her husband was on a farm in Canada and would join her later. She testified also that she was a graduate nurse. The board of special inquiry ordered her excluded as likely to become a public charge on the theory that the case was not clearly one

[88] File No. 55241–29. [89] File No. 55255–40. [90] File No. 55270–136.

for admission, thus applying the rule of decision at primary inspection. She also was admitted on appeal.[91]

In the case of an Italian family, father, mother, and two boys, ages eight and five, the testimony was that after a residence in this country of eighteen months they had gone to Italy to see the man's sick father. The man had a shoe-repairing shop in this country and had left money to pay the rent during his absence. He testified that it was locked up ready for him with his tools in it. They had been away for a little over a year and testified that they had been delayed because of the death of the man's father. They were ordered excluded as excess quota, although according to the evidence they were non-quota immigrants. The department admitted them on appeal.[92] In another case the issue was the important one of whether a woman of the Italian race was entitled to admission as an American citizen because born in the United States. She testified that her mother had told her she had been born in New York City at a certain address which she gave and that her mother had taken her back to Italy when she was still a small child. She submitted a certificate that a person of the same name had been baptized in a church in New York City one month after the date she alleged was the date of her birth in that city. Her husband who, she testified, had been in this country three or four years appeared as a witness and testified that she had told him that she had been born in this country. She had testified that her husband had sent her the certificate, but the board did not question him about it in order to test its authenticity. It ordered her excluded as suffering from a physical defect (she was fifty-six and there was a medical certificate of senility) and as likely to become a public charge although her husband was in this country and there was no evidence to show there was any such likelihood. She was admitted on appeal.[93] Three Russian Jewish girls, who gave their ages as seventeen, eighteen,

[91] File No. 55035–48. [92] File No. 55340–24. [93] File No. 55340–20.

and nineteen, the two eldest of whom had been employed in Europe as seamstresses, were excluded as likely to become a public charge although they had come with their mother, and their father had been in this country for ten years, had taken out his first papers, and testified that he had a small business which netted him forty-five dollars a week. Their mother's brother also gave testimony to the effect that he had been in this country for thirty-one years, had become a citizen, and had considerable financial ability. There was with the party a son eleven years of age, certified as an imbecile. The board voted to exclude all five. The department admitted them all except the imbecile boy who was returned to Europe where he had a married brother and an unmarried sister.[94]

In all of these cases the failure of the boards to exercise their own judgment or their attitude of suspicion unwarranted by the evidence made an appeal to the department at Washington necessary. There on the appeal the error was rectified. The evidence in each of the cases indicates that decisions to admit should have been rendered by the local boards in the first place and the expense and hardships caused by the appeal with its delays and the necessity of obtaining legal advice in some cases avoided.

§13. PROCEDURE ON APPEAL

The statutory right to appeal. The statute provides that the decision of any two members of the board of special inquiry shall prevail, but either the alien or any dissenting member of the board may appeal through the Commissioner of Immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of Labor.[95] It also provides that the decision of the Secretary shall be rendered solely upon the evidence adduced before the board of special inquiry. The taking of the appeal automatically stays any further proceedings

[94] File No. 55265–48.

[95] Act of 1917, Sec. 17.

either to admit or to deport the alien who remains in detention until the appeal is decided.

The statute also provides that in the cases where aliens have the right to appeal they shall be informed of this right.[96] This is usually done by the chairman of the board of special inquiry as soon as the decision to exclude is announced. If one of the members of the board desires to appeal from the decision of the other two to admit, he gives notice of his intention to appeal at the same time. The immigration rules provide that appeals must be filed promptly and that an appeal filed more than forty-eight hours after the excluding decision has been rendered may be rejected by the authorities as filed too late.[97] The rules also provide that any alien may appeal through a relative, a friend, an attorney permitted to practice before the immigration authorities, or through any society admitted to an immigrant station.[98] There was no evidence in the cases studied of any practice interfering with the right of appeal or of any tendency to be technical as to the time and manner of filing it.

Detention of aliens pending the appeal. The statutes and rules make no provision for the release on bail of aliens applying for admission while their cases are under consideration either during the period between the primary inspection and the hearing before the board of special inquiry or during the period while the appeal is pending. In the exclusion cases bail is not permitted and a federal district court has held that in such cases it need not be provided for.[99] The power of the Secretary to admit under bond applies to cases of non-immigrants coming for a temporary stay and immigrants who would be excludable as likely to become public charges or because they are suffering from a physical defect. It does not expressly apply to cases where aliens are at the ports of entry waiting for their applications for admission to be decided. In cases of great hard-

[96] Act of 1917, Sec. 16. [97] Immigration Rule 14, subd. A. [98] *Ibid.*
[99] *Ex parte Domingo Corypus,* D.C. W.D. Wash. N.D., 6 F. 2d 336.

ship and long delay, however, the power of the Secretary to grant temporary admission under bond may be used.

Counsel on the appeal. The statute contains a provision that an alien excluded by a board of special inquiry shall have the right to be represented by counsel or other adviser, and that at the time the decision of the board to exclude is rendered he shall be notified that he may be so represented.[100] There are provisions in the immigration rules limiting the amount of the fee which any attorney practicing before the department shall charge for his services to $25 for each alien or for a group of aliens constituting one family. There is also provision for the disbarment of attorneys from practice before the department for conduct in violation of the rules or for unethical or dishonest practices.[101] Of the five hundred appeal cases studied, however, counsel were secured in only forty-six. In all the remainder the case went through to a decision without the aliens' being so represented.

Rights of counsel under the rules. Under the rules attorneys and others who represent aliens applying for admission have authority to review the records in all cases in which their appearance has been entered.[102] They may file with the record a brief in support of the appeal. This brief may contain material in addition to that contained in the transcript of the record of the hearing. Counsel may, if he finds that he has new evidence to introduce, request that the case be reopened and a new hearing conducted before a board of special inquiry for the purpose of introducing it. In many cases such new evidence is introduced in the form of affidavits, letters, and petitions which are submitted to the local officers or filed with the department at Washington. Counsel may not, however, appear at a hearing before a board of special inquiry for the purpose of cross-examination of witnesses or argument. He may appear for

[100] Act of 1917, Sec. 16.

[101] Immigration Rule 28, subds. C and D.

[102] *Ibid.*, subd. B.

personal argument before the Board of Review in Washington and in administrative procedure such as that in exclusion cases there is always the possibility of having an informal interview with an administrative officer. The rules provide for the issuing of *subpoenas* to secure the attendance of witnesses. There is also a provision for the cross-examination of witnesses by counsel.[103] This, however, apparently applies only to witnesses in expulsion proceedings since in exclusion proceedings counsel is permitted only on appeal.

The Transcript of Testimony: Recommendations of local officers. The file in an exclusion case contains a typewritten transcript of the evidence at the hearing before the board of special inquiry and also the letters, reports, affidavits, certificates, newspaper clippings, and other documents submitted in evidence. The transcript of the evidence concludes with a statement of the action or finding of the board. This is usually recorded by a stereotyped statement in the language of the statute, of the causes for exclusion found to exist, such as "likely to become a public charge." Usually no detailed explanation of the evidence is given. Sometimes, however, there is a statement of the reasons for the conclusion reached, some analysis of the evidence, and a recommendation. Under the former practice the record was examined by the local officer in charge or some assistant for him and his report in typewritten form was added to the file. Such reports usually contained a summary of the facts, often in much detail, and concluded with a recommendation. In some of the cases examined the reports or recommendations of the officer in charge contained evidence, not in the transcript of the hearing, based on the officer's own opinion or knowledge. This practice, however, has been abandoned and the record now goes immediately to the Bureau of Immigration in Washington with only the findings and recommendations of the board of special inquiry.

[103] Immigration Rule 24, subd. A.

Additions of new evidence. In some of these cases these reports contained evidence not in the transcript of the hearing before the board of special inquiry. The officer evidently had his own opinion as to the merits of the case, based on his own knowledge or on the opinion of someone else passed on to him. This he put into the record as a part of his report and recommendation. Thus in one case, the report of the local officer in charge contained this statement, not supported by any testimony anywhere else in the record: "He is the father of at least five illegitimate children in Canada."[104] The report also stated that it was alleged that the alien was engaged in the illegal sale of liquor. Thus the record when it reaches the department at Washington contains this evidence. The report may or may not be shown to the attorney for the alien unless he is in Washington where at the Bureau of Immigration he would have access to it. The rules require that the summary of the examining officer in a warrant, that is, an expulsion case, shall be open to the attorney for the alien, but there is no such reference in them to the reports or summaries in appeal cases. If counsel for the alien remains in the locality of the station and contents himself with filing a brief, he may not see these reports and be aware of the facts and opinions stated in them.

The record in the Bureau of Immigration. The statute provides that the appeal shall be through the Commissioner-General of Immigration to the Secretary of Labor. The former practice was to have the record examined in the Bureau of Immigration by members of the office personnel assigned to that work and a recommendation endorsed on the record. The record then went to the office of the Secretary for final action. Usually the final action was taken under the direction of the Assistant Secretary who had special charge of this work. At present immigration matters come under the direct jurisdiction of the two Assistants to the Secretary, offices established in

[104] File No. 55035–43.

1927. Since the establishment of the Board of Review the practice of having an examination of the record in the office of the Commissioner-General and a recommendation endorsed on it as from the Bureau, has been abandoned. Action in the Bureau is now confined to routine matters of record and filing.

Non-appealable cases. In one class of cases appeal to the Secretary of Labor is not permitted and the decision of the board of special inquiry is said to be final. When the medical examiners certify that an alien is suffering from a loathsome or dangerous contagious disease or from tuberculosis, the board must vote to exclude and no appeal is provided for from their action.[105] If the certificate is to the effect that the alien is an idiot, an imbecile, an epileptic, or is insane or feeble-minded, or is afflicted with constitutional psychopathic inferiority or any mental defect, or chronic alcoholism, there is also no appeal.[106] In cases, however, where the medical officers certify insanity or mental defects the statute provides for an appeal to a board of medical officers.

§14. THE BOARD OF REVIEW

Advisory powers. Under the statutes the final decision in cases which have been appealed rests with the Secretary of Labor. Investigation and recommendation may, however, be delegated to assistants. The former practice was to delegate this task to individual members of the office personnel. Since 1922, however, it has been delegated to an unofficial body, not provided for by statute, known as the Secretary's and Commissioner-General's Board of Review.[107] The action of this body is advisory merely and need not be followed by the Secretary if he decides to ignore it. In practice, however, its recommenda-

[105] Act of 1917, Sec. 17; Immigration Rule 14, subd. D.

[106] *U.S. ex rel Fink* v. *Tod,* 2 C.C.A., 1 F. 2d 246; Immigration Rule 16, subd. D.

[107] Recently the membership of this body has been increased and at present there are three parts or smaller boards of five members each.

tions are usually followed and therefore become in fact decisions. This Board has been referred to with approval by a federal district court as a legal method of aiding the Secretary in carrying out his duties.[108]

Procedure for consideration and discussion. The procedure followed by the Board of Review is as follows. The cases are divided among the members so that each case comes before the individual consideration of one member. He examines the record, reads the transcript of the testimony, the brief of counsel, the summaries and recommendations of the local immigration officers, and the documents, letters, etc., which have been added to the file. He then reports his conclusions to the chairman of the Board. The chairman does not usually go over the evidence, but does review the proposed recommendations of the reviewing member. He may bring the case before the entire Board for a discussion but usually does not do so. In most cases there is no regular discussion of cases at regular conferences of the members of the Board. Every member does not read the evidence in each case and then join in a general discussion at a regular conference. Conferences are the exception. Usually the study of the record and the decision are made by one member of the Board. Even when a discussion may be had by two or more members, as a rule only one member has made a close personal study of the record.[108a]

Oral hearings. In cases where a special request has been made the Board of Review accords to interested persons an oral hearing. No calendar of hearings is made up, but they are arranged for as requested. At such hearings several members of the

[108] *Soo Hoo Doo* v. *Johnson,* D.C.D. Mass., 281 F. 870.

[108a] Since the recent increase in the membership of the Board the procedure has been changed in a most important particular. Now the individual member who has made the close detailed study of the case reports it, not to the general chairman of the Board, but to the other members of the smaller board to which he is assigned as a member. A conference is then held upon it and it is subjected to discussion by the members. Thus conferences are no longer the exception but the rule.

Board are present, not necessarily a majority. No evidence is taken. There is a short presentation of the case by the person appearing for the alien. Members of the Board may ask questions and there may be a short discussion consisting of questions and answers. Since the hearings are not calendared in advance and are often arranged for on short notice, it happens in many cases that the members of the Board are not familiar with the facts at the time of the hearing. These have to be gathered by a brief examination of the summary of the local immigration officers or from the statement of the one making the appearance. Of the five hundred appeal cases examined the records showed there were oral hearings before the Board in forty-one. In twelve of these, attorneys appeared; in eighteen, secretaries of members of Congress; in six, members of Congress; in three, relatives of the aliens involved; in one, a friend of the alien; and in one, an attaché of an embassy.

New evidence. The statute provides that the appeal shall be decided "solely upon the evidence adduced before the board of special inquiry."[109] New documentary evidence such as letters of recommendation, affidavits as to financial sufficiency of relatives, or reports of the investigation of local inspectors are sent back to the field immigration office for the consideration of the board of special inquiry there. If new witnesses are offered they are also heard by this board. An additional recommendation is then made and sent to the department.

A trial de novo on the record. The trial of exclusion cases before the Board of Review is called appellate, but the appeal is not limited to an inspection of the record for errors. The whole case is considered again on the record and a decision rendered *de novo*. The decision of the board of special inquiry against the alien or that of the two members who voted to admit him, when the appeal is by the dissenting member, is entitled to no *prima facie* weight except as a recommendation. Even if there

[109] Act of 1917, Sec. 17.

is sufficient evidence in the record reasonably to justify the decision of the board of special inquiry the member of the Board who reviews the case will use his own judgment and reach a different conclusion on the evidence if his judgment leads him to that result.

Other duties of the Board. The work of the Board of Review is not limited to the consideration of appeals from the action of the boards of special inquiry. As will be discussed later,[110] all cases where the expulsion of aliens already in the country is sought come as a matter of course before this body. In addition, other cases, "involving steamship fines, reëntry permits, applications for the waiver of the contract labor law, registration of aliens under the Act of March 2, 1929, and applications for the extension of temporary admission, etc.," are considered by them and recommendations made. During the fiscal year ending June 30, 1930, they considered and made recommendations in 22,601 cases.[111] This was at the rate of over three thousand cases for the year for each of the seven members and, eliminating Sundays and holidays, approximately ten cases a day. Oral hearings were held in 2,174 cases during the same fiscal year.

Final action by the Secretary. After the chairman has approved the conclusion of the member of the Board in charge of the case, the recommendation is endorsed on the record and the file then goes to the office of the Secretary. Sometimes the finding of the Board of Review contains reasons and discussion. In some cases it is merely findings or recommendations. In practice the record goes not to the office of the Secretary himself but to the Assistants to the Secretary. The statute provides that the two Assistants shall perform such duties as the Secretary shall assign to them. It has been held that he could

[110] See Chapter IV, §14, p. 142.

[111] *Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1930,* p. 78.

assign to them the duty and authority to decide appeals in immigration cases and that their decisions were those of the Secretary and final.[112]

The statute makes the decision of the Secretary against the alien final. The only recourse left to the alien to prevent his being sent back is the filing of a petition for a writ of *habeas corpus* in the local federal district court.[113]

[112] *Lew Shee* v. *Nagle*, 9 C.C.A., 22 F. 2d 107.

[113] See Chapter V, Judicial Review, §1, p. 149.

CHAPTER IV

THE EXPULSION PROCESS

§1. GENERAL EXPLANATION

THE statutes confer on the Secretary of Labor wide and summary powers to expel from the country aliens already here.[1] They contain detailed enumeration of the causes which shall be grounds for expulsion, but only two references to the administrative procedure: "shall upon the warrant of the Secretary of Labor be taken into custody and deported," and "pending the disposal of the case the alien so taken into custody may be released."[2] There are no provisions as to hearings, the right to counsel, or the right to appeal as there are in the statutory provisions in regard to exclusion. The only procedural requirements provided for in the statutes are that there must be a warrant of arrest issued by the Secretary of Labor at the time the alien is taken into custody, and that pending the decision on his case the alien so arrested may be released on bond. Directions and requirements in regard to the administrative procedure in expulsion cases are contained in the immigration rules made by the department, and in the decisions of the federal courts on petitions for writs of *habeas corpus*.

Steps in the expulsion procedure. The administrative process thus provided for consists of certain well-defined steps. These are the investigation of suspicious cases, the application to the department at Washington for a warrant of arrest, the arrest of the alien under this warrant, a hearing before a local immigration officer, the review of the record by the Board of Review in the department at Washington, and finally the decision by the Assistant to the Secretary of Labor which will be evidenced either by the cancellation of the warrant of arrest or the issuing of a warrant of deportation.

[1] Act of 1917, Sec. 19; Acts of 1918 and 1920; Act of 1924, Sec. 14.
[2] Act of 1917, Secs. 19 and 20.

§2. CAUSES FOR EXPULSION

Expulsion within time limit after entry. The causes for which aliens already here may be expelled from the country may be grouped into three classes with reference to the time limit after entry into the country within which the power to expel may be exercised. One group has a three-year limit, one a five-year limit, while a considerable number of causes allow expulsion prior to naturalization without any limit of time. The time limit of three years applies to cases of entry without inspection by the immigration officers or of entry at some place not designated by the department as a port of entry. Under the five-year limit come four classes: *first,* those aliens who at the time of their admission to the country were for certain reasons then existing, but not known to the officers, not legally entitled to enter, that is, were members of one or more of the classes excludable by law; *second,* those who entered or who are found to be in the United States in violation of any law of the United States; *third,* aliens, who have within five years after their entry into the country, become public charges "from causes not affirmatively shown to have arisen subsequent" to this entry; and *fourth,* those who have within five years after their admission been convicted of a crime involving moral turpitude and sentenced for it to imprisonment for one year or more. In the last two classes the five-year limitation applies to the happening of the event and not to the beginning of the proceedings by the department to expel or other action thought desirable.

Expulsion without time limit. For some causes there may be expulsion without time limit. These fall into five groups: belief in or advocacy of anarchy, revolution, or the overthrow of government by force or violence; a criminal record; connection with prostitution or entry for immoral purposes; conviction of violation of certain acts of war legislation if the alien so convicted is found to be an undesirable resident; and entry in violation of the quota act. The original expulsion section of the

Act of 1917 contained provisions for the expulsion of anarchists, persons advocating the unlawful destruction of property or the overthrow of government or law by force or violence, or the assassination of public officials. By the Act of 1918 as amended by the Act of June, 1920, these were expanded to include aliens found to be members of or affiliated with organizations found to be teaching revolution or opposition to organized government, or the overthrow of the government of the United States by "force or violence." As to the effect of a criminal record, conviction more than once of a crime involving moral turpitude and sentence more than once for the term of one year or more are grounds for expulsion without any time limit either for the second conviction or sentence or the bringing of the proceedings. Within this group come also cases where aliens were, prior to their entry into this country, convicted of a crime involving moral turpitude, or who have admitted that before their entry they committed such a crime, and cases where aliens have been convicted under the criminal provisions of the statute[3] for connection with prostitution or for the importation of an alien for an immoral purpose. The other cases include alien prostitutes or those connected with prostitution, and aliens who have imported or attempted to import an alien for an immoral purpose. In this last group conviction in a criminal trial is not necessary. The fact of guilt is to be found by the immigration officers. The Act of 1924 in addition to its visa and quota requirements contained a provision for the expulsion without any time limit of "any alien found to have been at the time of entry not entitled under this Act to enter the United States or to have remained therein for a longer time than permitted under this Act."[3a] An alien who effects an illegal entry has not secured a visa and entered in accordance with the quota provisions. The Supreme Court has held that under this act an alien seaman deserting his vessel and remaining unlawfully within the United

[3] Act of 1917, Sec. 4.

[3a] Act of 1924, 43 Stat. 153, 162.

States might be deported after the lapse of the three-year limitation of time provided for by the Act of 1917 for cases of surreptitious entry.[3b] Perhaps, therefore, illegal entry has been added to the already long list of grounds for expulsion without any time limit.

§3. THE ISSUES INVOLVED

An analysis of the grounds for the exercise of the Secretary's power to expel shows that very different kinds of causes are specified in the statutes. These include surreptitious entry, criminal conduct before or after admission, sexual immorality or connection with prostitution, "radical" opinion or teaching, and economic misfortunes after entry. They also include facts and conditions found by a retroactive judgment to have been present at some former date when the alien was admitted to the country. Since very different kinds of causes for expulsion are provided for in the statutes, very different kinds of issues are involved in their administration by the immigration officers.

Issues of fact. The simplest issue may for convenience be called one of fact only. The officers must decide whether certain acts have been committed or certain events have occurred, all more or less definitely alleged. For instance, there may be a conflict of testimony as to whether an alien woman has been a prostitute, as to whether another alien's bill at a hospital has been paid, or as to whether a third alien is a member of a certain definitely named organization. In other cases the question is whether a contract of employment was made before entry, whether the alien has been convicted of a crime or admits that he committed one, or whether there has been sexually immoral conduct by the aliens involved. In a case where an alien was charged with having received from a prostitute a part of her earnings, the only evidence against him was the testimony of the woman. The alien flatly denied the charges. Thus there was

[3b] *Philippides* v. *Day*, 51 Sup. Court Rep. 358.

a conflict of testimony and it was a question of which to believe.[4] In many cases the issue is whether the alien was smuggled in or entered surreptitiously. Among cases of this class are those where the issue before the department is whether the accused person is a citizen or an alien. Usually this hinges on the place and time of birth or naturalization. Again the question may be whether the father of the alleged citizen had been naturalized before the latter became of age.[5] In other cases the issue is whether the accused alien has been continuously within the United States for three or five years. In these cases the decision of the issues depends on the credibility of witnesses, on birth or naturalization certificates, or on the identity of the original of a photograph. They involve little in the way of shades of motive or quality of conduct.

Inferences of condition or character. In many other cases, however, the facts alleged, whether they may or may not be in contest, raise issues which involve the more difficult task of drawing an inference of condition or character. The cases where these mixed issues arise are those where it is alleged that the alien was likely to become a public charge at the time of his entry, that he has become a public charge from causes not shown to have arisen subsequent to entry, that he is an anarchist or believes in the overthrow of government by force or violence, or that he is an undesirable resident. The first issue of this kind involves a retroactive judgment as to the condition of the alien, his health, amount of money, knowledge of a trade or calling, domestic conditions, character or disposition, at the time he entered the country, potentially as much as five years before. Moreover, this judgment is passed upon the evidence of these conditions viewed in the light of events which have occurred since the alien's entry. In a more detailed discussion of these cases later on,[6] it will be shown how the misconduct or mis-

[4] File No. 55210–309.

[5] File No. 55225–5.

[6] See *infra*, §12, c, p. 119.

fortunes of an alien after his entry will be construed as evidence of his condition at the time of entry. In the cases where the alien has within five years after his entry become a public charge, he is, to avoid expulsion, required to prove that the causes of his insanity, tuberculosis, or other disease, or of his economic distress were not at least potentially present at the time he was admitted to the country, and have all of them arisen since that time. This is a most difficult question of physical or mental condition as to which in many cases physicians will not agree and medical science will be in doubt.

Issues in the "red" cases. The issues in the "anarchist-communist" or "red" cases depend upon the following definitive words of the statute, "anarchists," "opposition to organized government," "overthrow by force or violence of the Government of the United States or of all forms of law," "unlawful damage, injury or destruction of property," "sabotage." The question may be what the accused alien actually believes. It may be also the more difficult question of whether the admitted beliefs come within the classification of the statute. It may also be whether the accused alien advocates or teaches any of these proscribed beliefs or actions. In some cases the issue is not what the alien himself believes, but whether he is a member of or affiliated with an organization or party, the belief or program of which comes within the statutes. The issue of membership is simpler than one of belief, but the question may arise as to whether the organization itself comes within the statute, and this will present many of the difficulties met in the attempt to evaluate the belief of an individual. Writing, publishing, causing to be published, or knowingly having in possession for the purpose of publishing, written or printed matter advocating the forbidden beliefs is also a ground for expulsion. There the issue is not only the fact of writing, publishing, or knowingly having in possession, but the further one of whether the written or printed matter itself comes within the statute. These cases, therefore, involve a determination of what in fact are the beliefs

of the accused alien, or the doctrines and declared and actual aims of a political or social organization. They may also involve the evaluation of these beliefs or programs of action under the definitive words of the statute. Thus the immigration officers will in some cases have to decide whether admitted beliefs or party doctrines constitute "anarchy" or favor "the overthrow of the Government of the United States by force or violence" or "opposition to all forms of law."

Application of a standard. In a comparatively small group of cases, those where aliens were convicted and sentenced for violation of certain acts of war legislation, such as the selective service acts, the issue involved is the application of the standard "undesirable resident" to be applied by the Secretary of Labor to all the facts as to the history and character of the alien.[7] In a very large group of cases where commission of crime is the ground relied upon for expulsion the officers must apply to the acts committed the standard of moral turpitude. This becomes a difficult question only when the acts committed have been made crimes by recent legislation and there is a conflict of public opinion as to the social or ethical value of the legislation. In this class of cases no conflict of evidence is usually presented when conviction of a crime in this country is relied on. The case hinges largely on the accuracy and care of the officers in obtaining copies of public record, such as a copy of the record of the conviction or sentence or of the commitment to prison. When conviction of a crime in another country before entry is relied on, or the admission by the alien that the crime was committed, the issue sometimes becomes one of the credibility of witnesses.

In some cases the decision hinges on the interpretation of the statutes, and the issues become issues of law. Such cases shade into those where the issue involves an inference from facts, such as "likely to become a public charge" and "force and violence." As will be shown later the courts exercise judicial review in such

[7] Act of May 10, 1920.

cases and usually the final definition of the statute is made by them. Until they act the ruling of the department is followed.

§4. THE APPLICATION FOR THE WARRANT OF ARREST

Rules as to evidence to support the application. The immigration rules provide that "officers shall make thorough investigations of all cases where they are credibly informed or have reason to believe that a specified alien in the United States is subject to arrest and deportation on warrant."[8] If in the opinion of the local immigration officer in charge a warrant of arrest should be issued, application is made to the office of the Secretary of Labor in Washington. Local immigration officers may not issue such warrants. Only the office of the Secretary has the power. The rules require that the application for a warrant should state "facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry."[9] They also provide that it must be accompanied by some supporting evidence.

If the facts stated are within the personal knowledge of the inspector, or if he obtained his knowledge from the admissions of the accused alien, or if the facts are based upon the statements of sworn officers of the government, they need not be in affidavit form. In other cases where the evidence consists of statements of persons not government officers, the affidavits of such persons should accompany the application. Where the proceedings are based upon conviction of crime, a certificate of the officer of the court will be sufficient. In the case of persons who have become public charges in hospitals, a certificate of the officer in charge of the institution on a form prepared by the Bureau of Immigration is to be used and this is to be accompanied by certificates of attending physicians or other evidence, "tending to show that the alien has become a public charge from causes not affirmatively shown to have arisen sub-

[8] Immigration Rule 19, subd. A. [9] *Ibid.*

sequent to entry."[10] In cases where the right to expel is subject to a limitation of time after entry, or where expulsion will be at the expense of the steamship company, which charge is subject to a time limit, the rules require that the application for a warrant should be accompanied by a certificate of landing, or if such a certificate cannot be obtained, information in regard to the time of entry.[11]

Telegraphic applications. The rules also provide that "telegraphic application may be resorted to only in case of necessity" and "must state (a) that the usual written application is being forwarded by mail" and "(b) the date and place of entry and the substance of the facts and proofs contained in such application."[12] Apparently the immigration officers find it desirable to use telegraphic applications in a great many cases. Of the five hundred and ninety-seven cases of applications examined, two hundred and thirteen were by telegraph. The telegraphic applications were in code. The application consisted of the code word for warrant, the name of the alien, and the code words for the charges made, such as surreptitious entry by land or water, public charge, prostitute, or anarchist.

Preliminary examinations. The rules make no specific references as to the method of investigation to be pursued. The kind of evidence, however, which the records show was presented in support of the application for the warrants reveals in many cases the nature of the investigation. In more than one-fourth of the cases examined the investigation consisted of a "preliminary examination" of the suspected alien by an immigrant inspector. These examinations took place wherever the inspector found it convenient or possible to hold them. Sometimes the alien was requested to come to the local immigration station and complied. In other cases the examination was at his home or place of business. In some he was at the time confined in a station-house, jail, or prison, under a sentence of a court, a warrant of

[10] *Ibid.*, subd. C. [11] *Ibid.*, subd. B. [12] *Ibid.*

arrest issued by local police authorities, or in some cases without any warrant. In many cases the preliminary examination was at a hospital where he was a patient. At these preliminary examinations the alien is sworn and then subjected by the inspector to a series of questions, both the questions and the answers being recorded by a stenographer if one is present or by the inspector himself, in shorthand if he has sufficient skill in stenography, or in longhand. A complete transcript is then made of the testimony. The typewritten record in such cases usually begins with this question by the inspector: "You are advised that I am a United States immigrant inspector, and that I desire a statement from you relative to your right to be and remain in the United States. Such statement should be voluntary on your part and may be used either for or against you. Are you willing to make such a statement?" The hearing which then follows is usually a complete examination as to the whole case. Nothing is said about counsel. In theory the case has not yet begun.[13] In many instances, however, the whole case is established in this way. In one case the record of this preliminary hearing was fifteen typewritten pages.[14] Where such preliminary examinations are held the typewritten record of the testimony is used as the evidence to support the application for a warrant.

Letters and unsworn statements. In many of the cases examined the records indicated that there was no substantial investigation before the issuance of the warrant. Coincident with this the requirement that there be adequate evidence under oath to support the application for a warrant was not observed. In fifty of the cases examined warrants were issued upon letters to the immigration officers, or upon unsworn statements made to them by individuals other than the aliens involved. Two cases were found where warrants were issued on anonymous letters alone.[15] An inspector in one city wrote to the inspector

[13] *Bilokumsky* v. *Tod*, 263 U.S. 149.
[14] File No. 55210–122.
[15] File No. 55212–97; 55082–66.

in charge in another stating that an anonymous letter had been received and giving the substance of the letter. A warrant was issued apparently on this evidence alone. The letter itself which caused the trouble was not in the record.[16] In another case the evidence on which a warrant was issued consisted solely of a letter of which the following is a quotation in part: "I will let you know that —— came to Canada in ——. She was staying in ——, and she crossed the border to the United States under the name of ——. I find out she is at —— again under the name of ——. And after all we did for her she tries to spoil my good name and my reputation."[17] In other cases a letter was received from a wife who complained that there were improper relations between her husband and an alien woman, and from a parent that his son had run away and effected an entry into the United States.[18] Applications for warrants were made upon the receipt of letters[19] or reports from government officers. The officer in charge at one immigrant station wrote to the commissioner or other officer in charge at another, "We recently learned, etc." In another case an immigrant inspector reported that certain information had been given him by an employee of the local internal revenue office. This information was not sworn to and was apparently largely hearsay.[20] In another case[21] the statement on the application for a warrant was as follows: "While in the custody of the police it developed that this alien had applied for admission, etc." No source was given for the information. The hearing developed that there was no real evidence and the warrant had to be canceled. In forty-two of the cases examined the formal application merely stated, "Investigation discloses," or "Information has been received," "It is now reported," or "It now appears."

Confidential information. In a few of the applications there was the statement, "Confidential information has been re-

[16] File No. 55212–97. [17] File No. 55210–116. [18] File No. 55247–49.
[19] File No. 55210–104. [20] File No. 55076–39. [21] File No. 55080–22.

ceived";[22] "In connection with this application I beg to state that information was received from a confidential source, etc."[23] In one of the cases the inspector conducting the hearing refused to disclose the name of the person making the charges. The record failed to show any such evidence although there was reference in it to a file "containing documentary evidence" indicating that the alien had deserted his wife and children in England and had been "friendly with a single woman," etc. The case finally resulted in a cancellation of the warrant.[24] In some of the cases the application for a warrant merely stated the charges against the alien without giving the sources of the inspector's information.[25]

Reports of local public officers. In some of the cases the local police authorities reported a suspected case or a probation officer wrote a letter to the immigration officers. In a considerable number reports came from the authorities of prisons or jails. A local sheriff swore to the following: "Depose and say that I have reason to believe and do believe that ——, an alien, is engaged in the unlawful transportation of liquor. . . . I further swear that I could have arrested him on numerous occasions for intoxication."[26] Another government officer executed the following affidavit: "In the course of my personal investigation and that of employees under my supervision I am informed and believe that" (stating the charges).[27] A warrant was issued upon a letter from the associated charities of one of our larger cities. In another a copy of a letter addressed to the local overseer of the poor, signed by a person whose title was not given, was regarded as sufficient ground for the issuance of a warrant.[28] In still another, one immigration officer reported to another that "according to a report received from the Direc-

[22] File No. 55237–204.
[24] File No. 55212–97.
[26] File No. 55068–523.
[28] File No. 55237–245.
[28] File No. 55080–38 to 50 incl.
[25] File No. 55080–37.
[27] File No. 54885–55.

tor of Social Service," of a certain hospital an alien woman had been guilty of sexually immoral conduct. The original report did not appear in the record and apparently never reached the department.[29] In another the warrant of arrest was issued on the copy of a letter from a physician in the state psychopathic institute without any other evidence.[30]

Public charge certificates. In many cases the authorities of a hospital or similar institution reported aliens who were alleged to have become public charges. In these public charge cases where the aliens are in hospitals the supporting evidence is usually a certificate of the officer in charge of the institution. There is also in many cases a typewritten "clinical history" apparently copied from the hospital records. The certificates and the clinical history are not sworn to. The former are signed, the latter usually not.

In two cases the supporting evidence included newspaper clippings.[31] In one the application for a warrant was supported by the record of the alien's statement that he had been a resident of the United States for a considerable time before leaving for Canada and that he had become naturalized. The application for the warrant was made with the words: "From the foregoing evidence I am satisfied that —— is an alien and a citizen of Canada."[32] In one case the record showed no supporting evidence at all except some references to an affidavit, which may have been in the record.[33] In a minority of the cases examined the record showed that an investigation had been conducted by making inquiries of persons other than the alien. Some of these interviews were in the form of hearings with a stenographic record of the testimony. Others were conducted informally and the substance of the information obtained was reported to the department by the inspector.

[29] File No. 55212–87.
[30] File No. 55212–11.
[31] File No. 55237–242.
[32] File No. 55247–65.
[33] File No. 54885–64.

§5. THE WARRANT OF ARREST

Formal warrants. The formal written warrant consists of a general charge and an authority to arrest. The name of the alien is given and the date of his entry to the country, as that is often material. Usually the date is indicated as "on or about." The charges against the alien on the ground of which expulsion is sought are stated generally in the form of the language of the statute. For example the warrant may charge that at the time of entry the accused alien was "likely to become a public charge," or that he "entered without inspection." The definiteness and particularity of an indictment or of a complaint in a civil case are lacking. The warrant does not apprise the alien of the exact nature of the charges against him. In some cases the supporting evidence does contain the more exact details and would if shown to the alien or his counsel perform some of the offices of a bill of particulars. The warrant does not do so. The warrant is addressed to the commissioner or inspector in charge, or "any other immigration officer in the United States." Thus it is good anywhere in the United States and in the hands of any inspector or other immigration officer.

The warrant also contains the command that the officer "take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law."

Telegraphic warrants. Of the 605 cases studied in which warrants were issued, the warrants in 215 were telegraphic. The telegraphic warrant is as brief as is the telegraphic application for a warrant. It contains the code word for arrest, the name of the alien, and the code words for the charges which are the basis of the department's action in issuing the warrant. A literal translation of a warrant of this kind is "Arrest John Doe, anarchist." In cases like this the specific details of the charges are all made later.

§6. RELEASE ON BOND

After the arrest of the alien under the warrant, he may secure his release on filing a bond in the penalty of not less than $500. This is provided for by the statute,[34] and is a right which the department cannot lawfully withhold provided the security offered is approved by the Secretary.[35] Of the cases studied the accused aliens were released in one hundred and twenty-two, eighty-five of these on bail bonds, thirty-four on their own recognizances, and three in the custody of attorneys or relatives. Usually the minimum bond of $500 was exacted. In thirteen cases this was raised to $1,000. These were cases where the charge was that the aliens came within the "force or violence" statutes or those where there were accusations of illicit sexual relations. In many cases the aliens are already confined in hospitals at the time the warrant is issued and usually in such cases no change is made. In others they are in prison serving terms upon the completion of which they will be subject to deportation. In some cases where bail cannot be furnished, the aliens are confined in the detention quarters at the local immigrant stations. This, however, is possible only in a minority of the cases where the local station is large enough for the purpose. In most cases it is necessary to have them held in the local jails.

§7. COUNSEL

The Immigration Rule as to counsel. The Immigration Rules provide that "at the hearing under the warrant of arrest the alien . . . shall be advised that he may be represented by counsel."[36] It is also provided in the same paragraph that "if counsel be selected, he shall be permitted to be present during the con-

[34] Act of 1917, Sec. 20.

[35] *Colyer* v. *Skeffington,* D.C.D. Mass., 265 F. 17; *Prentiss* v. *Manoogian,* 6 C.C.A., 16 F. 2d 422.

[36] Immigration Rule 19, subd. D.

duct of the hearing and to offer evidence to meet any evidence presented or adduced by the government." The rule in force before the present rule was adopted read that the accused should be advised of his right to counsel "at the beginning of the hearing."[37] Prior to that rule the rule read, "preferably at the beginning of the hearing, or at any rate as soon as such hearing has proceeded sufficiently in the development of the facts to protect the government's interests." It is possible to read the present rule as a return to the former procedure leaving it to the discretion of the immigration officers in charge to conduct part of the hearing before counsel is permitted. The second sentence of the rule, however, that if counsel be selected he shall be permitted to be present during the conduct of the hearing might be interpreted as indicating that counsel be permitted during the entire hearing and as depriving the omission of the words, "at the beginning of the hearing," of any special significance. On the other hand, it might be interpreted as meaning that after the reference to counsel had been made his presence should be permitted. As at present phrased the rule contains an ambiguity on a point of much importance. The practice under the former rule of permitting the officers to postpone the admission of counsel until after part of the hearing had been conducted has been sustained by the Supreme Court[38] and held not inconsistent with due process of law.

Counsel during the entire hearing. Under the present administration the department is construing the present rule as not differing materially from its predecessor which contained the words "at the beginning of the hearing." The practice is to refer to counsel at the beginning. In many cases inspectors are given mimeographed sheets containing the questions with which the hearing is to be opened, with blank spaces in which the answers given by the alien are to be entered. Such sheets contain the words, "You are advised that you may be repre-

[37] See Chapter V, Judicial Review, §3, pp. 161 and 180.

[38] *Low Wah Suey* v. *Backus*, 225 U.S. 460.

sented by counsel." In almost all the cases studied the record showed that the question as to counsel was asked at the beginning. The exceptions were for the most part cases where the hearing was held during the short period from December 31, 1919, to January 28, 1920, when the rule was phrased so as to permit discretion in the inspector in charge of the hearing as to when counsel might be permitted. There was no indication of a practice of denying this right to the accused.

Absence of counsel in most cases. The significant facts as to the matter of counsel were that in many of the cases the evidence had already been adduced by the investigating inspector in the "preliminary examination" held before the warrant of arrest had been issued without the presence of counsel, and that counsel at the hearing were secured in only one-fifth of the cases even though the opportunity was afforded by the officers. In the vast majority of the cases the question was an academic one. In about one-sixth of them the aliens said they had no money. In about an equal number they said they did not want a lawyer because they did not want to contest the case. In the remainder they gave no reason for saying no. In the majority of the cases, therefore, the hearing proceeded and the case was concluded without counsel, the entire conduct of the procedure being in charge of the immigration officers. In some of the cases counsel was not secured during the hearing, but was brought in by family or friends after the case had reached Washington and sometimes after the department had rendered a decision to expel. In a few of the cases of this kind, the efforts of counsel secured in an eleventh-hour attempt to prevent deportation were successful either in the production of new evidence or in the presenting of arguments such that the department reversed its decision.

§8. NOTIFICATION OF THE CHARGES

The rules provide that "at the hearing the alien shall be allowed to inspect the warrant of arrest," and also, that "if

during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him, and he shall be given an opportunity to show cause why he should not be deported therefor."[39] The rule formerly provided that "at the beginning of the hearing the alien shall be allowed to inspect the warrant of arrest and the evidence upon which it was issued."[40] Thus the provision that the alien may inspect the supporting evidence has been eliminated from the rules and the department has reserved the right not to disclose the sources of the information on which it issued the warrant of arrest. The charges in the warrant are general and consist of repetitions of the words of the statute. The inspection of the supporting evidence by counsel under the former rule performed some of the functions of a bill of particulars. Under the present practice there is nothing which performs that function in advance of the actual introduction of evidence at the hearing. The details of the charges are brought out by the examination of the witnesses. The rules permit the adding of new charges during the hearing. The details of such charges are usually brought out during the hearing by questions and answers before the formal charges are made. They are then added to the record. There is no provision in the rules for a formal notice of detailed charges served on the alien in advance of the hearing, and in practice no such notice is served. Unless there is a request for a postponement made by counsel and agreed to by the examining inspector, the warrant is exhibited at the beginning of the hearing and the case goes on immediately. In the same way when additional charges have been placed in the record, unless there is counsel present to ask for a postponement so that there may be time to prepare a de-

[39] Immigration Rule 19, subd. D, par. 2.
[40] Immigration Rule 22, subd. 5.

fense to meet them, the questioning continues and the alien has to make his defense as best he can by his replies to the questions.

§9. THE HEARING

Burden of proof. The immigration rules contain the following provision for a hearing: "Upon receipt of a telegraphic or formal warrant of arrest, the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported."[41] The language of the rule would seem to throw the burden of proof in such cases on the alien, and that seems to be the attitude of the immigration officers in many cases. The Act of 1924 provides[42] that "in any deportation proceeding against any alien, the burden of proof shall be upon the alien to show that he entered the United States lawfully." Whether this provision will apply to the case where expulsion is sought because of acts or events occurring after entry is undetermined. The language of the statute would not seem to cover such a case. As to whether the requirement that the alien sustain the burden of proof applies to the issue where there is a claim of citizenship, there is a conflict of decisions. The Supreme Court has said that the burden of proving alienage rests with the government,[43] but the case was decided before the passage of the Act of 1924, and the words were *dicta.* Since the passage of that act, the circuit court of appeals of the first circuit has held in a case where the proceedings were to expel on the ground that the accused was likely to become a public charge at the time of entry and had before entry been convicted of a crime, that the burden was on the government to prove alienage.[44] In proceedings under the Chinese Exclusion

[41] Immigration Rule 19, subd. D.
[42] Act of 1924, Sec. 23.
[43] *Bilokumsky* v. *Tod,* 263 U.S. 149.
[44] *Riley* v. *Hawes,* 1 C.C.A., 24 F. 2d 686.

Acts burden of proving citizenship has been placed by the statute on the person of Chinese race who claims that right.[45]

The presiding inspector. The hearing is usually conducted by an inspector. In almost half of the cases examined, the inspector who conducted the hearing was the same who had made the preliminary investigation, recommended the issuing of the warrant, and served it. The case had been assigned to him in the beginning and he carried it through to the end. Thus the same immigrant officer made the investigation, prepared the case for the government, and presided at the trial.

The inspector as prosecutor. The inspector not only presides at the hearing. He also presents the case for the government. He questions the government witnesses. He also as a matter of course questions the alien. There is no rule in these cases against asking the accused alien questions which may incriminate him. If the questions are material to his right to remain in this country, the department may reach conclusions against him from his failure to answer, and if there is any evidence against him, may order him deported.[46] If the alien is represented by counsel the latter questions the witnesses whom he has called. He also has the opportunity to question the alien and to cross-examine any witnesses called by the inspector to the formal hearing. In form the hearing is similar to a proceeding before a master for the taking of testimony, with the inspector in the dual capacities of master and attorney for one of the parties.

Lack of legal training. Most of the inspectors have little or no legal training. As a consequence their questions, as a rule, lack the precision and conciseness of experienced counsel. They are often wordy and cumbersome. There is a marked tendency to put questions in the formal wording of the statute, which in many cases must be incomprehensible to ignorant aliens with

[45] *Bilokumsky* v. *Tod,* 263 U.S. 149; *Chin Lund* v. *U.S.,* 2 C.C.A., 9 F. 2d 283.

[46] *Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103.

only a meager knowledge of English. For instance in one case the inspector asked, "The —— physician here testifies that you are now afflicted with constitutional psychopathic inferiority, which is a ground for deportation under our deportation law. Can you state any reason why you should not be deported?"[47] There is a tendency to digress from the issues in the case to all sorts of extraneous matters, some of them not material to any of the causes for expulsion provided for in the statutes. For instance, a taxidriver arrested under a charge of assisting a prostitute was asked how he bought his taxicab.[48] In another case where the charge was likely to become a public charge at the time of entry the inspector said: "Mr. A reports you owe him $265 for a number of years and that you don't intend to pay him. What have you to offer in reply to his report? Do you owe any bills in Canada? Did you pay for the Buick roadster you are driving around in? As you claim your mother and wife have over —— of your money, why don't you pay the above bills?"[49] In another case where the charges in the warrant were bringing in a woman for immoral purposes, the inspector asked numerous questions as to whether the alien had registered for the draft, whether he had been opposed to the entry of the United States into the war, and whether he had made statements to that effect.[50] In another there were numerous and discursive questions covering all kinds of matters in regard to the alien's life in Mexico before coming to the United States.[51] In another where the proceedings were on the charge that the alien was a "red agitator," numerous questions were asked as to whether he attended the synagogue and had expressed a belief in God.[52] In still another a Roman Catholic priest had entered from Canada, apparently without being questioned by the immigration officers. He had later applied to the immigration officers to have his entry legalized. A warrant was thereupon issued for his arrest on the charge of surrepti-

[47] File No. 55119–24. [48] File No. 55212–104. [49] File No. 55068–523.
[50] File No. 55226–4. [51] File No. 55076–39. [52] File No. 55119–76.

tious entry. At the hearing he was asked, "In the course of your lectures are you advocating any specific program for the —— people that might be considered antagonistic to or against other nations?" The record disclosed that a certain organization of persons of his own nationality had made complaints against him accusing him of attacks on the institutions of this country.[53]

Leading questions appeared from time to time.[54] The inspector had interviewed a witness and obtained information which he thought pertinent to the case. He called this witness at the hearing and endeavored to put this information into the record by questions and answers. In his efforts to accomplish this, he asked the witness leading questions.

Digression from warrant charges. The tendency to digress from the issues involved in the charges in the warrant is increased by the provision of the rules that new charges may be added during the hearing. The whole question of the right of the accused alien is involved in any case. Questions not apparently in point are sometimes asked with the purpose that by such means additional grounds may be discovered. The inspector after securing an answer which he thinks is evidence for an additional charge formally notifies the alien that such additional charge has been placed against him. For instance, the warrant has been issued on the charge that the alien entered without inspection. During the hearing the inspector brings out facts which he thinks will establish that the alien has imported another alien for an immoral purpose. He accordingly notifies the alien of the additional charge and invites him to show cause as to it. Again an alien is arrested under a warrant charging him with being likely to become a public charge at the time of entry. During the hearing on new evidence the inspector adds a charge that he entered without inspection.[55]

The record of the hearing. The primary purpose of the

[53] File No. 55225–21. [54] File No. 55057–27.
[55] *In re Ng Wah Chong,* 136 C.C.A. 247.

hearing is the preparation of a record of the evidence in the case to be sent to the department at Washington. The inspector is not a trier of the facts, but a master whose function it is to gather the evidence for his superior officer, the Secretary of Labor. The practice is, therefore, to make a complete stenographic report of the hearing, including the questions asked and the answers to them. At the completion of the hearing a typewritten record is prepared in all cases. In many cases the inspector who has charge of the case acts also as the stenographer. In fact inspectors are sometimes assigned to expulsion or "warrant cases" because of their skill in stenography. Thus the inspector, while presiding at the hearing, conducting the introduction of the testimony of the witnesses for the government including the asking of the questions, and cross-examining witnesses for the alien, takes the complete testimony in shorthand and after the hearing transcribes the record.

§10. WITNESSES

Process to summon witnesses. Most of the witnesses who appear at the hearings do so voluntarily. The statute gives commissioners and immigrant inspectors in charge at local stations authority to compel the attendance of witnesses and the production of books, papers, and documents. It further provides that in case this *subpoena* is not obeyed the immigration officers may apply to a federal district court which is empowered to issue an order requiring that the *subpoena* be obeyed and may punish for contempt if the disobedience continues.[56] The immigration rules, however, direct that this power be exercised only when absolutely necessary. They also provide that when an alien's attorney desires to have this power exercised to secure witnesses whom he desires to have called he must state in writing what he expects to prove by such witness and must show

[56] Act of 1917, Sec. 16.

that he has already made diligent efforts to secure his attendance voluntarily. After the witness has been called the examination must be confined to the purposes specified in the written application. The law does not provide for any compensation for witnesses either for time or for expenses in coming to the hearing. Because of these restrictive provisions of the rules and the absence of any compensation for witnesses and because of the additional fact that in a vast majority of the cases the aliens are not represented by counsel to make the necessary applications, the *subpoena* is seldom resorted to.

Ex parte testimony. In many cases witnesses are interviewed informally by inspectors before the formal hearing or after it. Sometimes the witness comes to the immigration station for the interview and a complete stenographic report of his testimony is made. In other cases the inspector in charge of the case visits witnesses at their homes or places of business and interviews them, making a complete stenographic report if he is a stenographer or has one with him, or making a summary of the testimony of the witness in the inspector's own words. Sometimes witnesses are interviewed in other places by the local officers there and a report of their testimony is sent to the station which has the case in charge.

Cross-examination for the alien. The rules provide that in case the investigating immigrant officer has examined a witness and counsel for the alien has not had an opportunity to cross-examine such witness, a *subpoena* shall issue. The provisions of the rules requiring counsel to give notice in writing of what he intends to prove by his examination of a witness before his attendance will be required have been held not to apply to a summons for cross-examination. This must be issued at the request of counsel as a matter of right.[57] Perhaps this applies only to cases where witnesses have been examined at a formal hearing. As will be seen later much testimony of an informal

[57] Immigration Rule 24, subd. A. *Ex parte Radivoeff,* D.C.D. Montana, 278 F. 227.

character is introduced and in many cases cross-examination by counsel for the alien is not possible.[58]

§11. THE EVIDENCE

The statutes contain no references as to the kinds of evidence which the officers may admit at the hearings or the kinds which should support the action of the department. The rules contain only a few references to evidence but nothing in the way of general principles. They provide that a record shall be taken of the testimony at the hearing and that this record shall, in addition to the evidence presented, contain certain specified information as to the accused alien. The courts have held that the technical legal rules of evidence do not apply in these administrative hearings.[59]

Testimony in the preliminary examination. In about one-fifth of the cases examined the only material evidence was the typewritten record of the preliminary examination of the alien held by an immigrant inspector before the warrant of arrest was issued. In these cases, as soon as the preliminary questions at the beginning of the hearing had been asked, the inspector showed the alien this record, told him what it was, offered to read it to him, and then asked him if it was true. He then formally offered it in evidence. In most of these cases the alien did not even request a reading. In a few which were closely contested, a reading was demanded and an attempt made to deny some of the statements contained in it. In a few cases there were allegations by the alien or by his counsel either that the record was wrong or that the question asked at the preliminary examination had been misunderstood. In a few cases the accuracy of the interpreter was questioned.

Testimony at the formal hearing. In over a third of the cases examined, the major part of the evidence consisted of answers

[58] See *infra*, §11, p. 108 *et seq.*; Chapter V, Judicial Review, §3, p. 163.
[59] *Bilokumsky* v. *Tod*, 263 U.S. 149, 157.

by the alien to questions asked him by the inspector at a formal hearing. In about a fifth of them other witnesses were called in and examined by the inspector in the presence of counsel for the alien if he had any. In these cases the proceedings followed more or less the form of taking testimony before a master. In some of the cases of aliens confined in hospitals for the insane there was no record of any testimony by the alien against whom the proceedings were brought.

Testimony Secured Ex Parte: Affidavits. In some of the cases there were affidavits put in evidence executed by persons not called to testify at the formal hearing. The inspector who conducted the hearing introduced these affidavits. There was often no authentication except by him. In one case where the charge against an alien woman was that she was a prostitute, which she denied, the testimony against her included six affidavits of persons not called for any cross-examination. These affidavits had been made in other cities. There was also a letter from the chief of police of another city, who did not, however, give in it the source of his information. The record also included the testimony against her of her brothers taken before an immigrant inspector at another station.[60] In another case the evidence relied on as proof that the accused was not a citizen as he claimed to be, was a letter from the clerk of a state court that a search of the records had failed to show any record of the naturalization of the accused or of his father.[61]

Reports and departmental memoranda. Often the inspector reported, and this report was put into the record, the substance of an interview with a witness and not the witness' own words. The inspector interviewed various persons and secured their stories. The records contained no statement as to whether these witnesses had been sworn. Their own words were not given. In one case the inspector during the hearing said to the accused alien: "Your husband told me that you are a bad woman." The

[60] File No. 55210–78.

[61] *Brader* v. *Zurbrick*, 6 C.C.A., 38 F. 2d 472.

husband was not called as a witness. His testimony appeared only in this casual way yet it became part of the record.[62] In another case the inspector reported the substance of his interview with the alien's father-in-law, whose statements were derogatory, and in the same case there was the report of another inspector of the substance of interviews with several different persons. The exact testimony of these persons was not in the record and those who gave it were not subjected to any cross-examination.[63] In still another case the inspector referred to statements made to him: "Mr. S of —— reports you have owed him $265 for a number of years";[64] and in another: "The county prosecuting attorney stated that he found among his, the alien's, effects a membership card of the Communist Party."[65] In another case the inspector incorporated into the record a letter from the keeper of a boarding-house in which the accused aliens had been living. The letter was not sworn to or authenticated except by the inspector. The writer was not called as a witness.[66] In still another the evidence included a letter from the inspector in charge at another immigrant station giving statements made to that inspector by the alien's husband. The husband was not cross-examined nor did the record state that his statements derogatory to the alien were under oath.[67] In a third case the evidence contained a letter from the alien's wife in Canada addressed to the immigration service complaining that her husband had deserted her and his children and asking the officers to return him.[68]

Letters and confidential information. In a case where the alien was accused of being a communist the sole evidence against him was a letter from his superior officer in an office in which he had worked before coming to this country, with whom the alien testified he had quarreled over details of the work and who had had him discharged from his position.[69] In

[62] File No. 55068–509. [63] File No. 55225–7. [64] File No. 55068–523.
[65] File No. 55119–33. [66] File No. 55210–104. [67] File No. 55246–44.
[68] File No. 55225–10. [69] File No. 55119–20.

a similar case against several alleged communists the inspector in charge of the hearing introduced in evidence affidavits of an investigator not called as a witness, which were to the effect that to the best of the affiant's knowledge and belief the accused was a communist. In the same case the inspector later on reported to the department that he had caused confidential inquiries to be made and that the informant was of the opinion, etc., including a statement of what the informant believed the alien would do if the warrant of arrest were canceled. He also reported that several labor leaders had been adjudged in contempt of court for disobedience of a court order forbidding picketing and that according to a newspaper report the accused alien was one of them.[70]

In some of the cases the immigration officer who had made an investigation reported his conclusions of fact as of his own knowledge. This was not put in the record in the shape of a formal examination but as a report in the officer's own words. Sometimes the details and sources were not given.[71]

The records of many cases also included memoranda and letters from one officer in the immigration service to another. These letters contained reports as to testimony given by witnesses interviewed by the officers, or reports of the contents of departmental records, such as the testimony of an alien in a former case or a report on the action of the department in prior proceedings. In one case the record contained such letters and memoranda in regard to statements of witnesses secured before the alien's arrest, but not put into the record at the hearing. In many cases also there were reports or certificates of physicians in hospitals as to the physical or mental condition of the accused aliens. Sometimes there were certificates of the results of examinations by surgeons of the Public Health Service. As a rule the statements in these documents were accepted by the officers without much question as to the conduct

[70] *Ungar* v. *Seaman*, 8 C.C.A., 4 F. 2d 80. [71] File No. 55226–4.

of the examinations. The certificate was authenticated only by the inspector in charge of the hearing. As a rule the physicians or surgeons who signed them were not called to testify or to be cross-examined.

Looseness as to documents. The records showed considerable looseness in the matter of documentary evidence. In most of the cases there was no authentication of the reports, letters, newspaper clippings, membership cards, etc., which the inspector showed to the alien and put into the record. This was especially true of reports from other departments of the government. The statement of the inspector that the paper in question was found in the alien's room or in the alien's pocket, or in the room of someone else, or that it was a letter from X or a report from Y was the authentication. In one case the examining inspector gave the following testimony as to certain documents which had been put into the record: "When I took —— into custody at the police station at —— these documents were delivered to me by the desk sergeant as ——'s property." Sometimes there was no evidence to show the history of a document. As a rule documentary evidence was received in many cases and much reliance placed upon it without much criticism of the sources from which the information contained in the document might have come.

Hearsay and opinion evidence. Hearsay evidence appeared in the records from time to time. A government employee called as a witness said that he did not know the facts as of his own knowledge and had first seen the alien at the office of the department.[72] An inspector asked a witness, a policeman:[73]

Question: Is there anything else you can tell me that will assist in getting at the true facts in this case?

Answer: Nothing, just that we know this Jap has been running a loose place and we are satisfied that he has made lots of money—he has a kind of slick way.

[72] File No. 55210–92. [73] *Ibid.*

Question: Are you depending entirely on his statement?
Answer: Not at all.
Question: Others have told you?
Answer: Mrs. B.

In another case a witness testified as to what her mother-in-law had told her of the noises and conditions in rooms she, the mother-in-law, had rented to the accused aliens.[74] In the same case another witness testified that she had received a letter from an unknown person in another country complaining about the actions there of the witness' husband. Again in another case the alien had been arrested while tending a soft-drink bar in a house alleged to be a house of prostitution. Two police officers appeared at the hearing as witnesses. One of them testified as to what a brother officer had told him about the alien, including an alleged conversation between the alien and an alleged prostitute.[75]

Opinion testimony was also introduced. A witness says that it is his opinion that the accused alien had been a watchman in a house of prostitution.[76] In another case a witness in a hearing was a county judge who testified that at one time he had been an immigrant inspector. The examining inspector asked him: "What would you recommend in this case, and personally as an ex-immigrant inspector, what is your opinion of this case so far as you know?"[77]

§12. SPECIAL TYPES OF CASES

Certain types of expulsion cases merit special discussion. These are as follows: those where the ground for expulsion is the allegation that the alien has become a public charge within five years after his entry, from causes not affirmatively shown to have arisen since that entry; those where the commission of crimes before entry is the ground for expulsion; those where it

[74] File No. 55076–43.
[75] File No. 55119–32.
[76] File No. 55247–25.
[77] File No. 55210–117.

is alleged that at the time of his entry the alien was likely to become a public charge; cases of alleged prostitutes or of persons connected with prostitutes; "red" cases; and cases of entry without inspection, and cases of administrative discretion.

a. *Public Charges within Five Years*

Cases where expulsion is sought on the ground that within five years after entry the alien has become a public charge constitute a large group. The statute provides that expulsion shall follow unless the alien shows affirmatively that the causes for his condition have arisen since his admission to the country. The burden of proving this is upon him and it is seldom successfully sustained.

In many of these cases there was a record of questions and answers in a hearing conducted by an inspector usually at a hospital. Sometimes the hearing was in different parts, one part at the hospital, the others at the home of relatives of the alien or at an immigration station to which the relatives came for the purpose. In a few cases the hearing included an interrogation by an inspector of physicians or nurses at the hospital where the alien was confined. In a few cases the record stated that the alien was in a physical or mental condition which made it impossible to question him in the regular way.

Medical certificates as to causes of disability. In all of these public charge cases the principal evidence was the medical certificate, signed by a physician at the hospital, but not sworn to, and the clinical history, if one was included. This latter was unsigned and unsworn to and appeared to be a copy of hospital records. The medical certificate contained a statement that the causes of the disability did not arise subsequent to arrival. Most of them gave as a reason for the physician's opinion the present condition of the patient, such as, "The progress of the disease shows the causes must have existed prior to entry." Other than this they contained no details as to the condition of the patient and the facts on which the physician relied for his opinion. The

certificates contained no facts as to the qualifications of the physician to reach the conclusion, as, for instance, his training and the length and character of his experience. In no cases was there any effort made to test these factors. In most the certificate was relied on almost completely without any questioning of the physician who signed it. In one case the certificate stated that the alien was suffering from insanity, hereditary and not due to causes arising since entry. There was included in the record a copy of the "medical history" of the case unsigned and accepted without any authentication. At the hearing the questions were largely routine as to the alien's family, date of birth, etc. The testimony of the alien seemed surprisingly lucid and included statements that none of his relatives had ever been insane. The department relied on the medical certificate and the medical history and deportation followed.[78] The alien had no attorney. No effort was made to test the accuracy of the statements in the medical certificate. It was accepted at face value.

Evidence to contradict the certificate. In a few of the cases the evidence of the alien or of his family as to his condition when he entered the country contradicted the statements in the medical certificate. In one such case the testimony of the alien's husband was that she had not been ill with any mental or nervous trouble until after the death of her nine-month-old infant after she came to this country. The case was heard over two years after her entry. The medical certificate stated: "It is reasonably certain that the disease is of long standing and existed previous to the landing in the United States." The physician who signed the certificate was not questioned. The department relied upon the certificate and deported the woman.[79]

In another the medical certificate stated that the cause of the insanity did not arise subsequent to landing. The testimony of the alien was that he was in good health when he landed and

[78] File No. 55223–18.

[79] File No. 55211–34.

had gone to work the next day and for a year and a half had had no illness. A warrant of deportation was issued.[80] In another the evidence, except for the medical certificate, was all in favor of the alien. The department, however, ordered the case held in abeyance for six months instead of canceling the warrant. They were loath to decide contrary to the medical certificate.[81] In another a man, sixty years of age, suffered a stroke of paralysis about seventeen months after his arrival in this country and was admitted to a hospital as a consequence. There was testimony that he had never been sick before his entry. He was deported on the theory that he had not shown the causes to be subsequent to entry. The department relied upon the certificate.[82]

Cases where certifying physicians are in doubt. In some cases the medical certificate was to the effect that the physician could not say that the causes were not subsequent,[83] or that they were unknown,[84] or indicated considerable doubt as to whether they existed before entry.[85] In one such case it contained the statement that it was impossible to say that the mental disorder was caused by factors operating before the immigration of the person. The alien woman in question had been in this country nearly three years before she had been committed to the hospital for the insane. Her testimony was that she had been sick only once before when she had had scarlet fever.[86] In another the medical certificate stated that the physician was "in no position to state that the causes bringing about this mental collapse existed prior to the time the patient landed."[87] In both these cases deportation was ordered. Again in another case the certificate stated, under the question as to whether the disease came from causes existing prior to arrival: "There is no information available to substantiate such a claim." There was evidence

[80] File No. 55237–227. [81] File No. 55211–38. [82] File No. 55211–4.
[83] File No. 55069–138. [84] File No. 55212–6. [85] File No. 55212–14.
[86] File No. 55212–110. [87] File No. 55212–18.

tending to show that the alien woman had not been ill before her entry. All the officers recommended deportation, but the Board of Review recommended that the case be held in abeyance for one year.[88] In still another case the alien had become a public charge suffering from tuberculosis. He had been a resident of this country for just twelve days short of five years. There was a statement in the certificate that the disease was so far advanced that it must have taken a longer time to develop than the period of almost five years which had elapsed since the alien's entry.[89] In another medical certificate it was stated that the physician had no information to justify the conclusion that the cause of insanity did not arise subsequent to arrival. No questions were asked the alien but the nurse and a physician were questioned. The record clearly showed the alien's insanity. She had, however, been in this country nearly two years.[90] Deportation took place in both of these cases. In another case the medical certificate stated that the physician had no means of being informed as to whether the causes existed prior to entry. The testimony of the alien's husband was to the effect that her health had been good until the birth of their child. She had been in this country nearly two years. Deportation was ordered and carried out; the husband and an American-born child were left in this country.[91] In all such cases as these where the medical certificate expresses doubt as to when the causes of the disability arose, the alien is deportable since he must show affirmatively that they arose subsequent to landing. The officers spend little time in investigation of such cases. Deportation is proceeded with as a matter of routine.

Persons found not to be public charges. The medical certificates in these public charge cases contained also the statement that the institution was supported in whole or in part by public funds. There was no reference as to whether the bills of the par-

[88] File No. 55212–60.
[89] File No. 55223–29.
[90] File No. 55212–54.
[91] File No. 55212–50.

ticular alien had been paid. It seemed to be assumed that they had not been paid because of the fact that the form of the public charge certificate had been used. It was apparently left to the alien or to his relatives or attorney to advance the defense that in fact his expenses at the hospital had been paid or that there had been a *bona fide* attempt to secure bills and such bills as had been presented had been paid. In one such case an alien woman testified that her sister had paid her expenses at the hospital for the insane to which she had been committed and was willing and able to take care of her. There was no evidence in the record to contradict this statement. There was the certificate and the statement in it that the institution was supported in whole or in part by public funds. Deportation was recommended on the ground that the woman had become a public charge. The alien had no attorney and the true facts as to the bills were not brought out in the record.[92] In another case an alien woman had been committed to a public hospital for the insane at the suggestion of her family physician because he thought she would receive better care there. Her brother with whom she had been living had offered to pay all her expenses and had paid all the bills sent to him which amounted to $10 per month. He was a well-to-do business man and was able to support her. The department ordered her deported as a public charge and it was necessary to resort to *habeas corpus* proceedings to secure her release.[93] In still another case a young alien had been committed to a state hospital for the insane. Later he had been removed to a private sanatorium at the expense of his parents. The record of the case failed to show whether or not his expenses at the public hospital had been paid. His parents resided in the state and under the state law were legally responsible for his expenses. He was ordered deported as a public charge on a record which contained a statement from a physician

[92] File No. 55211–29.

[93] *U.S. ex rel Brugnoli* v. *Tod,* D.C. S.D. N.Y., 300 F. 913.

that his condition was such that deportation would probably cause his death. His discharge was secured on writ of *habeas corpus* on the ground that under the state law he had not become a public charge.[94] Again in another case there was evidence that all the bills of the alien had been paid at the hospital for the insane where he was confined. His family had requested that bills be sent to them and had paid all that they had received and were able to continue such payments. The examining inspector reported this in his recommendation. The department refused to cancel the warrant but ordered the case deferred.[95] In still another similar case an alien girl had gone to a hospital because of the birth of her illegitimate child. The affidavit on which the warrant was issued charging her with becoming a public charge stated that the hospital bills had been paid at the time she left the hospital. The department proceeded with the case just as if she had become a public charge and ordered it held in abeyance for a year.[96]

b. *Crimes Committed before Entry*

As to crimes committed before entry as a ground for expulsion, the statute provides that there must have been a conviction of the crime or the alien must have admitted its commission. It must also be morally reprehensible. The fact that the officers are convinced that the crime was committed is not enough. In some cases the officers fail to see that the act must be a crime by the law of the place where the act was committed. The offense is assumed to be a crime. Thus in numerous cases adultery and sexual intercourse between unmarried persons were treated as a crime and expulsion ordered without any consideration of whether a crime had in fact been committed.[97] As to crimes committed after entry the alien must have been convicted and sentenced. The evidence in such cases usually includes the rec-

[94] *Ex parte Kichmiriantz,* D.C. N.D. Cal., 283 F. 697.
[95] File No. 55211–23.
[96] File No. 55069–116.
[97] File No. 55210–106; 55210–133.

ord of the conviction. In some cases crimes committed in this country or admissions that such crimes were committed here are relied upon as crimes committed before entry where after the commission of the act the aliens left the country even when the departure was for a short visit only.

c. *Likely to Become a Public Charge at the Time of Entry*

The most obvious case of this kind is one where the evidence shows that at the time the alien was admitted to the country his economic condition was doubtful, for instance, that he had little money, no trade or profession, was not skilled in any occupation, had no relatives or friends capable of helping him, or was of poor physique or suffered from some physical defect. The department, however, does not confine itself to cases of that kind. It is a common practice in expulsion cases to charge that the alien was at the time of entry likely to become a public charge. This is regarded as a miscellaneous general charge, a kind of general count within which the case may be brought if other alleged grounds fail.

Crimes before entry. In cases where the alien has admitted the commission before entry of some act which might not be a crime by the law of the place where it was committed, or might not be serious enough to be held a crime involving moral turpitude, the department is likely to hold that the commission of the act shows that at the time of his entry the alien was likely to become a public charge. The same practice is followed in many cases where the officers think on the evidence that the alien committed a crime, but there has been no conviction and no admission by the alien that he committed it. The theory is that these acts show that the alien is likely to be arrested and become a public charge in a station-house, jail, or prison.

Crimes and misdemeanors after entry. In cases where an alien has been convicted after entry of some minor offense not to be regarded as involving moral turpitude or not involving a sentence to a year or more of imprisonment, or where al-

though never convicted of an offense or perhaps never prosecuted, he admits he committed the acts charged by the officers, it is also the practice to find in his conduct evidence of criminal tendencies which show that at the time of entry he was likely to become a public charge. The records examined showed numerous cases illustrative of these practices.

An alien since his entry had been arrested for vagrancy and misconduct although the evidence showed that he had been employed and had not been the recipient of charity.[98] An alien had been convicted and given a short period in jail for violation of the prohibition laws.[99] In neither case did the offense come within the provisions of the statute which apply specifically to the commission of crime. The department, however, proceeded on the theory that these aliens had shown by their conduct that at the time of entry they were likely to become a public charge. An alien was sentenced to jail for six months for drunkenness and fighting. This was evidence of criminal tendencies at the time of entry and therefore he was held likely to become a public charge at that time and deported on that ground.[100] An alien boy of sixteen had been in this country eight months and had during that time worked in a factory and boarded with his brother. He was arrested and fined $100 for carrying a pistol, the only trouble he had had since his entry. The department found from this evidence that he was likely to become a public charge at the time he entered. The case, however, was held in abeyance for a time and the warrant was finally canceled.[101] An alien was arrested three times and convicted on two of these occasions for petit larceny, on which convictions he was sentenced to thirty days and ninety days respectively. At the time of his entry he had had some money and he had supported himself for three years by employment in this country, except in the cases where he had fallen into the clutches

[98] File No. 55068–520.
[99] *Lisotta* v. *U.S.*, 5 C.C.A., 3 F. 2d 108.
[100] File No. 55080–34.
[101] File No. 55211–18.

of the law. He was deported as likely to become a public charge at the time of entry.[102]

A Canadian news agent on a train between the United States and Canada brought with him on his run into this country a grip containing three bottles of whiskey with which to celebrate his "lay-over" in this country. He was arrested, pleaded guilty, and was fined $25. He had been a good worker and had $100 he had saved. He had never been discharged. A warrant for his arrest as likely to become a public charge at the time of entry followed this episode. Deportation was recommended on that ground by the inspector who heard the case. The local officer in charge recommended cancellation on the ground that the alien "had been punished sufficiently." The warrant was canceled since the alien in question had returned voluntarily.[103] In another case the troubles of the alien with the police for minor offenses were thought to be sufficient evidence to support a charge that he was likely to become a public charge when he entered.[104] In another similar case two Syrians had been resident in this country for eight years, during which time they had supported themselves. One of them had a fruit store and the other made $45 a week in wages. They went to Canada and tried to smuggle in two or three other Syrians but failed. They were arrested in Vermont and tried on an indictment for conspiracy to evade the immigration laws, but the jury were unable to agree and the charges were later dropped. They were arrested under a warrant of the Secretary of Labor and ordered deported as likely to become a public charge at the time of their last entry, that from Canada. Their attempt to smuggle in their fellow countrymen was the ground for this action. They secured their release from the immigration officers by *habeas corpus* proceedings. The court held that their offense was not a ground for deportation and that it was

[102] File No. 55076–36.
[103] File No. 55068–495.
[104] File No. 55068–520.

"preposterous" to find that "aliens who had supported themselves for eight years" were likely to become public charges.[105]

Surreptitious entry. A young Mexican, twenty-three years of age, strong and well and at the time of the hearing employed as a section hand, was arrested on a department warrant on the charge that he had entered without inspection. This was shown to have occurred more than three years before. During this period he had never been ill and had never found it necessary to secure public aid. The examining inspector reported that the charge that he entered without inspection could not be sustained since he had entered more than three years before, but that the charge that at the time he entered he was likely to become a public charge could be, because he had entered by crossing the river. He was deported on that ground.[106] Because of his surreptitious entry he was, as soon as he entered, liable to be arrested and he was therefore likely to become a public charge.[107] By this construction of the statute, that evidence of surreptitious entry shows that the alien was likely to become a public charge at the time, the jurisdiction of the department in such cases is extended from three years to five. In the same way the making of false statements while being inspected for admission to the country might subject the alien who made them to arrest and prosecution and perhaps imprisonment for perjury. Even if the false statements were not made under oath, the giving of them might be regarded as evidence that the alien was unreliable and lacked moral stamina and respect for law. Therefore, in either case, the conclusion of the officer that an alien has given false statements while being examined for admission is treated as evidence that at the time of this admission the alien was likely to become a public charge. This also extends the jurisdiction of the department since the giving of false testimony while being examined for admission is not made a ground for exclusion by the statute.

[105] *In re Wysback,* D.C.D. Mass., 292 F. 761.

[106] File No. 55247–54. [107] File No. 55068–551.

Marital difficulties. A husband and father had been in this country for eighteen months with his wife and children and had supported them during that time by working at his trade as a barber at which he earned about $25 a week. Suddenly he deserted them and, posing as a single man, went through a marriage ceremony with another woman with whom he lived as her husband in another state. Later on his wife became insane and after explaining the state of affairs to the second wife he took the children to live with them. When his wife died he went through a second marriage ceremony with the second. More than three years after his entry he was arrested on a department warrant and ordered deported as likely to become a public charge at the time of entry. The officers based their conclusions on his acts more than eighteen months after his entry as evidence of a tendency present at the time of his entry. He was released on *habeas corpus.*[108] The allegation that a man had deserted his family in Canada to come to the United States on a visit was used as a basis for a charge that at the time of his admission he was likely to become a public charge. The hearing showed that there was no evidence to support the charge, but the department held the case in abeyance for six months instead of canceling the warrant. The local officers had recommended deportation.[109] The following was an extreme case. An alien of French race had settled in California. He and an alien of Italian race had gone through a marriage ceremony there in the presence of a party of friends without license or celebrant. They had lived together for twelve years believing themselves to be husband and wife and regarded as such by their friends and neighbors. They went to Canada on a visit incident to the man's business and returned. They then discovered through newspaper articles that their marriage in California was not valid because of provisions of the code of that state. The man offered to go through another ceremony with the

[108] *Ex parte Costrelli,* D.C. D. Mass., 295 F. 217.

[109] File No. 55212–104.

woman in compliance with the law of the state, but she refused and they separated, he giving her a sum of money. Later he married an American woman. He was ordered deported partly on the ground that on his second entry from Canada with the woman who he thought was his wife, he had imported a woman for an immoral purpose, and partly on the ground that at that time because of the illegality of his marriage he was likely to become a public charge. He was discharged on *habeas corpus*.[110]

Sexual immorality. Violations of the code as to sex morals before entry are not in themselves a ground for expulsion. They are often brought within the statute by the immigration authorities by being treated as evidence that at the time of entry the alien who committed them was likely to become a public charge. An alien woman admitted such immoral conduct in Canada before her admission to this country. On the other hand, she had supported herself and her child in this country for nearly five years and had been sending the child to school. She was ordered deported as being, at the time of entry, likely to become a public charge.[111]

Immoral conduct by an alien after his entry is commonly treated as evidence to sustain a finding that at the time of entry he was likely to become a public charge. In one case the brother of an alien girl made affidavit that she had run away and was living with an alien man who had deserted his wife and family.[112] She was arrested on a warrant on the ground that at the time of entry she was likely to become a public charge. In another an alien girl during her first two years in this country gave birth to two illegitimate children. There was evidence in the record tending to show that before her entry to this country she had been well behaved and had lived quietly with her mother. In his report the examining inspector referred to her undesira-

[110] *Ex parte Morel*, D.C. W.D. Wash. N.D., 292 F. 423.

[111] File No. 55210–97.

[112] File No. 55237–242.

bility and to the fact that her morals "were entirely controlled by outside forces." She was deported accompanied by her two American-born children, the charge against her being "likely to become a public charge at the time of entry."[113] In another an alien girl after a year's residence in this country had given birth to an illegitimate child. The father of this child appeared as a witness and testified that he and the girl had had relations on the boat coming over. This she denied. She admitted relations with him after they had reached this country. Since her entry she had supported herself except for the period of her confinement to a hospital when the child was born. The time of the child's birth indicated that it had been conceived since her admission to this country. She was ordered deported as likely to become a public charge at the time of entry. The additional ground alleged that she had become a public charge from causes not shown to have arisen since entry was hardly applicable in view of the time of the child's birth.[114] In still another case the sister and brother of an alien girl testified that she had had sexual relations with the sister's husband and had given birth to a child of which he was the father. Their testimony showed much animus against her. She testified that while her sister was away the husband "took advantage of her." The testimony of other witnesses tended to show that her general conduct had been satisfactory. There was no evidence to support the indefinite charges of the sister that the accused had been guilty of immoral conduct before coming to this country. At the time of the hearing the girl was employed. She was ordered deported as likely to become a public charge at the time of entry. An additional charge of illiteracy added during the hearing justified the action in any event.[115]

Misfortunes subsequent to entry. Misfortunes suffered subsequent to entry are regarded as evidence that the alien was at the time of entry likely to become a public charge. A boy, nine

[113] File No. 55211–27. [114] File No. 55212–87. [115] File No. 55237–191.

years of age, was admitted to go to his mother who had been resident in this country for several years. He also had two aunts in this country. Shortly after his admission his mother became insane. A warrant was issued for the boy's deportation on the ground that he had been likely to become a public charge when he entered.[116] In another case a husband, wife, and their seven-year-old son were admitted. At the time of their entry their destination was the home of the husband's brother. Thirteen months later the husband deserted his family. The mother and child were deported as likely to become a public charge at the time of entry.[117] The instability of the husband as shown by his desertion was relied upon. In another a family of husband, wife, and five children were admitted. Eleven months later the husband and father died after a week's illness. He had provided for his family up to the time of his death. The family were proceeded against by the department and an order to deport them issued on the ground "likely to become a public charge." Meanwhile, however, the mother had remarried and her second husband was supporting the family. The case was held in abeyance for six months and again for a year.[118] In still another the husband died of tuberculosis about a year after he brought in his wife and she had since their entry given birth to a child. She was ordered deported on the same ground, "likely to become a public charge at the time of entry," on the theory that at the time of their entry her husband had been afflicted with tuberculosis. Subsequently she married again and the warrant was canceled.[119] Again a husband became a public charge about fourteen months after entry because he was suffering from tuberculosis. The department held the wife subject to deportation as likely to become a public charge at the time of entry on the theory that "she was apparently dependent upon her husband." The evidence showed, however, that she was employed

[116] File No. 55237–244.
[117] File No. 55212–13.
[118] File No. 55212–55.
[119] File No. 55212–39.

and the report of the examining inspector stated that she "appeared entirely capable of self-support." Representations were made to the officers to permit the wife to remain and offers to see that she was employed and to give bond for her. The department refused and issued the warrant of deportation.[120] An alien woman in good health entered with one child, coming to her husband then a resident of this country and employed as a machinist and making enough to support the family. Later he lost his job and then another because of strikes. He then deserted his family and went to Russia leaving them penniless. The inspectors and the reviewing officers recommended the deportation of the wife and child on the ground that they were likely to become a public charge at the time of entry. The Secretary, however, canceled the warrant for lack of evidence.[121] An alien girl was admitted with some money in her possession and secured employment immediately as a domestic servant. Eight months later she became acquainted with a man with whom she began to keep company. About ten months later according to her testimony this man assaulted her and as a result she became pregnant. She was deported as likely to become a public charge at the time of entry.[122] In still another case the conclusion that the aliens in question were at the time of entry likely to become a public charge was reached because "the use of subterfuge indicates lack of moral stamina and this taken in connection with the alien's general manner convinces me."[123]

d. *Prostitutes or Persons Connected with Prostitution*

Reliance on convictions in criminal cases. In many of the cases where department warrants were issued against alleged prostitutes, the evidence included the police court record of the conviction of the accused. In these cases, however, the ground

[120] File No. 55211–11.
[121] File No. 55076–40.
[122] File No. 55211–5.
[123] File No. 55210–86.

for expulsion is the commission of the act and not the conviction. Although the immigration officers are not bound by the conviction the tendency is to regard it as conclusive of the accused alien's guilt. In a few cases efforts were made to show that the conviction by the police court magistrate was not justified. Thus in one the alien woman claimed that she had been falsely convicted on the perjury of a complaining witness. The immigration officers did not attempt to call this witness for examination. They relied on the fact of the conviction and the report of the examining officer that the appearance and manner of the woman tended to support the charges.[124] In another case, however, where the police court record showed a conviction, the immigration officers found that the alien woman in question had not known any English and had not known what was going on in the court room, and came to the conclusion that there had been a mistake, and the warrant was canceled.[125]

Conflicts of testimony. Some of these cases and cases related to them where the charge is that there was entry for an immoral purpose exhibit some of the characteristics of a criminal trial. There is a conflict of testimony between complaining witnesses and the accused. For instance, in one case one of the witnesses, a police officer, testified that he saw the accused alien woman soliciting men on the street as a prostitute and her husband across the street watching her. Both the man and the woman denied this. The department had to decide on the record of the testimony which to believe.[126] In another, investigators for a government social hygiene agency testified that a hotel of which the alien was manager was being used as a house of prostitution. The counsel for the accused introduced witnesses, whose testimony conflicted with that of the others in many points, in an effort to prove that if the hotel were so used the alien had no knowledge of it.[127] In another, two girls arrested

[124] File No. 55210–287.
[125] File No. 55210–133.
[126] File No. 55210–78.
[127] File No. 55210–74; 55210–92.

by the police as prostitutes testified that they had practiced in the boarding-house kept by the accused and had given him money. He in his testimony denied this and his attorney introduced witnesses to testify as to the good character of the house.[128] In another, the principal complaining witness was a wife who testified that the accused alien girl had been too intimate with her husband and another witness accused the girl of having been a prostitute before her entry into this country and since. This the accused denied. Evidence of her good reputation was also introduced. In this case the department believed the testimony of the accused and canceled the warrant.[129]

e. *"Red" Cases*

In the "red" cases the evidence usually consisted of two general kinds, documents and the interrogation of the accused alien himself. Other witnesses were seldom called in except in those cases where the issue was the possession of "radical" publications with knowledge of their character. The documents were "radical" periodicals and newspapers and membership cards in "radical" organizations. These had been seized by arresting officers. In the introduction of these documents in evidence there was the same looseness as to authentication as in other cases. Often the officers who had made the seizure were not called as witnesses.

In the interrogation of the accused the usual practice was to ask him questions framed in the words of the statute: "Do you believe in the overthrow of government by force or violence?" "Are you an anarchist?" "Do you believe in revolution?" "Have you read any anarchistic literature?" "Have you read any publications of the —— party?" In these cases the immigration officers were evidently trying to obtain some admission from the alien which might bring the case within the literal interpretation of the words of the statute.

[128] File No. 55210–137.

[129] File No. 55210–134.

The easiest and most concrete case was one where the issue was membership in an organization already held by the department to be proscribed under the statute. The extent of the participation of the accused in its activities was not an issue. For example, the accused testified that he attended a meeting at which it was voted to organize a branch of the communist party. He had voted aye but since the meeting had made no further application and had taken no further part. He testified that at the time he had been undecided. When questioned further he said: "Yes, I voted for it, but I do not know what I was voting for. I don't endorse it but I have to say yes now. I might just as well go one way as the other." He was deported on this admission. Subsequently his case came before the department upon an application by him for permission to reapply for admission and upon the reëxamination of the case which followed, the warrant was canceled.[130]

The following questions and answers in the records of these cases throw some light on the difficulties involved and on the nature of the proceedings.

Q. Are you satisfied with the conditions under which you work?
A. As far as for me I am satisfied.
Q. Have you anything against your employer?
A. The only thing I have the boss swears at me sometimes and I have nothing against the company.[131]
Q. Do you believe in revolution?
A. Don't know if it would make things any better. If it would make things better would be O.K.[132]
Q. Do you believe in law?
A. What law?
Q. The law of the United States.
A. Sure I do.
Q. Do you entertain opposition to all organized government?
A. I do not know what kind of an organization that would be.[133]

[130] File No. 54859–122.
[131] File No. 54885–71.
[132] File No. 54859–116.
[133] File No. 54859–125.

Q. But you had known that the communist party advocated the overthrow of the government by force and violence?
A. No.
Q. Haven't you read the platform?
A. No. If I had read it I did not understand the big words.
Q. And it advocates the overthrow of the government in this country doesn't it?
A. That is what you said about it.
Q. You know it now.
A. I didn't know it at the time.[134]
Q. Do you believe in God?
A. Yes.[135]
Q. Do you advocate the communist form of government for the United States?
A. Not unless the people of the United States would be in favor of it.
Q. Since you have been in this country have you read communist literature?
A. I am reading many books on communism I get from the public library.
Q. Are you satisfied with political conditions as you find them existing in the country at the present time?
A. I don't believe any sane man would ever be entirely satisfied with any conditions in this world at any time; still I may add I like the United States and its people enough to have spent here many years of my existence.
Q. Are you a subscriber to any socialistic or communistic magazine in this country?
A. No.[136]

f. *Cases of Entry without Inspection*

The statute provides that within three years after entry any alien shall be deported, "who enters without inspection."[137] The clearest case of this type is surreptitious entry such as slipping

[134] File No. 54859–136.
[135] File No. 54885–64.
[136] File No. 55119–20.
[137] Act of 1917, Sec. 19.

over the border at night or being smuggled in at some port or at some part of the coast not indicated as a port. The statute also provides that any person who shall, after being duly sworn, knowingly give false evidence in relation to the right of an alien to be admitted to the United States or to reside therein shall be deemed guilty of perjury and punished as provided for that offense by the federal statutes.[138] There is no provision that the giving of false evidence or the making of false or misleading statements during an examination of an alien for admission shall be a ground for expulsion. Apparently the sanction of the criminal process is relied on. It has been held that the offense of perjury, if it is committed at the time of the inspection, is a crime committed after entry and not one committed before entry.[139] Consequently in such cases there must have been a conviction after a criminal trial and a sentence for more than one year.

It is, however, the practice of the immigration officers to treat the giving of "false and misleading statements" by the alien at the time of his admission as evidence to support a charge in a warrant of arrest for expulsion that "he entered without inspection." Numerous cases can be found where it is alleged in the warrant that the alien "entered by means of false and misleading statements, thereby entering without inspection." The charge does not state that the statements were knowingly and intentionally false. Cases where there was misunderstanding of the questions on the part of the alien or of the answers on the part of the inspector would be included. So would cases of forgetfulness or honest mistake. It seems that the same charge would cover a case where, because of the haste or lack of care of the inspector and the failure of the alien to volunteer information, the inspection did not bring out all the material facts.

[138] Act of 1917, Sec. 16.

[139] *Ex parte Keizo Shibata,* 9 C.C.A., 35 F. 2d 636; *Squillari* v. *Day,* 3 C.C.A., 35 F. 2d 284.

An alien woman secured admission from Canada by misrepresenting that she wanted to go to Poland through New York and thus securing a permit to go in transit. Her deportation was ordered on the ground that she had entered without inspection.[140] A Canadian girl was questioned by an inspector on a train. He asked her if she were coming on a visit and she answered yes. In answer to another question she said that she did not know for how long. Later the immigration officers discovered that she had been ordered by her employers from her position in Canada to a similar position in this country, she did not know for how long, and at the time of her entry was on her way to her new post. She was ordered deported as having entered without inspection but secured her release on *habeas corpus,* the court saying that if she did fail to give all the information, she had not entered without inspection but had in fact been inspected by the officer who interviewed her.[141] An alien woman gave to the inspector who was questioning her at the time of her admission her maiden name instead of her married name and the wrong destination. She was ordered deported as entering without inspection but was discharged by a court which held that the evidence that she gave this false information did not establish that she entered without inspection.[142] An alien entering from Canada was not stopped by the officers and entered "in the line" without being questioned. He was later on arrested as having entered without inspection. The local officers recommended expulsion but the department at Washington canceled the warrant on the ground that there was no evidence that he intended to evade the law.[143] These are a few of the cases which illustrate the problems involved in the enforcement by the department of the ground for expulsion "entered without inspection."

[140] File No. 55227–15.
[141] *Ex parte Gouthro,* D.C. E.D. Mich. S.D., 296 F. 506.
[142] *Ex parte Guest,* D.C. D.R.I., 287 F. 884.
[143] File No. 55068–521.

g. *Cases of Administrative Discretion*

The statutes make no mention of any exercise of discretion in their application to the expulsion of aliens. They give the immigration officials no power similar to that of a judge in a criminal case to suspend sentence, or of a chief executive to issue a pardon. If the Secretary of Labor or the Assistant to whom the duty has been delegated has found the facts or conditions which under the statutes constitute a ground for expulsion, a literal interpretation of them requires that deportation follow. There are no provisions for the exercise of clemency because of the merits of individuals or the hardships to them and others which may result from their expulsion.

The need for executive clemency. Cases occur where the evidence shows that the alien is technically subject to expulsion, but is except for the technicality a desirable resident. In addition it may appear that the deportation would work terrible hardship upon him and upon others, some of them American citizens. Dictates of humanity and common sense are all opposed to the banishment. A resident alien had, after a visit to relatives abroad, been unable to work his passage back to America and had effected entry as a stowaway. He was otherwise desirable and had always provided for his children. He had made three applications for his final naturalization papers, but had been refused each time because he was an enemy alien. To deport him would have removed the means of support of three American-born children and made them public charges.[144] A man who had been abroad after a residence in this country of nearly twenty years feared exclusion on his return because he was illiterate. He had been away for less than six months and was exempt from the literacy test. He had four American-born children. He bribed a sailor to permit his escape from the ship and thus entered without inspection. Except for his failure to obey the law as to inspection he was not an undesirable resi-

[144] File No. 55212–109.

dent.[145] An alien returning to a residence in this country of fourteen years after a brief trip abroad, had been told by some employee on the ship that he might go ashore and had in that way entered without inspection. He also was not an undesirable person.[146] A man, clearly deportable as a stowaway and according to the evidence something of a nc'er-do-weel, had rendered acceptable military service during the war and had an American-born wife and an American-born child to whom he was attempting to return when he entered as a stowaway.[147]

Cases were found where aliens had been resident in this country for many years and had gone to Canada or to Mexico on a visit. On their return they secured entry without complying with the law as to inspection. Technically they were subject to expulsion. Except for this they were not undesirable.[148] Aliens had entered for a visit and had subsequently changed their minds, secured employment and settled down, but had neglected to apply to the immigration service to have their admission legalized.[149] A girl had been sent for by her fiancé, a resident of this country, in order that they might get married, and had been admitted. Later she was found to have tuberculosis and there was medical testimony to the effect that the disease was present at the time of her entry.[150] An alien woman had resided in this country for thirty-three years. She had become a patient in an insane asylum, but had escaped and made her way to the old country. Later she had returned and secured admission at the port of entry. At the time the case came before the department, she was employed and highly recommended by her employers as a person of good health, good conduct, and industry.[151] Under the law she was subject to expulsion on the ground that before her admission she had had an attack of insanity. A girl had secured admission by misrepresenting that she was coming on a visit. She was seduced under a promise to

[145] File No. 55227–9. [146] File No. 55227–3. [147] File No. 55211–9.
[148] File No. 55246–25. [149] File No. 55068–518. [150] File No. 55076–31.
[151] File No. 55212–36.

marry and gave birth to a child. As a result she became a public charge in part, although some of her bills at the hospital had been paid. She was ordered deported as a person likely to become a public charge at the time of entry and as having entered without inspection. After this order had been issued the department received a letter from her employer calling attention to the fact that she had always supported herself except for the few weeks when her child was born, and was an excellent mother and an admirable domestic servant and offering to give bond for her.[152] A man who had been employed continuously since his admission nearly two years before had become a public charge at a hospital because of an illness diagnosed as tuberculosis. After eight weeks in the hospital he had been discharged as cured. He gave every indication of a willingness to pay his hospital bills as soon as he could, by returning to his employment, earn the money. His wife was employed. They had four children, but no relatives abroad to whom the family could go if they were deported.[153] A family of three, mother, son, and daughter, were admitted with transportation to their destination and a reasonable sum of money. The son secured employment, but because of illness which he contracted within five months after their entry and the inability of the mother and daughter to obtain employment, they had had to secure aid from charity.[154] There were still other cases where aliens had become public charges within five years of their entry. Their family and friends were all on this side and to send them back would cause great hardship. There was an offer to pay their bills and in some cases to furnish bond for future payment.[155]

An alien woman, desiring to escape from an unhappy marriage and to live with her sister already resident in this country, had secured her admission by letting her companion, an American citizen, make certain misrepresentations for her at the time

[152] File No. 55211–15.
[153] File No. 55237–206.
[154] File No. 55076–32.
[155] File No. 55069–120; 55211–14.

of the inspection. At the time the case came up she was well employed living with her sister and supporting her child.[156] Another woman also unhappily married had effected entry without inspection at the Canadian border with her father.[157] An alien accused of being a communist was found to have three American-born children, ages seven, five, and three years, dependent upon him for support, to be an excellent workman, and except for his political and economic views, a desirable citizen.[158] An alien during a prior stay in this country had been convicted of some technical violation of a statute and had served a term of imprisonment for it, but was in no other way undesirable. There was also evidence that the conviction had been through an error and the defendant had been imposed upon at the time.[159] Aliens otherwise desirable had become subject to expulsion by entering without complying with the requirements as to inspection or the possession of proper papers. They were willing to depart at their own expense to avoid the discomfort and humiliation of deportation under custody.[160] An alien had been arrested under the charge of surreptitious entry. He admitted it, but because he had received word of the illness of a member of his family, he had applied for permission to depart voluntarily at his own expense.[161]

Deferred action as executive clemency. In these cases and in many like them, the administrative officers have been faced with the problem of aliens technically deportable, whose deportation would in most cases accomplish no purpose and would in many cases subject them and others to great hardships. Aliens innocent of violation of the law and even citizens would in some of them be affected. The statutes contained no answer to the problem. They contained no provisions for the exer-

[156] File No. 55246–44.
[157] File No. 55225–12.
[158] File No. 54859–133.
[159] File No. 55076–34.
[160] File No. 55247–44; 55225–41; 55225–21; 55225–44; 55225–40; 55247–29.
[161] File No. 55227–28.

cise of administrative discretion in such cases. Three methods were employed. One was to direct that the case be deferred or held in abeyance for six months or a year. This might be done before the decision to deport had been rendered or after the warrant of deportation had been issued. In some of these cases a report was received from the local officers at the end of the period of delay, on the basis of which a further stay was granted; or where the report was favorable to the accused, the warrant of arrest was canceled and the case closed. In some of the cases unfavorable reports were received at the end of the period and thereupon deportation was proceeded with. In some of the cases the warrant was canceled immediately. In the cases where permission to depart voluntarily at their own expense was requested by persons not themselves undesirable, it was granted.

Deferred action in doubtful cases. The practice of exercising administrative discretion in the deferring of action is also made use of in two other classes of cases. One of these consists of cases where there is a conflict of testimony making the decision a matter of doubt and rather than render a decision the department resorts to the expedient of postponing action for six months in the hope of getting more light by a later report on the conduct of the alien since the hearing. The other is made up of cases where the evidence as developed shows that the alien is not guilty of the charges alleged, but the officers either think that he is in fact guilty or think that he is of questionable desirability and that they ought to retain jurisdiction over him. This they accomplished by a decision that the case be deferred, sometimes with a further requirement that the alien report to the local office at stated intervals during the period of delay. As in some of the exclusion cases, this is often spoken of as probation or parole.

In two cases illustrative of the first class, the evidence in support of the charge that alien women were prostitutes was the records of their convictions in magistrates' courts on the same

charge. The officers regarded the fact of conviction as strong evidence. Yet there was some evidence to show that the summary trial before the magistrate had been unfair and that the women were in fact not guilty. Faced with this problem the department ordered the cases to be deferred for six months in order that later reports might be made.[162] In another case the evidence was that a boy accused of being a public charge at the time of entry had been arrested on a charge of vagrancy in one city, and in another had been arrested and told by the police officer in charge at the station-house that he must keep away from the sister of the complaining witness. There was doubt as to whether at his entry he had been properly inspected. There was, on the other hand, evidence that he had constantly been employed since he came to this country. The department again solved the difficulty by ordering that the case be deferred and that the boy be paroled for six months with directions that he report at intervals to the local immigration officers.[163]

Deferred Action to Retain Jurisdiction: Probation. Cases of the second type were numerous. Some have already been mentioned in other connections.[164] Two years after a family of father, mother, and five small children had entered, the father died suddenly. Since their entry a sixth child had been born. The husband, until his illness, had supported the family. The widow and children were proceeded against for deportation as likely to become a public charge at the time of entry.[165] Six months after the admission of a man and his wife and child he became insane. The wife and child did not become public charges. They lived with the wife's sister and the wife had employment which enabled her to support herself and the child, and at the time the case came up she had saved $300 from her wages.[166] In two cases aliens had not become public charges

[162] File No. 55210–90; 55210–83.
[163] File No. 55068–520.
[164] See Chapter III, §11, p. 66.
[165] File No. 55212–55.
[166] File No. 55247–45.

since the bills at the hospital of both had been paid. In one there was an offer to guarantee future expenses by the family and also by a fraternal society, and in the other the alien had already been discharged from the hospital. In the first case the alien was proceeded against as likely to become a public charge at the time of entry and as becoming a public charge within five years after entry, and in the second, as being a public charge at the time of entry.[167] A woman was shown by the evidence to have been the victim of an attempt of relatives to have her placed in a hospital as a public charge in order to cause her deportation. She had been employed at the hospital during her short stay there and then been discharged from the institution and had been employed since that time. She filed an affidavit of a physician that she was in good health. She was proceeded against by the department on the grounds that she had become a public charge within five years after entry and was likely to become a public charge at the time of entry.[168] Proceedings to deport a boy of fifteen were brought six months after his entry on the complaint of a director of special schools that the boy had the mentality of a child of seven. He had come to his mother after the death of the grandmother in Europe with whom he had been left when the family had migrated to America, and had no family or friends abroad. There was abundant evidence to show that what the boy needed was treatment for bad teeth and tonsils, that the treatment was being given, and that he was improving. None of the family had become a public charge, and the boy was being sent to the doctor at their expense. All of the children were employed except one married daughter and the boy in question. The examining inspector reported that the boy was able to read and write and seemed fairly bright. This testimony was corroborated by that of a public health surgeon who had also examined him. The grounds for expulsion alleged in the warrant of arrest were that at the

[167] File No. 55211–23; 55212–106. [168] File No. 55211–38.

time of his admission he was a child under sixteen years of age, unaccompanied, and that at the time he was likely to become a public charge. The first of these was clearly not applicable since the provision of the statute as to children under sixteen directs exclusion only when they are not "accompanied by or coming to one or both parents,"[169] and in this case the boy had come to his mother who had been in this country for nine years.[170] A boy of sixteen had been arrested and fined $100 for carrying a pistol. The fine had been paid. The boy's father and mother and an adult brother resided in this country and the boy himself had been steadily employed since his entry eight months before. There was no evidence of any other trouble. The ground alleged in the warrant of arrest was "likely to become a public charge at the time of entry."[171] A man disclosed by the evidence to be a person of considerable intelligence was charged with being a communist. The only evidence against him was a letter from a former superior officer in a government office abroad, with whom he had quarreled and who had secured his dismissal, and the fact that he admitted reading certain books on "sociology" and on communism, most of which he had secured from the circulation department of the local public library in this country. The Board of Review in this case stated that the evidence did not support the charges.[172]

In all of these cases the evidence was insufficient to sustain the charges. In some of them the examining inspector or some of the officers higher up indicated that that was their judgment. Yet in every case the department instead of canceling the warrant ordered that the case be held in abeyance for six months or a year, in some of them directing that the aliens were to submit reports at intervals to the local immigration officers. Thus the officers retained jurisdiction over the accused and attempted to maintain a kind of system of probation and

[169] Act of 1917, Sec. 3.
[170] File No. 55212–12.
[171] File No. 55211–18.
[172] File No. 55119–20.

exercise a supervision over them which the statute did not authorize or the evidence justify.

§13. PROCEEDINGS AFTER THE HEARING

The hearing as an investigation not a trial. The hearing under the warrant of arrest is not the trial. It is the taking of testimony before a master. The theory is that the subordinate officer is conducting an investigation and gathering evidence on the basis of which the superior officer who is the judge will render his decision. The inspector who conducts the hearing is not in theory the trial judge. The Secretary of Labor is not an appellate court to which appeal may be made from the decisions of the local tribunals, as is the case in the exclusion process. He is the original trier of the facts. There is in the expulsion process no appellate tribunal. There is one trial and the judgment in that trial is conclusive. The local immigration officers cannot, therefore, discharge an alien from custody after the hearing under the warrant of arrest as can the boards of special inquiry in exclusion cases when they vote to admit. The local officers make the investigations, conduct the hearings, prepare the records, and file their recommendations. They must in all cases, however, forward the record to the department at Washington. There the decision is rendered on the basis of this record.

The record in a warrant case. A record in an expulsion or "warrant" case usually contains the following: There is an application for a warrant of arrest with supporting evidence and a carbon copy of the warrant which was issued in response. If the case has been completed the original warrant will be there also. In many cases the application is in the form of a code telegram from the local immigration officer in charge, requesting that a telegraphic warrant be issued and in such cases the record also contains a copy of the telegraphic warrant of arrest. In such cases the record usually also contains the formal

written application for a warrant and a carbon copy of the formal warrant. Other documents usually in the record are: the certificate of the alien's entry or of his rejection by a board of special inquiry; a typewritten record of the preliminary examination of the alien if there was one, or of the examination of other witnesses during the investigation before the warrant of arrest had been issued; a typewritten record of the testimony in the formal hearing; a summary of the case with findings and recommendations by the local immigration officer in charge of the case; a brief of counsel of the alien if he has counsel; miscellaneous documentary evidence, such as affidavits, letters, telegrams, departmental memoranda, petitions, books, pamphlets, newspaper clippings; a memorandum of the findings and recommendations of the Board of Review; and a memorandum of the action of the office of the Secretary, that is, of the officer in the department, now the Assistant to the Secretary, to whom the duty of making the final decision has been delegated. If the case has been completed by the deportation of the accused there is also the warrant of deportation with the fact of its execution endorsed thereon.

Report of the examining inspector. In every case the inspector who has conducted the hearing, called in the rules the examining inspector, adds at the end of the typewritten record of the testimony a finding and recommendation. In many of the cases examined this finding consisted of a mere repetition of the technical terms of the charges in the warrant of arrest and a recommendation that the alien be deported. "From the foregoing evidence, I do find the following facts" (repeating the words of the warrant);[173] "From the foregoing evidence, I am of the opinion that —— is an alien; that he entered the United States on [*date*] at [*place*]; that he was a person likely to become a public charge at the time of entry; and that he entered without inspection. His deportation is recom-

[173] File No. 55210–285.

mended."[174] In some cases, however, the finding contained comments upon the appearance and manner of the witnesses. "I have examined her five times. . . . Despite severe cross-examination there has been no material change in her testimony. In my opinion she is telling the absolute truth."[175] "Was a bit shifty and evasive."[176] "I am constrained to believe the alien. His manner in testifying was convincing."[177] "I believe he is telling the truth."[178] It also contained a description of a place, such as, "The —— hotel is a disreputable-looking place. It is situated in the —— district, red light district, so-called."[179]

In some of these findings the inspector included an attempt to analyze the evidence. Such comments as these appeared in only a minority of the cases. "He gave me a detailed account of his several places of residence in the United States. I am convinced that his claim of seven years' residence is well founded."[180]

In some the finding or report of the examining inspector included new evidence not brought out at the hearing and not referred to anywhere else than in the officer's report. He included facts as to the alien which he himself had observed,[181] for instance, the alien's conduct in a court room.[182] In some cases the inspector incorporated in his report his own conclusions based on sources of information outside of the record of the hearing and not brought out in it: "Statements made to me by influential citizens of —— who consider the alien a very dangerous anarchist";[183] "From information received the alien does not bear a good reputation";[184] "It is common knowledge in Chinatown that she is a prostitute."[185] The report also contained in some cases the results of a search of records,[186] such as marriage

[174] File No. 55210–285.
[175] File No. 55210–307.
[176] File No. 55138–65.
[177] File No. 54859–130.
[178] File No. 55210–307.
[179] File No. 55210–308.
[180] File No. 55212–100.
[181] File No. 55076–47.
[182] File No. 55057–31.
[183] File No. 55060–509.
[184] File No. 55068–509.
[185] *Chin Shee* v. *White*, 9 C.C.A., 273 F. 803.
[186] File No. 55226–9.

records, birth records, records of admission at a port of entry. In some it included a statement of events which had taken place after the hearing, as, "Mrs. C informs me that she has been offered $500 to come in and change her testimony. She has also been threatened with bodily injury."[187] In some cases the report consisted of a summary in detail in narrative form given in the inspector's own words usually without any comments on the witnesses.

In some cases the report showed an evident conviction of the guilt of the accused alien and assumed the attitude of a prosecutor. In one such case the inspector referred to testimony against the alien given by police officers and to admissions made by him, but omitted any reference to the alien's denial of the facts which it was necessary to prove to establish his guilt.[188] In another the report ignored the uncontradicted testimony of the alien in the record that he had been resident in the United States for twenty years and stated that there was no evidence to support the claim of this residence.[189] In one case the report stated that the inspector believed the alien guilty but that "unfortunately" the evidence did not support the charges.[190] In some cases the inspector did not stick to the issues involved in the charges, but branched out into the question of the general undesirability of the alien.[191]

After the examining inspector has completed the record and the brief prepared by the alien's counsel, in case the alien has counsel, has been placed in the file and additional documents if any more have been secured have been added, the file is sent to the department at Washington. In exceptional cases the local officer in charge may also communicate with the department as to certain features of the cases. The former practice of having the local officer review each case and add a recommendation has been discontinued.

[187] File No. 55210–308.
[188] File No. 55210–82.
[189] File No. 55225–9.
[190] File No. 55076–43.
[191] File No. 55068–509; 55068–507.

§14. THE TRIAL AT THE DEPARTMENT

New evidence. The file goes first to the Bureau of Immigration for filing and record. It then goes to the Board of Review for examination and recommendation. In theory this is the trial of the case. All that went before was investigation. In expulsion cases the statutes do not limit the Board to the evidence contained in the file at the time it leaves the examining inspector. Additional evidence may be added at any time up to the decision. Sometimes the case is sent back to the local office for a rehearing in order that new evidence may be received. Sometimes such new evidence is in the form of affidavits, letters or recommendations, and petitions filed by counsel or relatives or friends of the accused alien. In some cases the authorities at the department send to a local immigration office for a report on certain phases of the case including the conduct of the alien since the hearing. The local officer may be the one who conducted the hearing. He may also be some other officer. The local officers secure the information and send it to the department in a departmental memorandum or letter. The whole matter is conducted administratively. For instance, in a case which finally reached the courts, the department, while the case was pending, secured from a local inspector reports obtained by that officer from "confidential sources" as to the conduct of the accused alien, an alleged communist since the hearing. The information from the "confidential informant" included the latter's opinion as to what the alien would do if the warrant were canceled.[192] The same report contained information obtained from the local newspapers as to the alien's conduct. Sometimes very material facts are contained in the documents filed after the case reaches the department. In one such case, an alien woman had been seduced under a promise of marriage and confined to a hospital at the time of the birth of her child. This was the principal evidence urged against her to support

[192] *Ungar* v. *Seaman,* 8 C.C.A., 4 F. 2d 80.

the charges in the warrant that at the time of entry she was likely to become a public charge. Some days after the department had ordered her deported her employer wrote a letter to the local immigration officers praising the girl in the strongest terms and presenting additional facts not known to the officers before. The result was that the case was reopened and the warrant canceled.[193]

Procedure. The procedure of the Board of Review in the case of expulsion cases is the same as in that of exclusion cases. There is no observable difference in the handling of the two. The exclusion cases are called appeal cases and the expulsion cases warrant cases. The approach to the two kinds seems identical. In both the whole case is considered on the record. There is in effect a trial *de novo* on the evidence contained in it. In both classes of cases, oral hearings are conducted by some of the members of the board when they are requested. These do not include the hearing of witnesses but brief argument on the case as contained in the record. The person who makes the appearance can, however, call additional facts to the attention of the members of the board. After the member of the board to whom the case has been assigned has reviewed it and reported to the chairman the case with the recommendation added is sent to the office of the Assistant to the Secretary for final action.

If the recommendation of the Board of Review is that the alien be deported and the Assistant to the Secretary does not disapprove, the final step is the issuance of the warrant of deportation. This is addressed to the commissioner or officer in charge at the port of entry or in the district in which the expulsion proceedings began. The warrant of deportation recites:

> Whereas from proofs submitted to me after due hearing before ..... held at ....., I have become satisfied that the alien ..... who landed at the port of .....

[193] File No. 55211–15.

..... on or about the .... day of ....., has been found in the United States in violation of the Act of ...., for the following reasons among others, that he is an alien who .....

[*stating the charges found to be true*]

.....

I ..... do hereby command you to return the alien

[*name title*]

..... to ..... the country whence he came.

The warrant of deportation does not always end the case. There is often an attempt to secure discharge by appeal to the federal courts. This is in the form of a petition for a writ of *habeas corpus*. The problems involved are discussed in the chapter on judicial review.[194]

[194] See Chapter V.

CHAPTER V

JUDICIAL REVIEW

§1. GENERAL PRINCIPLES

By the general immigration laws the district courts of the United States are given full jurisdiction of all causes, civil and criminal, arising under the provisions of the acts.[1] These and provisions for the punishment of the violation of the laws by fine or imprisonment, or by the collection of a civil penalty by suit, are the only references to court action. There is no provision for judicial review. On the contrary, there are express statements that the decision of the administrative officers shall be final.[2] Court review has, however, not been lacking as the numerous cases in the reports of the Supreme Court and the lower federal courts will testify. Judicial review extends to both exclusion and expulsion cases. It depends upon this principle. An alien held in the custody of the immigration officers for deportation, either after his application for admission has been denied or after the Secretary has decided against him in warrant or expulsion proceedings, is restrained of his liberty by the action of federal officers. "He is in custody under or by color of the authority of the United States."[3] Aliens held for expulsion are persons within the territorial limits of the United States and as such are entitled to the constitutional guaranties of the Fifth Amendment that this restraint of their liberty must be in accordance with "due process of law." The amendment refers to persons and its protection is not limited to citizens.[4] As to the exclusion cases, there have been judicial statements that an alien who has applied for admission at a port of entry and has been refused admission may be considered as stopped at the border and therefore not entitled to the consti-

[1] Act of 1917, Sec. 25. [2] *Ibid.*, Sec. 19.
[3] *U.S.* v. *Jung Ah Lung*, 124 U.S. 621, Rev. Stat. Sec. 753.
[4] *Yick Wo* v. *Hopkins*, 118 U.S. 356.

tutional rights of a resident.[5] This technical argument, however, has not been allowed to interfere with the granting in exclusion cases of the same intervention by the judiciary as has taken place in expulsion cases. Moreover, in such cases where the claim to enter is based on an alleged American citizenship, the person held for deportation is in fact imprisoned and if he is a citizen, wrongly. "*De facto* he is locked up until carried out of the country against his will."[6] The means employed by the courts of testing the legality of the restraint of liberty exercised by the immigration officers is a hearing upon a petition for a writ of *habeas corpus*. They have no appellate jurisdiction which they can exercise by a writ of *certiorari* to examine the proceedings of the administrative officers.

Necessity of exhausting administrative remedies. In exclusion cases, as a general rule, judicial intervention by *habeas corpus* will take place only after the administrative remedy provided for by the statute of an appeal to the Secretary has been exhausted. In *U.S.* v. *Sing Tuck*,[7] persons of Chinese race had applied for admission claiming to be American citizens. When the inspector rendered an adverse decision against them, they applied for a writ of *habeas corpus* without appealing to the Secretary. The Supreme Court denied the writ squarely on the ground that there had been no such appeal. Speaking through Mr. Justice Holmes the Court said:

> It is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way. If the allegations of a petition for habeas corpus setting up want of jurisdiction, whether of an executive officer or of an ordinary court, are true, the petitioner theoretically is entitled to his liberty at once. Yet a summary interruption of the regular order of proceedings by means of the writ is not always a matter of right.

The *Sing Tuck* case was decided in April, 1904. The preceding

[5] *U.S.* v. *Ju Toy*, 198 U.S. 253; *Kaplan* v. *Tod*, 276 U.S. 228.
[6] Mr. Justice Holmes in *Chin Yow* v. *U.S.*, 204 U.S. 8, 13.
[7] 194 U.S. 161.

January a citizen of Porto Rico, denied admission as an alien within the excluded classes, had been granted a writ and a discharge by the Supreme Court on the ground that as a matter of law the immigrant authorities had no jurisdiction under the act.[8] The facts were admitted and the only question at issue was the meaning of the statute. Such a question was one primarily for the courts, and therefore, there was nothing to be gained by delaying the issue of the writ until an appeal had been taken. On a clear-cut question, therefore, of statutory interpretation only, it seems perhaps that the exhaustion of all administrative remedies is not necessary before recourse can be had to the courts. In all other exclusion cases it apparently is.

In expulsion cases there is theoretically no remedy by administrative appeal. There is only one tribunal, the Secretary of Labor, who makes the first and also the final decision on the record presented to him. Must the alien arrested and held for deportation wait until the Secretary's final action before appeal to the courts? The reasoning of Mr. Justice Holmes in the *Sing Tuck* case, that even fundamental questions must be determined in an orderly way, might well apply. The circuit court of appeals in the eighth circuit has held, however, in an expulsion case that the court could take action before the decision of the Secretary had been rendered.[9] The court based its decision on two Supreme Court decisions.[10] Both of these cases involved clear-cut questions of law with no controverted facts, and both had been decided prior to the case of *U.S.* v. *Sing Tuck*.[11] The distinction which was attempted between expulsion and exclusion cases, that the former did not provide for an appeal to the Secretary and therefore that it was not necessary to wait for his final action, is not convincing. The necessity for the court's

[8] *Gonzales* v. *Williams*, 192 U.S. 1.

[9] *Whitfield* v. *Hanges*, 8 C.C.A., 222 F. 745.

[10] *Gonzales* v. *Williams*, 192 U.S. 1; *U.S.* v. *Wong Kim Ark*, 169 U.S. 649.

[11] 194 U.S. 161.

refraining from interference with the administrative process until it has been completed in an orderly way is equally applicable to both. In this case, however, there were special circumstances showing a clear abuse of administrative power, such as arbitrary refusal of bail and unreasonable delay in completing a hearing and reaching a decision, with resulting hardship on the alien held in custody. These special circumstances, it would seem, would justify a court in interfering with the action of the administrative officers with a writ of *habeas corpus* even though the final decision against the alien had not been rendered. If, however, the alien has been released on bail pending the final administrative decision, no such case is presented for immediate action, and the court will not interfere until the case has been considered in the department and the warrant of deportation has been ordered.[12]

Review as a trial of the administrative proceedings. The proceedings before the federal district court on the petition for a writ of *habeas corpus* do not constitute a trial *de novo* either on the record or with the introduction of new evidence. The court confines itself to an examination of the record of the proceedings before the immigration officers. It does not try the alien so much as the actions of the administrative officers to see whether they meet the test of due process of law. Should the petitioner convince the court that the administrative officers have unfairly refused to admit and consider new evidence material to his case, the court may order the discharge of the petitioner from the jurisdiction of the officers and receive the evidence in a new trial of the case. It may, however, instead, order the discharge of the petitioner unless within a certain time the department accords him a new hearing on the alleged new evidence.[12a]

For convenience the detailed discussion of the problems of judicial review has been divided into four topics: questions of law, questions of administrative procedure, questions of ad-

[12] *Sibray* v. *U.S.*, 3 C.C.A., 185 F. 401.

[12a] *Scimeca* v. *Husband*, 2 C.C.A., 6 F. 2d 957.

ministrative discretion, and questions of fact. Such a classification, it must be added, is only for convenience in discussion. It is partially arbitrary and the various classes of questions shade into one another.

§2. QUESTIONS OF LAW

Limitation to statutory construction. Questions of procedure and questions of the adequacy of evidence are often spoken of as questions of law. Under this section, however, the term is used to mean matters of statutory construction. The immigration officers derive their powers from the statute. It provides also limits and directions. Action by them contrary to its terms or outside the jurisdiction given by it is not "due process of law." The immigration law makes the decision of the Secretary when adverse to the alien final, but when that decision has involved the construction of some provision of the act, the courts have uniformly reviewed it and substituted their own judgment for that of the Secretary when they differed with him.

> Final determination of the statute applicable to the case, and interpretation of the grant of power therein, cannot rest with the executive officers under any authority cited.[13]

Citizen and alien. The immigration laws apply in terms to aliens and have no application to citizens. The question as to the meaning and scope of the terms "alien" and "citizen," as to whether an individual in regard to whom the facts were admitted came within one class or the other, has been before the courts several times. In both exclusion and expulsion cases they have passed on it without any hesitation. Two leading cases are *U.S.* v. *Wong Kim Ark*[14] and *Gonzales* v. *Williams*.[15] In the first, a person of Chinese descent, who it was conceded had

[13] *Davies* v. *Manolis*, 7 C.C.A., 179 F. 818.
[14] 169 U.S. 649. [15] 192 U.S. 1.

been born in San Francisco, was denied admission by the immigration officers on his return from a visit to China; in the second, a citizen of Porto Rico, after its cession to the United States, was also denied admission. In both cases the courts treated the matter as one entirely for their decision. In the first case the court held that the Chinese person was a citizen because born in the United States and in the other, that the term "alien immigrant" in the statute did not apply to a citizen of Porto Rico applying for admission after the cession of that island.

A similar question of law going to the jurisdiction of the immigration authorities has arisen in expulsion cases. For most grounds the power to expel may be exercised only within a time limit from the time of entry, under the present act, five years. In a case where an alien, after a residence here for a period longer than the time limit of the statute, left the country temporarily, returned, and was readmitted, the department held it had jurisdiction to deport within the time limit from the last entry. This was treated, not as a final decision of the Secretary, conclusive because of that fact, but as a question for the courts, although the decision of the department was sustained.[16]

The excluded classes. Another occasion for judicial interpretation of the statute has been furnished by the words descriptive of the excluded classes or of those subject to expulsion. The words "merchant" under the Chinese exclusion laws,[17] "crime involving moral turpitude,"[18] "receive, share in, or derive benefit from any part of the earnings of any prostitute,"[19] "member of a learned profession,"[20] "artist,"[21] "professor in a college or

[16] *Lapina* v. *Williams,* 232 U.S. 78; *Lewis* v. *Frick,* 233 U.S. 291.

[17] *Tom Hong* v. *U.S.,* 193 U.S. 517; *Tulsidas* v. *Insular Collector,* 262 U.S. 258.

[18] *U.S. ex rel Mylius* v. *Uhl,* 2 C.C.A., 210 F. 860.

[19] *Katz* v. *Commissioner of Immigration,* 9 C.C.A., 245 F. 316.

[20] *Tatsukshi Kuwabaro* v. *U.S.,* 9 C.C.A., 260 F. 104.

[21] *Gentile* v. *Day,* 2 C.C.A., 25 F. 2d 717.

academy,"[22] "likely to become a public charge,"[23] and "anarchist,"[24] have all been given definition or interpretation by the courts.

The question of whether an alien convicted in this country of a crime involving moral turpitude should be deported when it was shown that the acts constituting the crime also constituted a political offense in the country to which the alien would be deported was decided by the court as a question of law and decided in the affirmative.[25] The court has also dealt with the question of whether the admission of an alien that he had given false testimony before a board of special inquiry after being put under oath was an admission that he had committed perjury and therefore a crime involving moral turpitude before entry. It held that the crime was committed in the United States and not before entry.[26] In *Gegiow* v. *Uhl*,[27] the Supreme Court held that the department could not refuse admission on the ground that the labor situation in the part of the country to which the aliens were bound made them likely to become public charges, and stated that exclusion for that cause must be on the "ground of permanent personal objections accompanying them." The court based its decision partly on the position of the words "likely to become a public charge" in the statute along with idiots, persons diseased, and persons mentally or physically defective, and between paupers and professional beggars. The meaning of the term, however, has again been rendered doubtful since by the Act of 1917 the words were taken from their former place and made an entirely separate category, thus perhaps indicating an intention by Congress to leave the administrative officers a wider dis-

[22] *Jacovidis* v. *Day*, 2 C.C.A., 32 F. 2d 542.

[23] *Gegiow* v. *Uhl*, 239 U.S. 3.

[24] *Turner* v. *Williams*, 194 U.S. 279.

[25] *Giletti* v. *Commissioner of Immigration*, 2 C.C.A., 35 F. 2d 687.

[26] *Ex parte Keizo Shibata*, 9 C.C.A., 35 F. 2d 636; *Squillari* v. *Day*, 3 C.C.A., 35 F. 2d 284.

[27] 239 U.S. 3.

cretion. If labor conditions in a part of the country or in the entire country can be considered in such cases, the administrative officers can perhaps in times of general industrial depression exclude as likely to become a public charge all aliens who might compete with domestic labor, both physical and intellectual.[28]

The question of whether the likelihood that an alien, because of some criminal offense, may have to be supported at public expense in a jail or prison makes him likely to become a public charge within the meaning of the words in the statute, has not yet been settled by the Supreme Court. The question has been before the lower federal courts and there is a conflict of decisions.[29] The question of whether the crime of petit larceny was a crime involving moral turpitude was decided by a court as a question of law.[30] The court held that the offense constituted such a crime. Another question of law was whether convictions for four different offenses and sentence for more than a year in each under one information and trial was conviction more than once within the meaning of the statute. The court held in the affirmative.[31]

The word, "anarchist," because of its indefiniteness, has raised a similar question of law for the courts. In *Turner* v. *Williams*,[32] an expulsion case, the contention was made that a philosophical anarchist, one who regarded the abolition of government as only an ideal and did not seek to attain it with force or violence, was not included within the term as used in the immigration laws. The court held that in the case there was

[28] *Immigration Laws and Rules of January 1, 1930*, Sen. Rep. 352, 64th Congress, 1st Sess., p. 25, note 5.

[29] *Coykendall* v. *Skimetta*, 5 C.C.A., 22 F. 2d 120; *Mantler* v. *Commissioner of Immigration*, 2 C.C.A., 3 F. 2d 234 (held in both cases that the alien was not likely to become a public charge); *Ex parte Riley*, D.C. Me. N.D., 17 F. 2d 646 (held that the fact that the alien was a persistent bootlegger made him likely to become a public charge).

[30] *Tillinghast* v. *Edmead*, 1 C.C.A., 31 F. 2d 81.

[31] *Johnson* v. *Pepe*, 2 C.C.A., 28 F. 2d 810.

[32] 194 U.S. 279.

evidence that the alien had "contemplated the ultimate realization of his ideal by the use of force," but its dictum stated that both kinds of anarchists, philosophical and violent, were included in the act. Subsequently a circuit court of appeals followed the principles laid down in this dictum with a square decision that a "philosophical anarchist" was included.[33]

The Act of October 16, 1918,[34] has raised another question of statutory construction for ultimate decision by the courts. By that act there were added to the excludable and expellable classes, "aliens who believe in, advise, advocate or teach, or who are members of or affiliated with any organization, association or society or group, that believes in, advises, advocates or teaches the overthrow by force or violence of the Government of the United States." The Secretary ruled that the words "force or violence" include economic pressure by the use of general strikes.[35] This decision has been overruled by one federal district court[36] and sustained by another.[37] As to the practice of the courts in overruling the department in matters of the construction of statutes, the authorities are clearly settled. Their ultimate construction is not left to the administrative officials.

§3. QUESTIONS OF PROCEDURE

The power to review. The power of the courts to examine the administrative procedure of the immigration officers is well established. It is exercised in both exclusion and expulsion cases. There was an early recognition of it in the *Japanese Immigrant Case.*[38] The opinion of Mr. Justice Harlan in that case contained the statement:

> But this court has never held that administrative officers, when

[33] *Lopez* v. *Howe,* 2 C.C.A., 259 F. 401.

[34] 40 Stat. 1012; 41 Stat. 1008.

[35] Opinion of the Secretary of Labor: *In re Engleburt Preis,* Jan., 1920.

[36] *Colyer* v. *Skeffington,* D.C. D. Mass., 265 F. 17.

[37] *U.S.* v. *Wallis,* D.C. S.D. N.Y., 268 F. 413. [38] 189 U.S. 86, 100.

executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in due process of law as understood at the time of the adoption of the constitution. One of these is that no person shall be deprived of his liberty without opportunity at some time to be heard before such officers, in respect of the matters upon which that liberty depends . . . one that will secure the prompt vigorous action contemplated by Congress and at the same time be appropriate to the nature of the case. Therefore it is not competent for . . . any executive officer arbitrarily to cause an alien who has entered the country and has become subject to its jurisdiction and a part of its population, to be taken into custody and deported.

Thus there was laid down the principle that the administrative process must be in accordance with the standard of due process of law, and that this means that the alien must be given an opportunity to be heard and the action of the officers must not be arbitrary. If these principles are not observed, the courts will interfere and give protection to the alien affected. The court accordingly in that case examined the proceedings of the immigration officers. It found that an opportunity to be heard had been given, and that there was no evidence of arbitrary conduct. The case was an expulsion case and the court referred to the fact that the alien had entered the country and become subject to its laws and a part of its population. The case is, therefore, not a direct authority for exclusion cases. As to expulsion cases, there is no doubt of the authority of the courts to interfere in cases of improper procedure.[39]

The Supreme Court decisions where court review of procedure in exclusion cases has been sustained have nearly all involved a claim of citizenship by Chinese persons. In *U.S.* v. *Sing Tuck*[40] the court considered the procedure prescribed by the Chinese regulations for the examination of applicants for admission to the country, in the presence of only such witnesses

[39] *Bilokumsky* v. *Tod*, 263 U.S. 149; *Zakonaite* v. *Wolf*, 226 U.S. 272.
[40] 194 U.S. 161.

as the immigrant officers should designate, and held it a material and reasonable precaution and not contrary to the principles of due process of law. In *Chin Yow* v. *U.S.*[41] the court held violative of due process the refusal of an inspector to permit certain witnesses offered by the alien to testify. The opinion of Mr. Justice Holmes contained this statement of the principle:

> The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form.

In two subsequent cases the Supreme Court has followed this decision.[42] This principle of judicial review of procedure is not, however, limited to cases where a claim of citizenship is involved. It is applied to cases where alienage is admitted. In *Tod* v. *Waldman*[43] where alienage was admitted and admission was denied on the ground of illiteracy and likelihood that the applicant would become a public charge, the Supreme Court found the administrative procedure defective because the record did not show definite findings of fact by the department to constitute the basis of the order of deportation. It held to the same effect in *Mahler* v. *Eby*.[44]

A standard of fairness. The test of procedure which the courts have laid down for the conduct of the cases by the immigration officers is a general standard of fairness under all the circumstances, not one of technical rules which must be followed in all cases. The entire case is considered with this requirement of fairness in mind. Therefore, a specific act by the officers which may be found proper in one case will in another be found defective because under all the circumstances of the case it was unfair. Much latitude is allowed as long as the

[41] 208 U.S. 8.

[42] *Tang Tung* v. *Edsell,* 223 U.S. 673; *Kwock Jan Fat* v. *White,* 253 U.S. 454.

[43] 266 U.S. 113.

[44] 264 U.S. 132.

courts can find there was no abuse of discretion and no arbitrary action, and that there was an attempt in good faith and without prejudice and passion to discover all the facts and to pass a fair judgment upon them. Where, on the other hand, technical rules have been observed, but the record shows unfairness, passion, and prejudice, the court may intervene.

> The attitude of the examiner, the introduction of confused and voluminous evidence taken elsewhere, the strong indication that the applicant was vaguely regarded as undesirable . . . these warn us.[45]

The essentials of a fair hearing have been specified by the circuit court of appeals of the eighth circuit as follows:

> Indispensable requisites of a fair hearing according to these fundamental principles are that the course of the proceedings shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it.[46]

General requirements of fairness. The requirements of a fair hearing have not been met: *first,* when because of defects in the statutes or rules the proceedings of the officers in accordance therewith are unreasonable and arbitrary and prevent the holding of such a hearing; *second,* when the statute is constitutional but is not followed by the officers, and the alien as a result is deprived of substantial rights; *third,* when the officers fail to follow the immigration rules and thus prejudice the alien's

[45] Hand, Circuit Judge, in *Iorio* v. *Day,* 2 C.C.A., 34 F. 2d 920.
[46] Sanborn, Circuit Judge, in *Whitfield* v. *Hanges,* 8 C.C.A., 222 F. 745.

case; and *fourth,* when the acts of the officers either of commission or of omission are not covered by any statute or rule, but in view of all the facts are arbitrary and unfair. A fifth situation may raise a question of judicial review of procedure. The immigration rules if consistent with the statutes and not unconstitutional are binding on the officers and are treated by the courts as in effect part of the law. The Secretary has the power to change them in his discretion. Suppose they are changed for the sole purpose of providing a more strict procedure for the case of an individual or a class of persons against whom action is contemplated under the new rules at the time. The precise question was raised in *Colyer* v. *Skeffington.*[47] On December 30, 1919, rule 22, subdivision 5, of the immigration rules then in force, required that an alien arrested upon a warrant for expulsion proceedings should at the beginning of the hearing be allowed to inspect the warrant and the *prima facie* evidence on which it was issued, and should be advised that he might be represented by counsel. The next day this was changed to read that inspection of the warrant and aid of counsel should be allowed, "preferably at the beginning of the hearing, or, at any rate, as soon as such hearing has proceeded sufficiently in the development of the facts to protect the Government's interests." Under this amended rule, hearings were conducted without aid of counsel during the "red" raids of January, 1920, for the deportation of alleged alien communists under the Act of 1918. On January 28 following, the rule was restored to its original form with a provision for counsel at the beginning of the hearing. The court found that this change of rule was made for the purpose of affecting the cases of aliens substantially then under consideration, that is, for the purpose of depriving them of the protection of counsel formerly allowed them. Under the decision of the courts, right to counsel from the beginning of the hearing is not constitutionally neces-

[47] 265 F. 17.

sary,[48] but to establish the right as a matter of general policy in the conduct of hearings, and then to change the rule in order to prejudice the defense of a special group whose arrest was then under contemplation, the court found was essentially unfair, and therefore a violation of the requirement of due process of law.[49] The unfair purpose behind the change of the rule was the deciding factor, although without such purpose the change would have been proper.

Introduction or exclusion of evidence. One class of cases where there is judicial review of procedure involves the question of the proper introduction or exclusion of evidence. It has been held that fairness requires that the immigration officers do not arbitrarily and without a proper reason exclude and refuse to hear witnesses whom the alien offers to produce. The latter must be given an adequate opportunity to prove his right to enter or to remain, and there is no such opportunity when there is an arbitrary and unwarranted refusal to hear witnesses.[50] Thus, in a case where the alleged minor son of a Chinese merchant was applying for admission, the department voted to exclude because of discrepancies between the testimony of the applicant and that of his alleged father as to the age and marriage of the applicant's older brother. When the father was recalled as a witness the inspector failed to question him as to the inconsistencies, and no questions were asked of the applicant to give him a chance to explain. Counsel, moreover, was not permitted to see the applicant to ask him about the inconsistencies. The court held that the refusal of the department to permit the additional evidence to be taken made the hearing unfair.[51] In the same way the court held the refusal of the immigration officers to have submitted to a board of special inquiry at the request of the alien the testimony of two phy-

[48] *Loh Wah Suey* v. *Backus,* 225 U.S. 460.
[49] *Colyer* v. *Skeffington,* D.C.D. Mass., 265 F. 17.
[50] *Chin Yow* v. *U.S.,* 208 U.S. 8; *Diguardia* v. *Flynn,* 15 F. 2d 576.
[51] *Ex parte Low Joe,* D.C. N.D. Cal., 287 F. 545.

sicians at one time connected with the department that there was a large margin of error in determining the age of a person by a physical examination held by surgeons, made the hearing unfair.[52] In another case, the refusal of the officers to reopen a case at the request of counsel in order that he might ask the alien and his witnesses questions as to inconsistencies and discrepancies in their testimony as to the exact locations of certain houses in their village in China and attempt to secure an explanation of these inconsistencies, was held ground for judicial intervention.[53]

Ex parte evidence. It is not necessary, however, that in every case the witnesses be heard orally in a formal hearing. Apparently testimony may be taken in the form of affidavits and submitted in that form. It may also be gathered by means of letters and reports. In *Healy* v. *Backus*[54] the examining officers considered affidavits, letters, newspaper clippings, and the report of an inspector who had had interviews with several persons who had given him information informally and not under oath. The action of the officers was upheld.

Necessity of compulsory process. If the alien desires to have certain evidence introduced and the persons whose testimony is wanted are unwilling to appear or to execute affidavits, due process of law does not require that there be compulsory process to compel the witnesses to give the testimony.[55] The distinction between administrative and criminal cases has been invoked by the courts to avoid the application of the constitutional guaranty of compulsory process of the Sixth Amendment. It seems that another attitude might have been taken. It is true that the proceedings are not criminal and no provision

[52] *Ex parte Gin Mun On,* D.C. N.D. Cal., 286 F. 752.

[53] *Lum Hoy Kee* v. *Johnson,* D.C. D. Mass., 281 F. 872.

[54] 9 C.C.A., 221 F. 358; also see *Lau Shee* v. *Nagle,* 9 C.C.A. 747, 19 F. 2d 747; *Smith* v. *Curran,* 2 C.C.A., 12 F. 2d 636; *Ng Wing* v. *Brough,* 2 C.C.A., 15 F. 2d 377.

[55] *Low Wah Suey* v. *Backus,* 225 U.S. 460.

of the Constitution is directly applicable. There is, however, a strong analogy to criminal proceedings in the case of the expulsion cases. Moreover the principle that fairness and adequacy of hearing are a necessity of due process of law would seem to require power in the investigating officers to compel the giving of such testimony as may be material, and the use of this power to compel the attendance of witnesses. It would also seem that such a power ought to be invoked in behalf of an alien who needs the evidence to justify his presence within the country as well as on behalf of the officers. Since, however, the statutes and immigration rules now give the officers the power to issue *subpoenas,* an arbitrary and unreasonable refusal by them to comply with the request of an alien that such process issue to compel the attendance of witnesses is a failure to observe the requirements of due process.[56] These statutory provisions have been considerably modified by the provisions of rule 23 that requests for a *subpoena* must be in writing, must show that the evidence is relevant and material, and that the examination of the witnesses so summoned must be limited to the purpose specified in the application. The statement in the rule that the power is to be used only when it is absolutely necessary indicates that the department desires to exercise the power as seldom as possible. There is moreover no provision for witness fees or expenses. This rule has been held not to be unreasonable, and a refusal of the officers to issue a *subpoena* without the written application of counsel has been held not to be error.[57] The rule does not, however, apply to a request by the alien that a government witness be recalled for cross-examination.[58]

Cross-examination of witnesses. Related to the question of the right to have witnesses summoned and the right to intro-

[56] *Whitfield* v. *Hanges,* 8 C.C.A., 222 F. 745; *Maltez* v. *Nagle,* 9 C.C.A., 27 F. 2d 835.

[57] *Chun Shee* v. *Nagle,* 9 C.C.A., 9 F. 2d 342.

[58] *Ex parte Radivoeff,* D.C.D. Mont., 278 F. 227.

duce evidence is the right of the alien or his counsel to cross-examine the witnesses for the government. It has been held that where testimony has been brought to the attention of the alien or his counsel it is not always necessary that he have the right to cross-examine the witnesses who gave it, or to confront them during their examination. In one case[59] the inspector had taken testimony during his preliminary investigation before the issuance of the warrant of arrest. It was held that such evidence was properly in the case, and could be part of the basis for the department's decision, without a recall of the witness for cross-examination. Counsel for the alien had been informed of the evidence and given an opportunity to meet it. In another case an inspector while making an investigation questioned men whom he saw on the premises. He did not make a transcript of their answers, but reported the substance of this interview. Later the department was unable to locate these men. It was held not unfair to use this evidence. The court said that if the witnesses had been available and had not been produced the hearing would have been unfair.[60]

In some cases, however, the refusal of the department to secure its witnesses for cross-examination has been held to make the hearing unfair. In one such case an investigating inspector obtained written statements from two persons who were present at the time the alien was first questioned. Later the officers failed to call these persons as witnesses in the formal hearing although requested to do so by counsel for the alien. The statements were put into the record as evidence. The court said this was error. As, however, there was other evidence the writ of *habeas corpus* was denied.[61] In another case counsel for the alien requested that a former immigrant inspector, whose state-

[59] *Chow Gum* v. *Backus*, 9 C.C.A., 223 F. 487.

[60] *Ng Wing* v. *Brough*, 2 C.C.A., 15 F. 2d 377; *Quack Sa Muir* v. *Nagle*, 9 C.C.A., 11 F. 2d 492.

[61] *Yeh Wah* v. *Nagle*, 9 C.C.A., 7 F. 2d 426; *Maltez* v. *Nagle*, 9 C.C.A., 27 F. 2d 835.

ment in writing against the alien had been put into the record, be called for cross-examination. The inspector refused to do this unless counsel would state in writing what he expected to prove by the cross-examination and provide for compensation for the witness. This refusal was held to make the hearing unfair. The court held that the requirement of the departmental rule that there be a statement in writing by the alien of what he expected to prove by the witness as the condition of issuing the *subpoena* applied to the calling of witnesses for the alien and not to cross-examination.[62] In another case a decision of the department was based on the report of an inspector that a certain Mexican had stated to him that he had seen the accused alien in a laundry in Mexico, identifying him by a photograph. The failure to call this witness for cross-examination was held by the court as a failure to conduct a fair hearing, under the circumstances, which were that the witness could readily be reached and that there was a sharp conflict of testimony.[63] In still another case the preliminary examination of an alien against whom expulsion proceedings had been brought was held in jail three days after he had been painfully wounded by a pistol shot while he was running away from the inspector and a police officer. The examination had been held by the inspector with no one else present except an interpreter. At the hearing the counsel for the alien requested that the inspector who had conducted this preliminary hearing be called for questioning as to that hearing and the condition of the alien at the time. This the inspector in charge of the formal hearing refused to do. The court held the refusal under the circumstances to be unfair and arbitrary and discharged the alien.[64] Rule 24, subdivision A, provides that "when a witness has been examined by the investigating officer and counsel has not had an opportunity to

[62] *Ex parte Radivoeff,* D.C.D. Mont., 278 F. 227.
[63] *Backus* v. *Owe Sam Goon,* 9 C.C.A., 235 F. 847.
[64] *In re Sugano,* D.C. S.D. Cal. S.D., 40 F. 2d 961.

cross-examine such witness, and it is apparent or is shown that such witness will not appear for cross-examination unless commanded to do so, a *subpoena* shall issue." This rule might be regarded as securing to the alien the right to have his counsel cross-examine all the witnesses whose testimony is relied on by the government. Yet there are a number of cases which hold that when for one reason or another, such as the distance from the place of the hearing, evidence is introduced in the form of *ex parte* statements or affidavits, or where informal evidence such as letters, reports, telegrams, etc., is relied on, the fact that a cross-examination was not practicable does not prevent the use of the evidence.

Concealment of evidence from the alien. It seems settled that all the evidence which the immigration officers consider as the basis of their decision must be disclosed to the alien or to his counsel, and that he must be given a fair opportunity to introduce evidence or written argument to meet it. If, therefore, the inspector takes the testimony of witnesses in the alien's absence or the absence of his counsel in another place than the one in which the hearing has been conducted, or without notifying the alien or his counsel that he intends to do so, and immediately sends in his report to the Secretary without allowing alien or his counsel to inspect this new testimony and perhaps meet it if possible, there has been an invalid hearing.[65] In one case after the hearing had been closed further testimony was taken by the immigrant officer without notice to the alien or to his counsel. The officer failed to submit this testimony or a photograph on which it was based to counsel for the alien in time for them to meet it. This was held an unfair hearing. The court said:

> In determining the question whether a full and fair trial was given, it is enough to know that on the vital issues the government secured the cross-examination of petitioner and his witnesses alike, while the petitioner has received no corresponding advantages, and

[65] *McDonald* v. *Sui Tak Sam,* 8 C.C.A., 225 F. 710.

has been deprived even of the opportunity to explain the *ex parte* statements mentioned of the government's witnesses.[66]

In another case there were put into the record two letters, one ostensibly written by a Chinese person and one by an immigrant inspector, both stating that the father of the applicant for admission was not an American citizen. These letters were not called to the attention of the applicant or his counsel. The court held that this was error since it was clear that the department had been influenced by the evidence.[67] In a third case, the department at Washington, after the record in an expulsion case had reached it, but before a decision had been rendered, without notice to counsel for the alien, directed a local immigration officer to send additional reports as to the conduct of the accused alien since the hearing. Two such reports were sent and there was evidence to show they had been relied upon to a considerable extent in reaching a decision against the alien. Counsel was not advised of these reports or given an opportunity to inspect them. The proceedings because of this were held unfair.[68]

In *Kwock Jan Fat* v. *White*[69] the fact that evidence was suppressed and not shown to the alien was held to have been sufficiently alleged. There was, however, other evidence in the case not so concealed tending to show the same facts, and the immigration officers in their report stated that they had not been influenced in their decision by the concealed evidence, but that it had been valuable only in getting other evidence. The Supreme Court said that the concealment of the evidence did not make the hearing unfair. The writ of *habeas corpus* was, however, granted because on another entirely different ground the court thought the requirements of due process of law had been violated. The conclusion as to the concealed evidence was then

[66] *In re Chan Foo Lin*, 3 C.C.A., 243 F. 137.
[67] *Lai Thuey Lem* v. *Johnson*, 1 C.C.A., 16 F. 2d 180.
[68] *Ungar* v. *Seaman*, 8 C.C.A., 4 F. 2d 80.
[69] 253 U.S. 454.

dictum only. It seems that the existence of other evidence to the same effect might make the concealment of the evidence in question not a failure of due process. In a case in the sixth circuit the inspector in charge of an expulsion case after the hearing took the testimony of two other witnesses not called before because they could not be found. The court found that this additional evidence was merely cumulative and upheld the department.[70]

The immigration rules in force prior to the revision of 1925 provided that "at the beginning of the hearing on the warrant of arrest" in expulsion cases the alien should be allowed to inspect the warrant of arrest and the evidence upon which it had been issued. Under this rule it was held that the failure of the inspector who conducted the hearing to show the evidence upon which the warrant was issued to the alien or to read it to him so that he might be apprised of it made the hearing unfair. The court said:

> In other words the contention is made that under certain circumstances it is discretionary with the inspector as to whether or not he will disregard the rules of the department made pursuant to the authority of the statute. We are unable to subscribe to this proposition.[71]

The new rules omit the words the "evidence upon which it was issued" and thus apparently do not provide for an inspection of the supporting evidence upon which the application for a warrant of arrest was based.[72] Apparently under this rule the immigration officers may refuse to disclose to the alien or his counsel the evidence obtained before the warrant was issued and the sources of the information. If the department, however, relies on this evidence in reaching a decision it must be disclosed at some time before the end of the proceedings. If, however, other

[70] *Weinbrand* v. *Prentis,* 6 C.C.A., 4 F. 2d 778.

[71] Davis, Circuit Judge, in *Sibray* v. *Plichta,* 3 C.C.A., 282 F. 795.

[72] Immigration Rule 19, subd. D, par. 2.

evidence is obtained during the hearing sufficient to support the decision of the department against the alien, the evidence used to support the issuing of the warrant need not apparently be disclosed. This leaves a loophole for the officers to refuse to disclose the sources of the "confidential information" referred to in the records of some cases.

Conclusions of officers on their own knowledge. It has been said that the examining officer need not take evidence under oath at all, but may reach his conclusions on his own knowledge and investigation of the facts.[73] Undoubtedly there are cases where the inspector's decision or the decision of a board of special inquiry will be rightly based on such evidence. For instance, an inspector may make a personal investigation of official records of a custom-house to ascertain the date of arrival and sailing of a vessel, and to verify a manifest.[74] Each case must, however, be considered by itself with reference to the standard that a fair and adequate investigation must be conducted. In all cases where the statutes or rules call for a hearing, a more or less formal hearing must be conducted with testimony given usually under oath. In many cases, especially among those where expulsion proceedings have been brought, there is a sharp issue of fact raised by a conflict of testimony, as, for instance, where an alien is accused of being a prostitute, or as belonging to an organization advocating the overthrow of the government by force or violence. In such cases the failure to take sworn testimony would be violative of the requirement of due process. In such a case where the inspector added to the record statements as of his own knowledge not supported by any of the testimony given during the hearing, the proceedings were held defective.[75]

Hearsay evidence. May the decision of the administrative officers be based on hearsay evidence? Such evidence is admis-

[73] *Ekiu* v. *U.S.*, 142 U.S. 651.
[74] *Tang Tung* v. *Edsell*, 223 U.S. 673.
[75] *Whitfield* v. *Hanges*, 8 C.C.A., 222 F. 745.

sible and may be considered with other evidence.[76] Its introduction will not make the hearing defective since the courts have constantly emphasized that the technical legal rules of evidence do not apply. Thus, in an expulsion case, an immigrant inspector testified at a hearing that he had been told that the alien was a pimp and his wife a prostitute. The inclusion of this testimony was held not to make the hearing unfair because there was sufficient evidence to support the charges without it.[77] In another case the department received a telegram from a consul abroad stating that a consul at another city had informed him that the passports of the aliens in question had been forged. Later there was a report of a telegram from a consular office that it had not issued the visas in question. It was held that the telegrams were admissible, their probative value being for the immigration officers to determine.[78] When, however, there is no other evidence than hearsay and rumor to support the findings of the officers, the hearing has not been properly conducted. Thus in one expulsion case the sole evidence that the accused alien had been keeping a house of prostitution was hearsay. There was no direct evidence of any kind from which it could be inferred. The court held the decision was unfair and arbitrary because not supported by any evidence.[79] The question of the right of an alien to remain who had been domiciled in this country for eleven years was involved. The court said:

> Some substantial evidence besides mere hearsay and expression of opinion and belief (which is practically the equivalent of no competent evidence of the fact sought to be proved) is necessary upon which to base the inference.

In another the question was whether the accused alien had been in this country more than five years. He testified that he

[76] *Healy* v. *Backus*, 9 C.C.A., 221 F. 358; *Lau Shee* v. *Nagle*, 9 C.C.A., 19 F. 2d 747.

[77] *Caranica* v. *Nagle*, 9 C.C.A., 23 F. 2d 545.

[78] *Smith* v. *Curran*, 2 C.C.A., 12 F. 2d 636.

[79] *Katz* v. *Commissioner of Immigration*, 9 C.C.A., 245 F. 316.

had entered from Mexico a little more than five years before the date of the warrant of arrest, but his testimony as to the ship on which he went to Mexico and the street in which he lived in New Orleans was somewhat vague. The only witness against him testified that the alien's father had told him that his son had entered from Cuba less than three years before. The department ordered expulsion. The court held that the evidence was not sufficient to sustain the decision and referred to the testimony as incompetent.[80] In still another case a woman fifteen years after her entry from Canada was arrested in expulsion proceedings and ordered deported on the ground that she was a prostitute. The evidence relied on was a letter from the chief of police of a Canadian city. The court held that this was "clearly inadmissible as evidence under any rule, however summary the procedure."[81]

Self-incrimination: Illegal search and seizure. The provisions of the Fifth Amendment against self-incrimination do not apply to immigration cases. The proceedings are not criminal and the alien is held not to be an accused person within the meaning of the amendment. He may be subjected to examination and from his failure to answer questions the immigration officers may reach conclusions against him.[82] It seems, however, that the guaranty of the Fourth Amendment against illegal searches and seizures does apply to the expulsion cases. Proceedings to expel an alien are not judicial proceedings and to that extent the decisions that in judicial trials evidence obtained against a defendant by an unlawful search and seizure of his property may not be used against him[83] do not apply. The principle underlying them, that the amendment must be protected

[80] *McCandless* v. *Chila,* 3 C.C.A., 37 F. 2d 575.

[81] *Ex parte McMahon,* D.C. W.D. Wash. N.D., 1 F. 2d 456.

[82] *Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103; *In re Chan Foo Lin,* 6 C.C.A., 243 F. 137.

[83] *Weeks* v. *U.S.,* 232 U.S. 383; *Silverthorne Lumber Co.* v. *U.S.,* 251 U.S. 385; *Gouled* v. *U.S.,* 255 U.S. 298.

against encroachments, does apply. There have been square decisions that a hearing by the immigration officers is improperly conducted if the evidence relied on was obtained by such an unlawful search and seizure.[84] There have also been dicta in several cases and in one of them the Supreme Court says through Mr. Justice Brandeis that it assumes that the amendment applies.[85] When, however, the evidence was obtained by an illegal search and seizure of the property of someone else than the alien, such evidence may be used against him.[86]

Unlawful arrest. Related to the question of evidence obtained by an illegal search or seizure is the question of the competency of evidence obtained from the alien while he is being held illegally without any warrant of arrest. Several cases have been before the courts. It has been held that if such evidence was given by the alien without any duress or intimidation other than the fact of the arrest and detention, the evidence was admissible. Thus in one case the alien was arrested without a warrant and taken to a jail. Here before a warrant of arrest had been issued or before he had been permitted to have counsel he was questioned by an immigrant inspector and his testimony taken down. At the hearing this evidence was introduced after counsel had had an opportunity to inspect it. It was held that this testimony, taken at the preliminary hearing while the alien was being held illegally, was admissible against him. The facts of the case as stated in the opinion of the court do not show whether or not counsel objected to the introduction of this testimony at the time of the formal hearing. The court said there was nothing to the contention that the evidence obtained in this way could not be used against the alien.[87] In a case

[84] *Ex parte Jackson,* D.C.D. Mont., 263 F. 110; *U.S.* v. *Wong Quong Wong,* D.C. D. Vt., 94 F. 832.

[85] *Bilokumsky* v. *Tod,* 263 U.S. 149; *Ex parte Caminita,* D.C. S.D. N.Y., 291 F. 914.

[86] *Ex parte Caminita,* D.C. S.D. N.Y., 291 F. 914.

[87] *Ematsu Kishimot* v. *Carr,* 9 C.C.A., 32 F. 2d 991.

brought under the Chinese Exclusion Acts before a United States commissioner the accused had been first arrested without a warrant and while held illegally in a station-house had been questioned by an immigrant inspector. The testimony thus obtained was introduced in the hearing before the commissioner. The circuit court of appeals held that since counsel for the alien had not objected to its introduction it was competent. There was a dictum, however, that since the proceedings were judicial in character such evidence would not have been admissible over counsel's objection, and that its use "in administrative proceedings where the tribunal itself is charged with the duty of safeguarding the defendant's rights would vitiate the results."[88] The analogy of the cases of evidence obtained by an unlawful search and seizure of the property of the accused would seem to apply to evidence obtained from him when he is unlawfully held in detention before a warrant has been issued. In a later case an alien was arrested without warrant and taken before an immigration officer for a hearing. She was ordered deported. It was held that she had never waived her rights by consenting to the introduction of the evidence thus illegally obtained and she was ordered discharged. Here, however, there was another reason for the action of the court, the failure of the officers to follow the statutory requirement that there be a warrant of arrest.[89] If the arrest is lawful and the alien answers the questions without any duress the testimony can be used against him even though the department warrant of arrest has not yet been issued.[90]

Evidence obtained by duress. To be admissible against the alien as evidence in the formal hearing the testimony given at the preliminary examination must be given voluntarily. If it was obtained by duress, physical or mental, so that he did not testify voluntarily, the hearing is defective. In one case an im-

[88] *Charlie Hee* v. *U.S.*, 1 C.C.A., 19 F. 2d 335.
[89] *Murphy* v. *McCandless*, D.C. E.D. Pa., 40 F. 2d 643.
[90] *Bilokumsky* v. *Tod*, 263 U.S. 149.

migrant inspector conducted in jail a preliminary examination of a Japanese three days after he had been painfully wounded while endeavoring to escape from custody. There was no one else present except an interpreter. The evidence so obtained was the only evidence in the case. The inspector who conducted the formal hearing refused to call for cross-examination by alien's counsel the one who had conducted the preliminary examination in jail. The court said that the condition of the alien at that time was material, that the real question was "not whether the petitioner had admitted facts that would subject him to deportation, but whether he had done so voluntarily." The writ was granted because of this refusal to call the first inspector.[91]

Evidence after formal hearings. The statute provides that the decision of the Secretary on an appeal from a board of special inquiry in an exclusion case shall be rendered solely upon the evidence adduced before the board.[92] It has been held that evidence brought before the Secretary after the hearing before the board of special inquiry and never considered by it was not competent to support his decision against an alien applying for admission. In the case in question the board voted two to one to admit the applicant, a Chinese who claimed to be an American citizen on the ground of alleged birth in New York. The principal evidence relied on by him was a birth certificate, although there was other evidence of identification. The dissenting member of the board had appealed and the Secretary sustained the appeal, but there was in the file other evidence not brought before the board and never brought to the attention of the alien or of his counsel. The court reversed the action of the Secretary.[93]

In expulsion cases, however, there is no requirement of statute or rules that all the evidence relied on by the Secretary

[91] *In re Sugano,* D.C. S.D. Cal. S.D., 40 F. 2d 961.

[92] Act of 1917, Sec. 17.

[93] *Hom Yuen Jum* v. *Dunton,* D.C. S.D. N.Y., 291 F. 905.

should be brought out in the hearing before the examining inspector. The cases do not go to the Secretary on appeal but for first trial. Evidence may, therefore, be introduced at any time subject to the requirement that the alien must be apprised of it and given an opportunity to meet it.

Requirements of the warrant of arrest. Questions of whether the warrant of arrest was properly issued and whether when issued it was legally sufficient have been considered by the courts. The rules require that the application for a warrant must "state a *prima facie*" case, and that "at the hearing the alien shall be allowed to inspect the warrant of arrest."[94] The warrant, thus to some extent, performs the office of an indictment since it apprises the alien of the charges against him. The courts have, however, reiterated that proceedings to expel are in no sense criminal proceedings but are merely hearings conducted by executive officers to enable them to ascertain facts upon which to base executive action. Consequently, defects of form are not material, if the essential requirement is preserved of "substantial notice of the reasons urged why they should be deported from this country" and "if they are given a fair and reasonable opportunity to present evidence controverting any evidence adduced by the department."[95] In one case the warrant of arrest was based on a landing certificate which described a different person of the same name. The court held that as the hearing itself had been fair this error in issuing the warrant of arrest would make no difference.[96] In another case the same court refused to consider allegations of the petitioner that there had been an insufficient showing of facts to justify the alien's arrest on the ground that the hearing itself had been fair.[97] In still another a federal district court held that the fact that the warrant was issued on insufficient evidence did not invalidate the pro-

[94] Immigration Rule 19, subd. D, par. 2.
[95] *Ex parte Hidekuri Iwata,* D.C. S.D. Cal. S.D., 219 F. 610.
[96] *Wong Shee* v. *Nagle,* 9 C.C.A., 7 F. 2d 612.
[97] *Chun Shee* v. *Nagle,* 9 C.C.A., 9 F. 2d 342.

ceedings if there were no other defects.[98] The fact that the warrant of arrest is so indefinite that it might have been objected to is not regarded as a defect in the proceedings when it appears that the alien was fully advised as to the charges made against him and tried to meet them.[99] Again the failure of the warrant to specify the time and place of the alien's alleged acts of immorality was held not to be a fatal defect in the warrant when it was shown that before the hearing the alien had been supplied with a copy of the sworn statement upon which the warrant had been issued.[100]

In *Bauder* v. *Uhl*[101] the evidence brought out at the hearing failed to show the alien guilty of the charges in the warrant, that is, that he had admitted that before entry he had committed a crime involving moral turpitude. It did, however, justify the decision reached by the department that he had entered with a woman not his wife with whom he had had illicit relations before coming to this country, and that they had planned to continue these relations in this country. The charge that he had imported another alien for an immoral purpose had been added to the record during the hearing. The court dismissed the petition for a writ of *habeas corpus,* saying,

> It is not necessary that a warrant of arrest shall have the formality and particularity of an indictment, although it is necessary that the alien should have sufficient information of the acts relied on to bring him within the excluded classes, to enable him to offer testimony in refutation at the hearing.

In another case the warrant charged that the alien was within the expellable classes as having admitted the commission of bigamy. At the hearing there was disclosed no evidence to sustain a finding that there had been such an admission, but

[98] *Ex parte Guest,* D.C.D. R.I., 287 F. 884.
[99] *Ong Chew Lung* v. *Burnett,* D.C. S.D. Cal. S.D., 219 F. 610.
[100] *Maltez* v. *Nagle,* 9 C.C.A., 27 F. 2d 835.
[101] 2 C.C.A., 211 F. 628.

during the hearing the examiner succeeded in obtaining the alien's admission for the first time that he had in fact committed such an offense. He was ordered deported on that ground and the court held the hearing was sufficient.[102]

It is necessary in all cases that a formal warrant of arrest be issued by the Secretary of Labor. This is a requirement of the statute.[103] This is true even though the warrant of deportation is executed in due form and the evidence is sufficient to sustain the charges contained therein. The issuing of a proper warrant of arrest is a necessary fact to establish the jurisdiction of the officers. In a case where an alien was arrested without warrant, given a hearing before an inspector, and ordered deported, the court held the procedure defective.[104]

The warrant of deportation. The warrant of deportation, issued by the Secretary after the decision to expel has been made, has also been subjected to tests by the courts. It must state the ground for deportation on which there has been a hearing and a finding by the Secretary. In one case the warrant of arrest and the hearing had been on the charge, "Without a properly visaed passport." The warrant of deportation was on the charge, "Passport issued for another person." The procedure was held defective.[105] In another a person of Chinese race had been arrested on a charge that after entry he had changed his status to that of laborer. The warrant of deportation was on the ground that he had entered fraudulently. The court held the proceedings defective stating that the grounds for deportation must be in the warrant of arrest or must be explained to the alien during the hearing.[106] Moreover the warrant of deportation must state that the Secretary has found facts which

[102] *U.S. ex rel Rosen* v. *Williams,* 2 C.C.A., 200 F. 538.

[103] Act of 1917, Sec. 19.

[104] *Murphy* v. *McCandless,* D.C. E.D. Pa., 40 F. 2d 643.

[105] *Throumoulopolous* v. *U.S.,* 1 C.C.A., 3 F. 2d 803.

[106] *Wong Sun Fay* v. *U.S.,* 9 C.C.A., 13 F. 2d 67; *Ex parte Keizo Shibata,* 9 C.C.A., 35 F. 2d 636.

are grounds for deportation under the statutes. In *Mahler* v. *Eby*[107] an alien had been ordered deported on the ground that he had been convicted and served a term for violation of the selective service act. The warrant of deportation recited the finding of conviction, but did not recite that the Secretary had found the convicted alien to be an undesirable resident of the United States. Since the statute provided for deportation, not on the ground of conviction of the war legislation alone, but only where the Secretary had found the aliens so convicted to be undesirable residents, the court held the warrant of deportation defective.

The warrant of deportation need not contain a finding as to all the charges in the warrant of arrest. It may also be based on charges not in the first warrant at all if these charges were added to the record during the hearing and were called to the attention of the alien at the time. For instance, the warrant of arrest in one case contained among other charges the allegation that the aliens had "entered by means of false and misleading statements, thus entering without inspection." The warrant of deportation was on the ground that the alien had been found in the United States in violation of the quota act. It appeared that the hearing had been upon this charge and a finding made on it. The court held the warrant of deportation adequate and sustained the department.[108]

The warrant of deportation, however, like the warrant of arrest, need not have the formality and particularity of an indictment if it performs the office of indicating the exact charges on which the action is based. In one case the warrant recited that the alien had "imported or attempted to import." It was objected that it was defective in that it did not specify whether deportation was for the importation or for the attempt. The court held that since the alien had been clearly informed of the

[107] 265 U.S. 32.

[108] *Giacomazzi* v. *Tillinghast,* D.C. D. Mass., 38 F. 2d 499.

charges against him, that of paying the passage and securing the entry of a woman not his wife in order to live with her here, although he had a wife in Poland, the defect in the wording of the warrant was not material.[109]

Related to the question of the sufficiency of the warrant of deportation in expulsion cases is that of the findings of the board of special inquiry or of the Secretary on appeal against an alien in exclusion cases. It has been held that the record must show a finding on each of the issues raised by the alien in his application for admission. Thus, where an alien alleged to be illiterate claimed to be exempt from the literacy test on the ground that she was a refugee from religious persecution, the failure of the record to show a finding by the board of special inquiry and by the Secretary on this issue was held to make the procedure defective.[110] The same was held to be true as to the issue raised in the same case as to whether the lameness of the applicant affected her ability to earn a living.

Counsel. Another problem involved in the review of procedure by the courts is the right of the alien to have counsel. Administrative proceedings to exclude or to expel aliens not being criminal trials, the provisions of the Sixth Amendment of the Federal Constitution guarantying the right of an accused person to have the assistance of counsel are not applicable. The constitutional question as to the right must depend upon the requirement of due process of law of the Fifth Amendment.

Before boards of special inquiry. The provision of the statute and rules that counsel need not be permitted in the hearings before the boards of special inquiry has been upheld by the courts as constitutional.[111] The court relied largely on the necessities of the case, the need for speedy, summary action, and the

[109] *Kostenowcyk* v. *Nagle,* 9 C.C.A., 18 F. 2d 834.

[110] *Tod* v. *Waldman,* 266 U.S. 113.

[111] *U.S. ex rel Buccino,* C.C. S.D. N.Y., 190 F. 897; *Brownlow* v. *Miers,* 5 C.C.A., 28 F. 2d 653.

practical impossibility of turning the hearings into trials with counsel present. The fact that the statute gave the alien the right to counsel on the appeal to the Secretary was regarded as material. The whole process was considered as one.

In expulsion cases. The statutory provisions for expulsion contain no reference to counsel. The right to counsel is established by the immigration rules. At one time these contained the following provisions on the subject:

> Preferably at the beginning of the hearing . . . or at any rate as soon as such hearing has progressed sufficiently in the development of the facts to protect the Government's interest, the alien shall be apprised that thereafter he may be represented by counsel.[112]

The validity of this provision, that part of the hearing may be held without counsel who will be allowed in the case only after the preliminary hearing has been completed, was upheld by the Supreme Court in *Low Wah Suey* v. *Backus.*[113] The present rule reads: "At the hearing . . . the alien shall be apprised that he may be represented by counsel" and "If counsel be selected, he shall be permitted to be present during the conduct of the hearing."[114] The rules prior to the present provided for counsel "at the beginning of the hearing." This former rule and the present rule as it is administered apparently are more liberal than the minimum requirements of due process on the subject as laid down by the Supreme Court.

Assuming, however, that the provisions of the rules do give the alien more extensive rights to counsel than this minimum, a denial of such right by the officers would make the hearing unfair and entitle the alien to relief by a court.[115] The rules must be administered so as to give the alien the benefit of counsel. A refusal to allow him counsel until the hearing has been

[112] Rule 22, subd. 5 (b), Rules of November, 1917.

[113] 225 U.S. 460. [114] Immigration Rule 19, subd. D, par. 2.

[115] *Mah Shee* v. *White,* 9 C.C.A., 242 F. 868; *Chew Hoy Quong* v. *White,* 9 C.C.A., 249 F. 869.

completed has been held an abuse of the discretion which the law gives to the officers.[116] It is also unfair and a failure of due process of law for the inspector, after formally apprising the alien that he may be represented by counsel, to persuade him that in fact counsel will not be necessary and thus induce him to waive the right to such assistance.[117]

At preliminary examinations. It is, however, permissible to conduct preliminary examinations of suspected aliens under oath before the warrant of arrest has been issued. As has been pointed out,[118] this is done in many cases. The testimony of the alien is recorded in shorthand. Counsel is not permitted. At the formal hearing the transcript of the testimony at this preliminary hearing is put into the record. In many cases the whole case is proved in that way. The Supreme Court has held that the use of the evidence obtained in these hearings did not invalidate the procedure.[119]

Oral argument. Although it may be said that due process of law requires that the alien have the benefit of counsel at some time during the expulsion process, and perhaps also in the exclusion process, it has been held that this right did not extend to the presentation of oral argument, and the Secretary could refuse to hear counsel in such an argument on an appeal.[120] The institution of the practice of holding oral hearings before the Board of Review might cause the courts to adopt a different view in an individual case where oral argument had been refused, on the ground that the exception in the particular case was unfair and arbitrary. The question does not seem to have been before the courts since the board makes it a general practice to accord oral hearings to counsel when they request it.

Bail. The statute provides that pending the final decision in

[116] *Whitfield* v. *Hanges,* 8 C.C.A., 222 F. 745.
[117] *Roux* v. *Commissioner of Immigration,* 9 C.C.A., 203 F. 413.
[118] See Chapter IV, §4, p. 90. [119] *Bilokumsky* v. *Tod,* 263 U.S. 149.
[120] *Chin Hing* v. *White,* 9 C.C.A., 234 F. 616.

an expulsion case, the accused alien may be released in the discretion of the Secretary under a bond in the penalty of not less than $500.[121] Is such a provision necessary and would it be a violation of constitutional guaranties to deny it altogether by the statute? Apparently the provision of the Seventh Amendment that excessive bail shall not be required is not applicable to administrative proceedings to deport. It has been held not to be applicable to judicial proceedings to expel under the Chinese Exclusion Acts.[122] The dictum of Mr. Justice Gray in *Fong Yue Ting* v. *U.S.*[123] that the constitutional provisions as to criminal cases are not applicable has often been cited to the same effect. The alien arrested in expulsion proceedings is, however, entitled to such protection and advantages as the statutes and the rules give him.[124] Therefore, when without any reason except a desire to keep the alien confined, bail has been refused or fixed at a prohibitive sum considering the nature of the charges, the character and reputation of the alien, and his means, there has been an arbitrary denial of bail which is ground for court intervention.[125]

As to the exclusion process, applicants for admission, held at the border while their cases are under consideration, are not entitled to bail under the statutes or rules.[126] There would undoubtedly, however, be a limit to the time permitted the immigration authorities to keep the alien in detention while delaying the decision of his case. The courts would no doubt require that reasonable efforts be made to expedite a case or would release the alien. They have so held in the case of aliens held in

[121] Act of 1917, Sec. 20.

[122] *In re Chin Wah,* D.C.D. Ore., 182 F. 256.

[123] 149 U.S. 698 at 730.

[124] *Weinstein* v. *Uhl,* D.C. S.D. N.Y., 266 F. 929.

[125] *Colyer* v. *Skeffington,* D.C. D. Mass., 265 F. 17; *Prentiss* v. *Manoogian,* 6 C.C.A., 16 F. 2d 422.

[126] *Ex parte Domingo Corypus,* D.C. W.D. Wash. N.D., 6 F. 2d 336; *Ex parte Fong Chou Oi,* D.C. N.D. Cal., 15 F. 2d 209.

detention while awaiting the execution of the warrant of deportation.[127]

Miscellaneous matters of procedure. The sufficiency of the administrative procedure in immigration cases has been questioned before the courts in other matters. It has been held not unfair not to permit the alien to examine the warrant of arrest when it appeared that the inspector explained it fully to him.[128] It was in another case held that the fact that at several hearings in an exclusion case the board of special inquiry at each hearing consisted of different inspectors was not a fatal defect since the board at the last hearing had considered all the evidence.[129] The legality of having a board of special inquiry consist of two inspectors and one stenographer was attacked in one case, but the court held that under the statute such a board could be authorized by the Secretary.[130] In another case the objection was made that the interpreter used was not regularly employed in the immigration service, but the court held that since there was no allegation that he had not done his work properly his employment in the individual case was not a defect in the procedure.[131] As has already been referred to,[132] the detention of an alien held in jail for deportation an unreasonable time after the decision to deport had been rendered, has been held to be a ground for judicial intervention and the alien was discharged on a writ of *habeas corpus*.[133] In a similar case a Russian alien had been ordered deported but there was delay in carrying out the warrant because of the difficulty in securing a passport for him. The department directed his release on bond with an order that he report to the immigration officers at regular inter-

[127] *Chumuna* v. *Smith*, D.C. W.D. N.Y., 29 F. 2d 287.
[128] *Seif* v. *Nagle*, 9 C.C.A., 14 F. 2d 416.
[129] *Hom Moon Ong* v. *Nagle*, 9 C.C.A., 32 F. 2d 470.
[130] *Ex parte Hosaye Sakaguchi*, 9 C.C.A., 277 F. 913.
[131] *Quock So Mui* v. *Nagle*, 9 C.C.A., 11 F. 2d 492.
[132] See *supra*, §3, p. 183.
[133] *Chumurra* v. *Smith*, D.C. W.D. N.Y., 29 F. 2d 287; *Ex parte Matthews*, D.C. W.D. Wash. N.D., 277 F. 857.

vals. The court held that the department had no power to issue such an order; that they must either release him from custody or deport him.[134] In a decision to the same effect the court ordered that unless the relator was deported within four months his discharge from the custody of the officers would be directed on another writ.[135]

The courts have also reviewed the method of giving the literacy test to applicants for admission. They have held that giving a test in two languages was not permitted under the statute, and that the record must contain an understandable description of the test actually made by the board of special inquiry and of the respects in which the alien failed to read. The statement of the conclusions of the board as to the test and not the facts upon which the conclusions were based was not sufficient.[136] It has also held a defect in procedure for the board of special inquiry which has voted to exclude an applicant for admission to fail to advise him of his right to appeal to the Secretary, since the duty to advise him is imposed by the statute.[137] In one case the department ordered a case to be reopened for a new hearing before the board of special inquiry on the question of the alien's literacy, with directions to the local officers to deport in case the alien failed to pass the reading test without any further reference of the case to the department. The board voted to exclude and failed to notify the alien of her right to appeal. The court held the proceedings to be improper and ordered the discharge of the alien.[138]

§4. QUESTIONS OF DISCRETION

Rule-making power. The statutes provide that the Commissioner-General shall under the direction of the Secretary of

[134] *Bonder* v. *Johnson,* D.C. D. Mass., 5 F. 2d 238.
[135] *Ross* v. *Wallis,* 2 C.C.A., 279 F. 401.
[136] *Tod* v. *Waldman,* 266 U.S. 113.
[137] Act of 1917, Sec. 16.
[138] *Tod* v. *Waldman,* 266 U.S. 113.

Labor prescribe rules and regulations for the enforcement of the law.[139] This rule-making power is the broadest power to use discretion given to the Secretary. In so far as such rules are not inconsistent with statutes, or do not call for administrative action inconsistent with the constitutional requirements of "due process of law," they are entirely a matter of his discretion. The wisdom or expediency of his actions in such cases is not open to question in any court. For instance, the entire procedure for the expulsion of aliens has been established by the use of this rule-making power including the provisions for a hearing and for counsel. Again by a rule the department has restricted the statutory right to have witnesses summoned by *subpoena* by the requirement that the written application by the alien's counsel must state the facts which he expects to prove by the witness and limit his examination to those facts. This rule has been upheld by the courts as an exercise of the rule-making power.[140]

Admission of aliens otherwise excludable. The classes of cases in which "in his discretion" the Secretary may admit aliens who without the exercise of the discretion would have to be excluded have already been discussed.[141] Over the exercise of this discretion the courts have no control. If discretion has actually been exercised, which means the exercise of an honest judgment, the wisdom or the reasonableness of the course adopted is not open to court review. It is not material whether the reasons for a refusal to exercise the discretion for or against a particular person may or may not seem persuasive to a court. For instance, in one case where a family of aliens including several small children applied for admission, the board of special inquiry rejected the mother on the ground that because of a physical disability she was likely to become a public charge. Application was made by the husband and father for

[139] Act of 1917, Sec. 23; Act of 1924, Sec. 24.

[140] *Chun Shee* v. *Nagle,* 9 C.C.A., 9 F. 2d 342.

[141] See Chapter II, §2, p. 34.

her admission under bond on the ground that a separation of the members of a family was involved. The Secretary, however, refused to grant the application. The court held that it had nothing to do with the case as Congress had confided the discretion to the Secretary, and he alone could exercise it.[142] The questions in such cases are, first, whether the power to exercise discretion has been given by the statute, and second, whether there has been in fact an exercise of the power. It has been held that in these cases of discretionary power to admit there must be a special petition for the exercise of the discretion in the alien's favor, with reasons advanced for the action. Thus the department did not abuse the discretion by ordering the deportation of a stowaway in the absence of affirmative reasons for its exercise in his favor.[143]

Arbitrary refusal to exercise. If, however, there has been an arbitrary refusal to exercise the discretion, to consider the merits of the case at all, the courts will perhaps intervene. In a case where the department refused to admit two unaccompanied children under sixteen years of age, coming to relatives in the United States who were able and willing to support them, the court held that the discretion had been abused.[144] In another case an Italian who could not read had after seven years' residence in the United States gone to Italy on a visit. He was delayed in getting an Italian passport for his return and thus reached the port of entry twenty days after the expiration of the period of six months' absence allowed him under the provisions of the statute establishing the literacy test.[145] Under the seventh proviso of the same section of the statute, however, he could be admitted in the discretion of the Secretary if he could prove a domicile of

[142] *U.S. ex rel Chanin* v. *Williams,* 2 C.C.A., 177 F. 689.

[143] *Colonna* v. *Tillinghast,* 1 C.C.A., 32 F. 2d 447.

[144] *Berman* v. *Curran,* 3 C.C.A., 13 F. 2d 96; *De Sousa* v. *Day,* 2 C.C.A., 22 F. 2d 472.

[145] Act of 1917, Sec. 3.

seven years in the United States. He complied with the rule of the department as to the proof of this domicile but was nevertheless refused admission and ordered deported. The court, however, intervened and held that in view of his proving the facts under the rule he was entitled to the exercise of the Secretary's discretion in his favor.[146]

Since the passage of the Act of 1918[147] under which the requirements as to passports and visas were established, there has been a very broad power to exclude aliens vested in effect in the officers of the Department of State. All aliens, both immigrants and non-immigrants, must have a visa. Under the statutes these visas may be issued by consular officers. The courts have held that they will not attempt to interfere with the exercise of this power, that the only recourse of an applicant for a visa against an unreasonable and arbitrary refusal is through diplomatic action.[148] The power is therefore a very broad discretionary one.

§5. QUESTIONS OF FACT

a. *Jurisdictional Facts*

In many cases, both exclusion and expulsion, the important issue is a claim to American citizenship. The statutes which give the immigration officers their authority apply in terms to aliens or to immigrants. They give the officers no power over citizens. Therefore, when the issue of citizenship or alienage is raised, a jurisdictional fact must be decided. In this connection it is more convenient to consider the exclusion and expulsion cases separately, since they have been treated differently by the courts.

[146] *Patti* v. *Curran,* D.C. S.D. N.Y., 22 F. 2d 314.

[147] An act approved May 22, 1918, 40 Stat. 559. This was extended by the Act of March 2, 1921.

[148] *London* v. *Phelps,* 2 C.C.A., 22 F. 2d 288; *Ulrich* v. *Kellogg,* D.C. Ct. of Appeals, 30 F. 2d 984.

Exclusion cases. In exclusion cases, the courts have apparently adopted the rule that a claim to American citizenship made by a person applying for admission does not entitle him to a judicial trial of the validity of the claim. This is so even when the facts alleged establish a *prima facie* case. Apparently, the immigration officers may in such cases decide the facts on which their own jurisdiction depends. This holding was forecast in the opinion of Mr. Justice Holmes in *U.S.* v. *Sing Tuck*,[149] but a definite decision was made in *U.S.* v. *Ju Toy*,[150] first, that the statutory provision that the decision of the Secretary should be final applied to the question of citizenship, and second, that the statute so providing was constitutional, as due process of law did not in such cases require a judicial trial. This case has been followed in later cases in the Supreme Court.[151] In exclusion cases there has been no indication of a tendency away from it.

Expulsion cases. In expulsion cases, however, the Supreme Court has departed from the rule it adopted in *U.S.* v. *Ju Toy*.[152] In these cases the rule as to the finality of the decision of the administrative officers on the issue of citizenship is otherwise. When a person within the country against whom a warrant of arrest in expulsion proceedings has been issued, has presented substantial evidence tending to establish a claim to citizenship, he is entitled to a judicial trial of the issue presented by his claim.[153] The first judicial statement that there was a difference between the exclusion and the expulsion proceedings such that the doctrine of *U.S.* v. *Ju Toy*[154] would not apply to the latter, was in a case decided by the circuit court of appeals of the seventh circuit.[155] It was held that the citizenship of a resident within the country was a right to be adjudi-

[149] 194 U.S. 161.
[150] 198 U.S. 253.
[151] *Tang Tung* v. *Edsell*, 223 U.S. 673; *Quon Quon Poy* v. *Johnson*, 273 U.S. 352.
[152] 198 U.S. 253.
[153] *Ng Fong Ho* v. *White*, 259 U.S. 276.
[154] 198 U.S. 253.
[155] *Moy Suey* v. *U.S.*, 147 F. 697.

cated by the courts in the usual and ordinary way of adjudicating constitutional rights. The opinion by Judge Grosscup stressed the difference between the exclusion and expulsion processes:

> But there is a fundamental distinction between the case of a citizen who has left the country and is asking to reënter it, and a citizen of the country who has never left it, but whom the government is seeking to deport; and while it is true now that the Supreme Court has so decided, that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to reënter or not, it seems to us uncontrovertible that a citizen of the country who has not gone out may not be deported or banished until the right of the government to deport or banish has been judicially determined.

This distinction was made effective by the Supreme Court in *Ng Fong Ho* v. *White*.[156] In that case, two persons of Chinese race had been arrested under warrant of the Secretary and had been ordered deported after expulsion proceedings had been completed. They claimed to be citizens on the ground that they were foreign-born sons of native-born American citizens. It was conceded that they had been duly admitted by the immigration authorities when they first arrived in this country, but the department claimed that an error had been made at that time because of deception practiced by the applicants. The latter petitioned for a writ of *habeas corpus*. The Supreme Court held unanimously that the petitioners were entitled to a judicial hearing on the issue of citizenship. In the opinion by Mr. Justice Brandeis the distinction between persons who are seeking admission at the border or have entered surreptitiously and those who are already within the country at the time the proceedings to expel are initiated, was emphasized.

> But they were not in the position of persons stopped at the border when seeking to enter the country. . . . Nor are they in the position

[156] 259 U.S. 276.

of persons who entered surreptitiously. . . . The constitutional question presented as to them is, May a resident of the United States who claims to be a citizen be arrested and deported on executive orders? . . . They supported the claim by evidence sufficient if believed to entitle them to a finding of citizenship.

The opinion then likened the case to one where a person brought before a military court denies that he is in the military service, and stated that the Fifth Amendment afforded protection against the loss of liberty and perhaps of both property and life involved in the deportation.

Effect of prior residence in exclusion cases. It seems then established by the Supreme Court that when an applicant for admission who has never resided in this country claims the right to enter on the ground that he is the son born abroad of an American citizen and, therefore, himself a citizen, he is not entitled to a judicial trial of the issue of citizenship.[157] It seems that the same rule applies when an applicant for admission claims that he is a citizen who has resided in this country and is returning from an absence abroad.[158] There is no indication of a different rule where prior residence in this country is admitted, but the citizenship of the returning resident is denied. In the opinion in the latest Supreme Court case on the subject, *Quon Quon Poy* v. *Johnson,*[159] the words, "and had never resided in the United States," were used. Perhaps a distinction may be built up later, on the basis of these words, to allow a judicial hearing in cases where prior residence has been established.

Effect of formal or of surreptitious entry in expulsion cases. It seems equally well settled that when proceedings to expel are brought against a person already resident in this country after a formal entry after inspection, the issue raised by a sub-

[157] *Quon Quon Poy* v. *Johnson,* 273 U.S. 352.

[158] *U.S.* v. *Ju Toy,* 198 U.S. 253; *Scimeca* v. *Husband,* 1 C.C.A., 6 F. 2d 957.

[159] 273 U.S. 352.

stantial claim of citizenship by such person must, if he so insists, be tried *de novo* in a judicial proceeding.[160] It may happen, however, that the person accused as a deportable alien claims to have been born in this country and to have been in continuous residence, whereas the department claims that he entered surreptitiously. Apparently, if the accused can offer substantial evidence of his citizenship, he is entitled to have that evidence heard *de novo* by a court.[161] Suppose, however, the alleged citizen admits that he entered surreptitiously without inspection, or suppose he is caught a short distance within the country a short time after his surreptitious entry. In one district court the distinction referred to by Mr. Justice Brandeis in *Ng Fong Ho* v. *White*,[162] between persons already in the country and those who have entered surreptitiously, was relied on. There a person of Chinese race was arrested within four and one-half miles of the Canadian border of the United States after a surreptitious entry. The court held that he was not entitled to a judicial trial of his claim to citizenship, and treated the rule in *Ng Fong Ho* v. *White*[163] as limited to cases of persons already admitted. A person shown to have entered surreptitiously was likened to one stopped at the border.[164] It has been held that a person admitted on bond while awaiting deportation was not dwelling within the United States for the purpose of acquiring the right of citizenship which comes to a minor whose father has been naturalized,[165] but was in the position of one stopped at the border. It does not seem, however, that this rule ought to be applied to cases where persons admitted on bond can introduce substantial evidence to support a claim of citizenship, or to cases where persons admitted temporarily can support the same claim after they have overstayed the

[160] *Ng Fong Ho* v. *White*, 259 U.S. 276.
[161] *Lew Shee* v. *Nagle*, 9 C.C.A., 7 F. 2d 367.
[162] 259 U.S. 276. [163] *Ibid.*
[164] *Jew Lee* v. *Brough*, D.C. S.D. N.Y., 16 F. 2d 492.
[165] *Kaplan* v. *Tod*, 276 U.S. 228.

period allowed them by the terms of the admission. In one case in a district court it was held that where an applicant had been admitted to the country with the consent of the department and without surreptitious entry or evasion, he was entitled to a judicial trial of his claim to citizenship.[166]

b. *Facts Other than Jurisdictional*

An analysis of the kinds of facts. It has been pointed out[167] that the decisions of the immigration officers on issues of "fact" are of two kinds. The first involves a conclusion that a certain event or series of events has occurred. An issue of this kind is raised in cases where the question is conviction of crime, practice of prostitution, the making of a contract of employment before entry, nationality, place of birth, or prior residence in this country. These cases depend upon the credibility of witnesses or the authenticity of documents. They may depend upon inferences from circumstantial evidence, or upon the self-consistency of testimony. These are properly questions of fact. The second involve inferences from other facts or events as to the character or qualifications of the alien, or as to the "likelihood" that certain events may happen to him in the future. This second kind of question arises when the rule is applied calling for the exclusion of those who are "likely to become a public charge," or whose physical defects are such that they may "affect the ability of the alien to earn a living," or for the expulsion of a person convicted of violation of the war acts and found to be an "undesirable resident," or of a person of "radical opinion." A simpler issue of this kind is the question of the literacy of the alien. Within this class come also the large class of cases where the issue is to be settled by a medical diagnosis by the public health surgeons, or where the immigration officers must decide between conflicting medical opinions

[166] *Gonzalez* v. *Kirk*, D.C. S.D. Tex., 39 F. 2d 246.

[167] See Chapter III, §3, p. 36, and Chapter IV, §3, p. 86.

as to the physical condition of an alien. Here the application to the question of technical medical knowledge is involved. Questions of this second class are also called questions of fact. They are issues like those involved in the application of a standard of quality, character, skill, or ability. They involve processes of judgment different from those of the first class. They shade more easily into questions of law. These differences sometimes affect the question of judicial review although in most cases the distinction is lost sight of.

The test of reasonableness. The courts reiterate, that if there has been a fair hearing, the decision of the Secretary on questions of "fact" is not open to judicial review. Yet they have on such questions established a measure of such review. Questions of fact of the first kind referred to above are included as well as those of the second. This review has been more or less close, varying with the attitude of individual judges in particular cases. It has resulted from the practice of inspecting the record of the administrative hearings to see whether there was sufficient evidence to justify the finding. This scrutiny of evidence is common in both exclusion and expulsion cases. In the circuit courts of appeal the action of the administrative officers has been held bad in several cases as a result. In the Supreme Court there has as yet been no case of reversal solely on that ground, but in several the evidence has been examined with the avowed purpose of thus testing it, although after due consideration the court has declared it sufficient.

The requirement which the evidence must meet has been variously stated. It is said that the decision must be supported by "substantial evidence";[168] that if the evidence is such that the question of whether the charges are true is debatable, there is substantial evidence;[169] that "if the executive tribunal had

[168] *Lo Pong* v. *Dunn,* 8 C.C.A., 235 F. 510; *Whitfield* v. *Hanges,* 8 C.C.A., 222 F. 745; *Jee Gim Bew* v. *Tillinghast,* 1 C.C.A., 28 F. 2d 612.

[169] *Gambroulis* v. *Nash,* 8 C.C.A., 12 F. 2d 49.

any basis upon which to exercise its judgment, it is not for the court to review and to revise that judgment by rebalancing the testimony, even if the court be of the opinion that upon the same testimony, or upon the same basis, it might have reached a contrary view";[170] that the question is whether there was any pertinent and competent testimony adduced to support the findings of the department;[171] and in several cases simply that there must be some evidence to support it.[172] Sometimes the test is stated negatively, that is, that the decision of the department will be reversed if there is no evidence to support it, or no adequate evidence, or if the decision is based on mere suspicion, guess, or surmise. Statements of the Supreme Court are that "it must find adequate support in the evidence,"[173] that there must be evidence from which the conclusion "might reasonably have been inferred,"[174] evidence "adequate to support the Secretary's conclusions of fact,"[175] and "sufficient evidence to fairly sustain the finding of the Secretary."[176] It seems that the fact that some evidence or testimony was secured in the hearing and put into the record does not of itself justify the court's sustaining the decision of the department. By some evidence, adequate evidence or substantial or sufficient evidence is meant evidence sufficient to raise an issue of fact. Facts must have been brought out from which the officers might reasonably have reached their decision. The test is a standard of reasonableness applied to the decision of the officers in the light of the evidence in the record. It is the application to the findings of fact of the immigration officers of the test of

[170] *Antolish* v. *Paul*, 7 C.C.A., 283 F. 957.

[171] *Healy* v. *Backus*, 9 C.C.A., 221 F. 358.

[172] *U.S.* v. *Uhl*, 2 C.C.A., 211 F. 628; *Williams* v. *U.S.*, 2 C.C.A., 206 F. 460.

[173] *Kwock Jan Fat* v. *White*, 253 U.S. 454.

[174] *Tisi* v. *Tod*, 264 U.S. 131.

[175] *Zakonaite* v. *Wolf*, 226 U.S. 272.

[176] *Lewis* v. *Frick*, 233 U.S. 454.

reasonableness applied by courts to the verdicts of juries. "There must be facts which if unanswered would justify men of ordinary reason and fairness in affirming the question."[177]

Justification for this test. The courts support this testing of the evidence on two grounds. They say that the determination of whether there was any substantial evidence is a question of law,[178] or that where there is a decision based on inadequate evidence there has been an unfair and arbitrary hearing.[179] The first is following the analogy of jury trials where such a question is called a question of law because it is decided by the judge. As to the second, it was stated by the court in one case that bad faith or a wilful disregard of probative value must be found.[180] In some cases the fact that the evidence furnishes no reasonable ground for the administrative decision justifies the inference that there was in fact bad faith and conduct so arbitrary that it can be called wilful. The cases, however, show that the courts go further than that. Their action is based on the principle that a decision not supported by substantial evidence is in itself defective. The good faith of the officer is not necessarily in issue any more than it is in many cases of defective procedure. Unfair and arbitrary are used in a broader sense. Prejudice, passion, the pressure of public opinion, carelessness, undue haste, overzealousness, ignorance, and stupidity may be causes of a decision on inadequate evidence. The question is whether the court in its own judgment thinks there was no reasonable ground for a difference of opinion. There is no attempt to seek for motives if in the opinion of the court there was no conflict of evidence. This review of the evidence is a development of the principle laid down in the *Chin Yow* case[181] that the decision of the department is final only after

[177] Wigmore on *Evidence*, Sec. 2494.
[178] *Whitfield* v. *Hanges*, 8 C.C.A., 222 F. 745.
[179] *Ong Chew Lung* v. *Burnett*, 9 C.C.A., 232 F. 853.
[180] *Lee How Ping* v. *Nagle*, 9 C.C.A., 36 F. 2d 582.
[181] 208 U.S. 8.

a properly conducted hearing. It is an easy step from a scrutiny of the record for defects in the mode of trial to a scrutiny of the evidence in the record to see whether it is adequate to support the decision. A review of the mode of trial requires in itself some consideration of the evidence relied on.

A general standard. In their examination of the evidence the courts are applying a general standard of reasonableness. No rules have been worked out to govern them in deciding when cases come on one side or the other of the line. Each case must depend upon its own particular facts. The question of how weak the case against an alien must be before a court will interfere with the action of the department, depends upon the judgment and point of view of the individual judge. In most of the cases an attitude of liberality toward the department is adopted. The cases of judicial interference on the ground of insufficiency of evidence are usually very clear cases where hasty prejudiced action, or carelessness, or action on little more than suspicion was evident. The courts do not interfere in close cases. They intervene only when the evidence against the alien is so flimsy that no reasonable person could rely upon it.

Cases involving a conflict of evidence. In deciding the question the court considers the evidence in the alien's favor as well as that against him. When the evidence on each side is such that reasonable persons could disagree as to what the decision ought to be, the decision of the administrative officers is upheld. If there is a conflict of testimony requiring the passing of judgment upon the credibility, memory, or accuracy of observation of witnesses, the court will usually find that there is sufficient evidence to furnish support for the action of the department.[182] For instance, in one case a witness testified that she had practiced prostitution in a hotel kept by an alien accused in expulsion proceedings, and had paid money to him. He on his part denied this and produced witnesses as to the

[182] *Wong Shee* v. *Nagle*, 9 C.C.A., 7 F. 2d 612.

good reputation of his house, and offered in evidence the hotel register and his account book. The court refused to interfere with the decision of the department to deport him.[183] In another similar case an immigrant inspector took the testimony of a woman found by him in a house kept by the accused alien. In this she testified that the house was a house of prostitution. This testimony was put into the record. At the hearing the witness again appeared and told a different story. The court sustained the department which believed the first story. This is a familiar type of case.[184] When there was a conflict of testimony as to when an alien had married, the action of the department in believing one witness and refusing to believe the alien, his alleged father, two alleged brothers, and three other witnesses was upheld, the court saying that the weight of the evidence was for the department.[185] In numerous cases there is presented a conflict of medical testimony as to the time when a physical disability had its origin or a disease was contracted. The medical certificate signed by a physician at the hospital where the alien is a patient states that the disability under which the alien is suffering did not have its origin since the alien was admitted to this country. This is contradicted by the testimony of other physicians who appear as witnesses for the alien. In such cases the action of the department in following the conclusions of the medical certificate is usually not interfered with by the courts.[186] If there is a conflict of testimony of physicians and other witnesses as to the age of the alien the court will sustain the department.[187] If there are in the testi-

[183] *Kii Tanaka* v. *Weedin,* 9 C.C.A., 15 F. 2d 844; *Benetazzo* v. *Bonhame,* 9 C.C.A., 19 F. 2d 520.

[184] *Ghiggeri* v. *Nagle,* 9 C.C.A., 19 F. 2d 875; *Leffer* v. *Nagle,* 9 C.C.A., 22 F. 2d 800.

[185] *Johnson* v. *Kock Shing,* 1 C.C.A., 3 F. 2d 889.

[186] *Bowlewic* v. *Day,* 2 C.C.A., 33 F. 2d 267; *Ex parte Wong Nung,* 9 C.C.A., 30 F. 2d 766.

[187] *Lew Git Cheung* v. *Nagle,* 9 C.C.A., 36 F. 2d 452.

mony of the alien and his witnesses substantial discrepancies or improbabilities justifying doubt as to their credibility, the refusal of the department to believe the testimony will be sustained by the courts, even though there is no affirmative evidence introduced to contradict this evidence.[188]

Examples of inadequate evidence. In a minority of cases the courts have found the evidence to be inadequate and have reversed the action of the department on that ground. In a number of these, applicants of Chinese race were involved, and the issue was American citizenship. In all of them there was direct testimony to support the claim. The department based its action in denying admission on discrepancies in the testimony of the witnesses. These discrepancies were as to minor details, such as whether the applicant's "father had remained at home all the time or had been absent sometimes,"[189] the pavement of an alley in front of a house in China, lands farmed there by applicant's father, and the windows and skylights in the schoolhouse;[190] details as to the home village, such as whether the houses were attached or detached, and the occupants of the various dwellings there, the lighting of the ancestral hall and its balconies;[191] when the applicant left school and his absence from a family photograph,[192] and slight discrepancies as to the dates in the account of various events.[193] The court characterized the action of the department in ordering exclusion in these cases as arbitrary, unfair, and capricious. The evidence

[188] *Cheung Toy* v. *Weedin,* 9 C.C.A., 12 F. 2d 984; *Chin Shue Teung* v. *Tillinghast,* 1 C.C.A., 33 F. 2d 123; *Singleton* v. *Tod,* 2 C.C.A., 290 F. 78.

[189] *Johnson* v. *Ng Ling Fong,* 1 C.C.A., 17 F. 2d 11; *Leong Ding* v. *Brough,* 2 C.C.A., 22 F. 2d 926; *Tillinghast* v. *Wong Wing,* 1 C.C.A., 33 F. 2d 291.

[190] *Go Lun* v. *Nagle,* 9 C.C.A., 22 F. 2d 246.

[191] *Johnson* v. *Damon,* 1 C.C.A., 16 F. 2d 65; *Lew Sun Soon* v. *Tillinghast,* D.C. D. Mass., 27 F. 2d 775.

[192] *Gum You* v. *Nagle,* 9 C.C.A., 24 F. 2d 848.

[193] *Nagle* v. *Dong Ming,* 9 C.C.A., 26 F. 2d 438.

was referred to as such that a reasonable mind would not feel justified in doubting the truth of the applicant's case.[194]

In one case an alien sought admission as a non-quota alien from Argentina. He submitted an affidavit from a consul at Buenos Aires to the effect that he had presented to that officer a police certificate proving residence in that city for five years, and that the consul had retained this certificate. The department refused to admit. The court held that he had sustained the burden of proving his residence in Argentine and that there was no evidence to justify his rejection.[195] In another case an alien girl had become insane more than four years after her entry. She was committed to a hospital where her father asked for her bills and paid them when they were rendered. She was ordered deported as being at the time of her entry "of constitutional psychopathic inferiority." The sole evidence relied on was a statement in the medical certificate signed by the physician at the hospital that the girl was at the time of entry a person in that condition, but this certificate gave no reasons and no details of her condition or history to support the conclusion. The court held that there was no adequate evidence to support the decision of the department since the certificate contained only a conclusion.[196] In another case a medical certificate was held not to be adequate evidence because the court thought it was not consistent with itself. An Italian woman applying for admission had been ordered rejected because of a medical certificate of trachoma. The certificate also stated that a certification that the condition could have been ascertained at the time of embarkation was not warranted. The court held that since trachoma was a disease of slow development, if it could be detected at the port of entry, it could have been detected at the time of embarkation. It therefore ordered her dis-

[194] *Fong Tan Jew* v. *Tillinghast*, 1 C.C.A., 24 F. 2d 632; *Tillinghast* v. *Wong Wing*, 1 C.C.A., 33 F. 2d 291; *Ng Yerk Ming* v. *Tillinghast*, 1 C.C.A., 28 F. 2d 547.

[195] *Kozok* v. *Curran*, 2 C.C.A., 14 F. 2d 113.

[196] *Mandel* v. *Day*, E.D. N.Y., 19 F. 2d 520.

charge because of the insufficiency of the evidence relied on.[197] In another case the court held that the decision to exclude a Japanese woman applying for admission as a visitor for six months on the ground that she would attempt to remain permanently was mere speculation and could not be supported.[198]

Variations in judicial judgment. It is said that the review of the evidence is not to involve a weighing of it, and that the case is not to be determined "by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct."[199] In the process of inspecting the evidence, however, there will be differences among the courts in the application of this principle. The question of whether there is adequate evidence is a question of individual judgment. The difference is one of degree. In some of the cases, therefore, it is not surprising that the court's action comes close to a retrial of the case on the record. In one such case an applicant for admission claimed citizenship on the ground of birth in Philadelphia. There were discrepancies in his testimony as to the date of his mother's death, and no death certificate could be found with her name. There were also discrepancies in his testimony as to the number of houses on the street where he claimed he had lived. On the other hand, there was substantial evidence in his favor. The court held that "the weight of the evidence was overwhelmingly in favor of the petitioner."[200] In another case an alien was ordered deported on a finding by the department that he was connected with a house of prostitution. The evidence against him was an affidavit obtained by an inspector from a woman found in the house. To contradict this his counsel called several witnesses. The court held the evidence against him insufficient. It would seem that it was deciding which evidence to believe.[201]

[197] *Hughes* v. *Licata,* 3 C.C.A., 295 F. 800.
[198] *Ex parte Himi Yasuda,* D.C. N.D. Cal. S.D., 22 F. 2d 864.
[199] *Tisi* v. *Tod,* 264 U.S. 131.
[200] *Moy Fong* v. *Tillinghast,* D.C.D. Mass., 33 F. 2d 125.
[201] *Mouratis* v. *Nagle,* 7 C.C.A., 24 F. 2d 799.

Cases involving inferences of character or quality. In exclusion cases the Secretary may find that the alien is likely to become a public charge, or that his physical defect is such that it may interfere with his making a living. In expulsion cases he may decide that the alien was at the time of entry likely to become a public charge; that as to an alien convicted of violation of war legislation, he is an undesirable resident; or that he has become a public charge from reasons not shown to have arisen since his entry. He may decide that the alien is an anarchist, or advocates the overthrow of government by force and violence, or that the offense of which he has been convicted and for which he has been sentenced involves moral turpitude. These cases involve fact questions of the second kind, that is, where an inference must be made of character or quality or the probability that certain events will happen. This inference must be made from facts admitted to exist or believed by the department to exist. The courts say that these findings must be supported by adequate evidence. This means that the inference must be one which a reasonable person might make from the facts. A test of reasonableness is therefore applied as in the cases of the first kind.

In all of these cases of the second kind the meaning of the standard or category is potentially involved in its application. The indefiniteness of the terms used by the statute, such as "likely to become a public charge," leaves much more room for a disagreement between the immigration authorities and the judges as to the application of the terms in a given case. The courts are, therefore, more ready to apply their own judgments to the accuracy and justifiableness of the inferences of the immigration officers than where the existence or non-existence of the basic facts is the sole issue to be decided from conflicting testimony or disputed documents. These cases of "fact" shade easily into cases involving questions of "law."

Cases have already been discussed in which the department inferred from the commission of misdemeanors or of acts of

moral delinquency after entry that the alien was at the time of entry likely to become a public charge. This question involved the interpretation of the statute. The decision of the department has been therefore reviewed by the courts.[202] A similar question was involved in cases where the alien was found likely to become a public charge because the officers felt convinced that before his entry he had committed a crime, but he had not been convicted of it and did not admit its commission. There was also the case where the department held that violation of the prohibition laws for which the alien was sentenced to thirty days was a crime involving moral turpitude. In all these cases the decision of the immigration officers was reviewed by the courts and the judgment of the courts substituted for that of the officers.[203] In an expulsion case the accused alien was at the time of entry thirty-nine years of age, in good health, a carpenter by trade, and had $75 with him. He was ordered deported because he had admitted that before his entry he had committed adultery in Italy. This was held to be the admission of the commission of a crime involving moral turpitude. The court ordered him discharged on the ground that there was no evidence that the act was a crime in Italy and, therefore, no evidence to sustain the department's finding.[204] In another case the accused alien had been a witness for the state in a criminal trial. After his return from a short visit to Canada the department ordered him deported on the ground that he had while testifying admitted the commission of a crime. The court held that the admission on the witness stand of facts from which the officers might infer that the alien had committed the crime was not sufficient. He must admit the crime itself.[205] In the same way when the department ordered

[202] *Skirmetta* v. *Coykendall,* D.C. N.D. Ga., 15 F. 2d 783; *Mantler* v. *Commissioner of Immigration,* 2 C.C.A., 3 F. 2d 234.

[203] *Iorio* v. *Day,* 2 C.C.A., 34 F. 2d 920.

[204] *Ex parte Sturgess,* 6 C.C.A., 13 F. 2d 624.

[205] *Howes* v. *Tozer,* 1 C.C.A., 3 F. 2d 849.

an Italian boy who had been sent to a state school for defectives deported as a public charge although his parents were able and willing to pay his bills, the court held the decision not justified.[206] Such cases as these, since they involve the interpretation of terms in the statute, might be classified under review of questions of law. They shade into questions of fact in some cases. The action of the officers is reviewed by the courts without hesitation.

In other cases, however, the problem of statutory interpretation is not regarded as present. The question is thought of as a question of fact and the courts are less ready to review. Is the amount of money which the alien has so insufficient that he is likely to become a public charge, or the fact that he is not skilled in a trade or profession? Does the fact that another has rich relatives who express a willingness to support him prevent the Secretary from finding that he also belongs to that category? In one such case an alien claimed to be a professional musician and exempt, therefore, from the quota law as an artist. He testified that he had worked during the day as a mechanic and had played the clarinet in an orchestra in the evening. The officers were sustained by the court in their finding that he was not an artist within the meaning of the quota law.[207] The court and the department did not differ as to the meaning of the term artist. The issue was whether the facts as to the alien in question came within the term. In another case, however, the department held a Japanese woman likely to become a public charge although she had some knowledge of English, some experience in teaching sewing, and training in sewing and in the making of artificial flowers. The court held the finding not justified by the evidence and ordered her discharged.[208] Here the case seems to be on the borderline.

[206] *Nocchi* v. *Johnson,* 1 C.C.A., 6 F. 2d 1.

[207] *Deliannis* v. *Commissioner of Immigration,* 2 C.C.A., 298 F. 449.

[208] *Ex parte Hosaye Sakaguchi,* 9 C.C.A., 277 F. 913.

c. *Burden of Proof*

Where alienage is admitted. Assuming that there is evidence for and against an alien sufficient to create an issue, what is the rule as to the burden of proof? The statute provides that any "alien" who applies for admission to the United States shall have "the burden of proof . . . to establish that he is not subject to exclusion."[209] The same statute also provides that "in any deportation proceedings . . . the burden of proof shall be upon such alien that he entered the United States lawfully."[210] Thus where the alleged cause for expulsion is a condition at the time of entry the burden of proof in expulsion cases seems to be upon the alien. The statutes and rules contain no provisions as to the burden of proof in cases where expulsion is sought for some cause occurring after entry, such as becoming affiliated with a proscribed political party or becoming connected with prostitution. There is a dictum in one case that the burden is then on the department.[211]

Citizenship cases. Where the claim of the applicant for admission or the defense of the accused in an expulsion case is citizenship, it might be held that the statutory provision as to burden of proof no longer applies. The statute uses the word "alien." The Supreme Court in *Bilokumsky* v. *Tod*[212] said that in an expulsion case the burden of proof was upon the government to establish that the accused was an alien. It excepted, however, cases under the Chinese Exclusion Acts which provide otherwise. This was decided before the passage of the Act of 1924. Since the passage of that act it has been held by the court of appeals of the sixth circuit that where expulsion was sought on the ground that the accused was an alien prostitute the burden of proof was on the government to establish the fact of alienage.[213] Since under the Chinese Exclusion Acts an

[209] Act of 1924, Sec. 23. [210] *Ibid.*
[211] *Hughes* v. *Tropello*, 3 C.C.A., 296 F. 306. [212] 263 U.S. 149.
[213] *Brader* v. *Zurbrick*, 6 C.C.A., 38 F. 2d 472.

American citizen of Chinese race has the burden of proof of establishing his citizenship, there seems to be no doubt of the power of Congress to place the burden on citizens of other races. Unless the Act of 1924 is ultimately given a different interpretation, that act does not place the burden of proving citizenship upon the accused but places the burden of proving alienage upon the government. Since the jurisdiction of the officers depends upon the fact of alienage this seems a reasonable rule.

Rules for decision. Assuming that in a particular case the burden of proof is on the government or on the alleged alien, or on the alien accused of being inadmissible or expellable as the case may be, is there any rule by which the question of whether the burden has been sustained should be tested? The argument might be made that in expulsion cases a rule of reasonable doubt should be applied similar to that which is said to be applied in criminal trials, and the warrant canceled if such reasonable doubt exists. There is a striking similarity in fact between the purposes and results of the expulsion process and those of a criminal trial. The courts have said, however, again and again that they are in legal theory entirely dissimilar.[214] On the contrary, there is much evidence of an attitude on the part of immigration officers in both exclusion and expulsion cases that the alien must establish his right beyond a reasonable doubt, and that in any doubtful case the decision must be against him. In one case the Board of Review in the department had in its report made this statement: ". . . is material to the issue and casts a clear, reasonable and substantial doubt upon the claims made." The court before which the petition for a writ of *habeas corpus* came said as to this that the applicant was not required to establish his right beyond a fair preponderance of the evidence, and that a clear, reasonable, and substantial doubt did not require exclusion.[215] There are other

[214] *Fong Yue Ting* v. *U.S.*, 149 U.S. 698.

[215] *Moy Yoke Shue* v. *Johnson*, D.C. D. Mass., 290 F. 621.

statements in the cases to the effect that the civil rule of requiring a preponderance of the evidence should govern.[216] If this is true of exclusion cases where the applicant has the burden of establishing his right to come in upon his own application, it is *a fortiori* true in expulsion cases where the government is the aggressor and is disturbing the *status quo.*

As a rule, however, little attention is paid to the question of the burden of proof. The department is left to apply its own standards to the evidence, the only requirement being that the standard shall be fairly and honestly applied, and that there be some substantial evidence to which to apply it.[217] If the evidence in favor of the alien is in itself inconsistent and improbable, it need not be accepted simply because there is no affirmative evidence to contradict it. The test is whether the administrative officers believe it. For example, a person of Chinese race testified that he was born in San Francisco. There was no positive evidence to contradict this testimony, but the testimony of the man himself showed lack of knowledge of the city and other discrepancies. The court held there was sufficient evidence to justify the finding that he was not a citizen.[218]

§6. DISPOSAL OF CASES REVIEWED

Two methods have been followed by the courts in cases where it has been necessary to reverse the action of the immigration officers. One is the method followed by the court in *Chin Yow* v. *U.S.,*[219] justified by Mr. Justice Holmes in that case as the most convenient and expeditious. This was a trial on the merits in the district court in which the petition for a writ of *habeas corpus* had been filed. The federal statute on the subject of *habeas corpus* provides that "the court or justice or

[216] *Woo Jew Dip* v. *U.S.,* 5 C.C.A., 192 F. 471; *Soo Hoo Hung* v. *Nagle,* 9 C.C.A., 3 F. 2d 267.

[217] *Kwock Jan Fat* v. *White,* 253 U.S. 454 at 457.

[218] *U.S. ex rel Hen Lee* v. *Sisson,* 2 C.C.A., 557, 232 F. 599.

[219] 208 U.S. 8.

judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."[220] The case has already been before the district judge and he has gone over the record. Often the issue is one which the court is well qualified to decide, particularly the issue of citizenship. Should the nature of the case require it, there can be a reference of the case to a master. Perhaps it is sometimes thought that to leave the case to a retrial by the same officers who have on the first hearing failed to conduct a fair investigation will be an injustice to the alien. There is a possibility that prejudgment based on the first hearing, and even pique and prejudice arising as a result, may have an influence on the final result in the second. The Supreme Court followed this method in *Kwock Jan Fat* v. *White*[221] where serious procedural errors were made by the immigration officers.

The other method is to remand the petitioner to the custody of the immigration officers to await action on their part, such as a rehearing or the decision of an appeal. The Supreme Court followed this method in *Tod* v. *Waldman*.[222] It said that there the issues were technical ones involving the literacy test and the effect of a physical defect on an alien's ability to earn a living which the court was not as well qualified to try as the immigration officers. In other cases the same result has been secured by ordering a conditional discharge of the petitioner to be effective only in case the immigration officers should fail to give him a fair hearing within a reasonable time.[223] In some expulsion cases the court has ordered the immediate discharge of the accused without prejudice to the right of the department to rearrest and conduct a new trial. The courts have technically no appellate jurisdiction over the immigration officers and cannot direct

[220] Rev. Stat. 761. [221] 253 U.S. 454. [222] 266 U.S. 113.

[223] *White* v. *Wong Quen Luck*, 9 C.C.A., 243 F. 547; *Billings* v. *Sitner*, 1 C.C.A., 228 F. 315.

a new hearing in accordance with principles laid down in their judgment. They can only test the legality of the alien's detention. A conditional discharge will, however, operate in most cases as would the remanding of a case to a trial court.

CHAPTER VI

CONCLUSIONS

A STUDY of the administrative procedure for the exclusion and expulsion of aliens and the manner in which it works leads to certain conclusions. These should be reached only after the purposes of the system and the effects upon the individual aliens involved have been considered. It is desirable to consider the two processes of exclusion and expulsion separately since, as has already been observed, they differ in procedure and in results.

§1. THE EXCLUSION PROCESS

Necessity for summary action. It has been pointed out that the exclusion process must secure speed. Summary action is a requisite of a procedure by which incoming aliens are examined at the borders. Even under the present immigration restrictions the number of aliens admitted during the fiscal year ended June 30, 1930, was 446,214, and the number rejected, 8,233. These figures do not include alien seamen examined by the officers, aliens admitted for periods not to exceed six months from foreign contiguous territory who had resided therein a year or more, or aliens resident in this country returning from visits of not to exceed six months in such territory. Nor do they include aliens who "habitually or periodically cross and recross the land boundaries."[1] Nor do they of course include the cases where American citizens are readmitted over and over again. The total number of alien inspections conducted by the immigration officers in carrying out the exclusion process is estimated by the Commissioner-General of Immigration in his annual report for the fiscal year ended June 30, 1930, as being approximately for that year 31,600,000.[2] These figures show the

[1] *Annual Report of the Commissioner-General of Immigration for the Fiscal Year Ending June 30, 1930*, p. 80.

[2] *Ibid.*, p. 8.

paramount need for speedy summary action in exclusion cases. To some extent, accuracy must be sacrificed to this need. The problem is to secure a proper reconciliation of the two. Judged from this point of view the exclusion procedure is well conceived. The details have been worked out by Congress and provided for by statute. Summary action has been provided for and to some extent individual interests have been subordinated to this need. On the other hand, speed is deliberately sacrificed by the addition of procedural steps the sole purpose of which is to safeguard the interests of applicants for admission. For the most part such features of the exclusion process as seem to merit adverse criticism are not inherent in the procedure provided for by statute, but are incident to its administration.

Effects of consular inspection. The requirement of a consular visa of all aliens has instituted the system of consular inspection abroad which was discussed pro and con for so many years before it was instituted. Its great merit is the sifting process which it provides before aliens embark. Thus the waste and hardship of a round trip are avoided in many cases. In his annual report for the fiscal year ending June 30, 1929, the Secretary of Labor stated as to this system of consular inspection that it has "practically eliminated rejections of *bona fide* immigrants at ports of arrival."[3] During the fiscal year ended June 30, 1930, less than one-sixth of one per cent of the aliens presenting themselves at seaports were rejected.[4] As the courts have so far construed the power of the consular officers to issue or refuse visas, a very great discretionary power has been given to the Department of State by the new system of consular inspection, a broader power than Congress has as yet seen fit to give to the Department of Labor. As the courts have indicated that they will not interfere, the power in effect resides with the de-

[3] *Annual Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1929*, p. 56.

[4] *Annual Report of the Commissioner-General of Immigration, etc., 1930*, p. 8.

partment to refuse visas and thus to exclude for such reasons as may seem convincing to the executive officers, even when such exclusion goes beyond the scope of the excludable classes provided by Congress. This wide power can affect the interests of both citizens and resident aliens. Even the wife of a citizen may be affected.[5] In prejudiced or arbitrary hands it could become oppressive.

Primary inspection. Such study of the system of primary inspection as could be made by personal observation and examination of the records of appeal cases leads to the conclusion that it works well. The inspector is given the power to admit at once. Thus the need for speed is taken care of. The public interest is guarded by limiting the power to admit to clear cases. The interests of aliens who may be rejected at the primary inspection is safeguarded by the provision for a hearing before a board of special inquiry. Even should individual inspectors become too technical, or be led by timidity or lack of decision to hold for further examination applicants who should be admitted, the hardship is lessened by the rapidity with which the cases come before the board of special inquiry. The public interest against a too liberal enforcement of the requirements for admission has to be safeguarded by administrative supervision. There is, however, the further safeguard of the use of the expulsion process in cases where it is later discovered by the department that a mistake has been made.

Boards of special inquiry. The system of hearings before the boards of special inquiry is well planned and has many advantages. The requirement that there be three judges to pass on the case is a safeguard against error either for or against the applicant for admission. The hearings although "separate and apart from the public" are not secret since there are three board members present in all cases, and in many an additional secretary and an interpreter. The rules also permit the alien to have

[5] See *Ulrich* v. *Kellogg,* D.C. Ct. of Appeals, 30 F. 2d 984.

one friend with him. In the records of appeal cases examined, however, there was little reference to this. The aliens appear in person. In many cases other witnesses are heard in their behalf. Witnesses are often examined in the presence of the applicant. There is an element of formality which tends to slow down the speed and this is conducive to accuracy. These hearings approach the nearest to judicial trials of any part of the administrative processes for either exclusion or expulsion. There is no doubt that the presence of counsel would be an additional safeguard for the alien against hasty, prejudiced, or stupid action. The result would be changed in some cases. Yet the reasons for excluding them seem convincing when the necessity for speed is considered. Their rigid exclusion is to some extent compensated for by the practice of having the testimony taken *verbatim* so that it will be available on the appeal, and the grant of the right to counsel at that stage of the proceedings. The practice of not permitting aliens to confer with relatives or friends or with counsel until the first hearing has been concluded is evidently designed to prevent the fabrication of false testimony. It leaves the proceedings entirely in the hands of the officers until the testimony of the alien and the witnesses has been given and a *verbatim* record made. Even in the making of this record the alien has to rely on the good faith and accuracy of the officers.

Tendency toward one-man tribunals. In the administration, however, of this well-planned system of hearings certain defects are observable. One of these is the practice of employing clerks, stenographers, interpreters, medical officers, and customs inspectors as members of these important tribunals. Often they are called in for temporary service only. Such persons are likely not to have the requisite training and experience and knowledge of the law and rules. They will have less sense of responsibility. They will inevitably defer to the judgment of the inspector members of the board, especially the chairman. The

common practice of having one of the members of the board act also as secretary and take in shorthand a *verbatim* report of the testimony results in having the attention of that member distracted by the mechanical process of making the shorthand notes. In the same way, although to a less extent, the clerical work which the third member has to do while the hearing is going on in filling out record sheets and cards tends to divide his attention. With one member of the board partially occupied with routine clerical duties and in nearly half the cases another acting as stenographer, the independent judgment of three persons which was the evident purpose of the statute is difficult to secure. These practices in administration tend to make these three-judge tribunals become one-man courts since the success or failure of the work of a board depends almost exclusively upon the chairman.

Reliance on informal evidence. Another difficulty is presented by the practice of the officers in relying on evidence of the most informal kind. Decisions are influenced by letters, telegrams, telephone conversations, "confidential communications," newspaper clippings, and hearsay and opinion evidence. The officers sometimes act on their own inferences of fact as of their own knowledge obtained from their own investigations, from the reports of other officers, or from local report or rumor. There is the same informality in the reception into the record of documentary evidence. These practices present real dangers of mistake through haste, routine action, carelessness, misunderstanding, stupidity, or prejudice. Yet it seems that it would be impracticable to apply to these hearings more strict rules of evidence. The use of much informal evidence is inevitable from the summary nature of the process. The danger is reduced by the fact that in these hearings most of the evidence in most cases is presented formally under oath by the alien or his witnesses or in the form of affidavits. This is a check on the less formal evidence.

Exclusion on too slight evidence. A very real difficulty is pre-

sented by the confusion of thought on the part of some officers as to the true function of the boards of special inquiry. There is sometimes a tendency to act as the inspectors at primary inspection are directed to act and exclude all doubtful cases. Exclusion on slight evidence and "passing the buck" to the department at Washington means delay and expense and serious hardship to individual aliens. This tendency to exclude on too little evidence may also be due to the practice of reducing the three-member boards in effect to one-man tribunals. It may be due to the fear of disapproval higher up, with its bad effect upon promotion. It is no doubt due in part to the acquisition of a habit, difficult to avoid where there is so much power and so many cases where it has to be exercised, of regarding all testimony with suspicion and all aliens as worthy of rigorous treatment. The cases which have been discussed in which the boards voted to exclude on very slight evidence, in some of them on little more than suspicion,[6] are indications of this tendency. It presents a more serious problem than do defects in rules or in the structure of the administrative procedure, since it depends upon department personnel for its solution.

Likely to become a public charge. The administration of the ground for exclusion, "likely to become a public charge," merits strongly adverse criticism. Congress has provided specific grounds for exclusion. Detailed specific rules have been put into the statutes as to the effect of crime on the right to enter, and as to when moral delinquency shall be a ground for denying that right. The presence of these detailed rules indicates that in cases not covered the alien shall be entitled to admission. "The statute by enumerating the conditions upon which the allowance to land may be denied prohibits the denial in other cases."[7] The statute does not provide for the exclusion of aliens on the ground of general undesirability, moral unfitness, disrespect for law and order, lack of coöpera-

[6] See Chapter III, §12, p. 68 *et seq.*

[7] Mr. Justice Holmes in *Gegiow* v. *Uhl,* 239 U.S. 3, 9.

tion with the immigration officers, or the fact that the alien's migration to this country may be ill advised for family reasons. The meaning of the term "likely to become a public charge" has been before the courts in a number of cases. The Supreme Court has held that the immigration officers could not exclude on the ground that the labor market in the locality to which the alien was bound made employment there doubtful, that there must be "permanent personal objections accompanying"[8] the immigrant. There is nothing in the case to indicate that anything more than economic status is involved. The circuit court of appeals of the second circuit has defined it as follows:

> A person likely to become a public charge is one whom it may be necessary to support at public expense by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty. . . .[9]

and the circuit court of appeals of the ninth circuit has said that a person "likely to become a public charge" is one who by means of poverty, insanity, disease, or disability will probably be a charge on the public.[10]

It is the practice of the department, however, to stretch this category in many cases far beyond the question of economic status to cover cases which otherwise would not be excludable under the statute. On this ground aliens have been excluded because they have committed acts which while morally reprehensible were not crimes by the law which governed them, or because although there had been no conviction of the alleged crime and no admission by the alien that he had committed it, the immigration officers were convinced that he was guilty. The majority of the decisions have held that likelihood that the alien may be confined in a jail or prison does not make him likely to become a public charge when the evidence shows that otherwise he can support himself. The department, however,

[8] Mr. Justice Holmes in *Gegiow* v. *Uhl*, 239 U.S. 3, 9.

[9] Manton, Circuit Judge, in *Wallis* v. *Manara*, 273 F. 509.

[10] Gilbert, Circuit Judge, in *Ex parte Hosaye Sakaguchi*, 9 C.C.A., 277 F. 913.

continues to include likelihood to arrest, thus, in effect, extending the effect of criminal acts on admissibility beyond the terms of the statute. In the same way, alleged sexually immoral conduct is brought within this category by construction although the statute contains specific provisions on the subject forbidding the admission of prostitutes and persons connected with prostitution, and of persons coming for an immoral purpose or importing or attempting to import others for such a purpose, but not covering individual violations of the moral code not connected with prostitution and having no connection with the alien's migration to this country. As administered by the department, this ground for exclusion has become so broad and so indefinite that it means substantially, "thought by the immigration officers to be excludable on general principles." Some cases present the anomaly of having persons excluded as likely to become a public charge when they have already demonstrated, during a prior residence in this country, their ability to support themselves here. Additional ground for exclusion should not be added to the statute by a strained interpretation by the administrative officers of the grounds provided by Congress. They should be added to the statute by Congress after due consideration with opportunity for the expression of public opinion. It may be doubted whether Congress would be willing to give to any executive officers the power to exclude simply on the broad ground that the officers thought the individual aliens before them ought to be excluded. The difficulty is that the vast majority of the cases are decided without counsel and never reach the courts.

Counsel on appeal. The provisions of the statutes and of the rules as to counsel on the appeal are as adequate as can be secured when it is considered that the case has already proceeded through the hearing and a decision to exclude before counsel is permitted. The rules state that counsel shall have the right to review the record including all motions. This would include the recommendations of the board of special inquiry.

The courts have laid down the requirement that all the evidence relied on by the department must be disclosed to the alien or to his counsel. There is no right to cross-examine since counsel is not present during the hearing. There is the right to file a brief and in practice the right to appear before the Board of Review is granted when it is asked for. As a matter of law the provisions for the assistance of counsel are reasonably adequate. The serious difficulty is that only a very few aliens can afford the luxury. In the vast majority of exclusion cases the immigration officers have to guard the interests of the aliens as well as those of the government with no assistance from counsel.

The Board of Review. The Board of Review is a distinct improvement in the administration machinery. It has the advantage of looking like a court. It therefore has a good effect on the public. It relieves the higher administrative officers of many interviews and much personal pressure. It makes possible a certain amount of oral argument. As now organized, it permits a conference of several members in each case. The new procedure is an improvement over the former method of review and recommendation by individual members of the office personnel, upon whose report the Secretary would base his decision. Hearings, however, are not held as a matter of course, but only when they are requested and they are requested in only a few cases. When they are held they are arranged informally and not calendared in advance and in many cases no member of the Board is familiar with the case before it is called. Usually a case is considered by only one member who renders a report to the chairman. Its very limited authority as a non-statutory, merely advisory, body is a great weakness. The very large number of cases which it has to consider makes the work doubly difficult. The departmental practice of referring to it other matters than exclusion appeals and expulsion cases, such as steamship fines, reëntry permits, applications for extension of tem-

porary admission, and the registration of aliens,[11] makes this difficulty even greater. Perhaps its greatest importance is the fact that it may be the forerunner of a regularly organized tribunal with statutory authority and a procedure which more closely approximates that of a court.

§2. THE EXPULSION PROCESS

Similarity to criminal cases. This process should be judged in the light of the charges upon which it is instituted, the facts which must be proved, the nature of the issues involved, and above all, by its purposes and its effects upon the persons against whom it is brought. The study of departmental records and judicial decisions makes one analogy constantly recur, that of criminal proceedings. The courts have reiterated that the proceedings to expel are not criminal but administrative. These words are mere labels, which the courts have used time and again as solving words with little or no discrimination. As is usually the case with such words, they have solved nothing except to furnish a verbal justification for the decision of the case in hand. The list of the causes for expulsion reads in part like a criminal code: "who shall have entered in violation of law" or "who shall be found in the United States in violation of law," "who shall be found advocating or teaching . . . the unlawful destruction of property . . . anarchy . . . the overthrow by force or violence of the Government of the United States . . . the assassination of public officials," "who shall be found connected with the management of a house of prostitution," "attempt to import any person for an immoral purpose," "who admits the commission of a felony or misdemeanor involving moral turpitude."[12] In many cases the testimony which is presented as to the guilt or innocence of

[11] *Annual Report of the Secretary of Labor, etc., 1930,* p. 78.

[12] Act of 1917, Sec. 19.

the accused, the facts which must be considered and the issues which must be decided are very like those in a criminal trial. The underlying purpose is the removal of the offender, an alleged undesirable person, from the social group in many cases because of alleged acts which are regarded as anti-social. No doubt, also, the formidable list of grounds for expulsion has, when its contents are known to aliens, a deterring effect from certain conduct, at least as much as most criminal codes. In theory the element of reprisal or revenge is not present, yet in some cases the officers seem to be thinking in terms of punishment and even the term itself is sometimes used. The penalty of being found guilty is forcible removal from the country by government officers. Since the passage of the Act of June 24, 1929,[13] this means permanent banishment since by the terms of that act any alien arrested and deported in accordance with law is to be excluded from the United States and his entry or attempt to enter is made a felony. Banishment as a punishment is no longer found in our criminal law. If it were there, there is little doubt that many would regard it as more severe than most penalties now imposed, certainly more severe than a short term of imprisonment. The effects of deportation upon many of the aliens affected have been discussed in an earlier chapter.[14]

Expulsion procedure in terms of criminal justice. Let us imagine a system of criminal procedure where in many cases the first step is to subject the accused to a complete hearing or preliminary examination without the presence of counsel and without the right to have counsel present. At this hearing all the issues in the case are covered by the questions and a complete *verbatim* report of the questions and answers is made either by a stenographer or by the officer who asks the questions. In some of the cases the subject of the preliminary examination is held in a station-house or jail with or without

[13] 46 Stat., approved June 24, 1929. [14] Chapter II, §3, p. 27.

a warrant of arrest. So far it might be said that the analogy to the practice in many of our criminal cases is correct and that the system described is to this point our own system of criminal procedure. Yet it must be remembered that to that extent the practice under our system of criminal justice is largely extra-legal and in many cases illegal.

After this preliminary hearing or examination a formal warrant of arrest is issued charging the accused with certain offenses and under this warrant he is formally arrested. He is then brought before a subordinate police officer, in most cases the officer who made the earlier investigations in the case and conducted the preliminary examination or hearing and a hearing is conducted, to enable the accused to "show cause, if any there be, why he should not be" found guilty. He may be represented by counsel, but if he is too poor to employ counsel none will be assigned to protect his interests, and he will be left to conduct his own defense. The hearing is conducted in a station-house or jail and is private except for the officer, a stenographer who is an employee of the police department, sometimes the officer who conducts the hearing also acts as stenographer, perhaps an interpreter, counsel in the minority of cases where the accused can afford to employ counsel, and sometimes a witness other than the accused. Witnesses if they are called to the hearing may be cross-examined by counsel for the accused or by the accused himself if he has the ability to conduct such an examination. The right of the accused to have process issued to compel the attendance of witnesses is restricted and process is issued grudgingly. Witnesses are often examined by the officer privately without calling them to a formal hearing and the testimony thus obtained is incorporated in the record. Such witnesses are not always available for cross-examination and if not, the use of the evidence given by them is permitted. They are often examined out of the presence of the accused and so in many cases he does not confront them during the examina-

tion. The charges in the warrant of arrest are general and do not give details and no bill of particulars is furnished. The sources of the information on which the warrant was issued are not disclosed to the accused. New charges may be added at any time during the trial and the evidence is therefore not limited to the issues involved in the original charges but may cover any matters from which evidence to support new charges may be obtained. There are no rules of evidence. Evidence of the most informal kind, reports of government officers, departmental memoranda, letters, telegrams, newspaper clippings, hearsay and opinion may be introduced and relied on.

The police officer who presides at the trial also presents the case for the government, questions the witnesses for the government and cross-examines the accused and the witnesses for him. He is both judge and prosecutor. After the conclusion of the hearing the record of the testimony is typewritten by the stenographer or by the officer himself if he has acted as reporter as well as judge and prosecutor, and is sent to the chief of police of the city or the superintendent of police for the state. Included in the record is the recommendation of the officer who conducted the trial. The record is at headquarters reviewed by some assistant in the office of the chief and is placed on his superior's desk with a recommendation. The superior who passes on this recommendation and makes the final decision is in turn an assistant to whom the chief has delegated the duty of passing upon the cases. In most cases the superior follows the finding and recommendation of the assistant who has reviewed the record. The trial at headquarters is on the record alone, although in cases where counsel request it an oral argument is permitted before a board of office assistants whose task it is to review the records. No one at headquarters sees the accused or his witnesses. The judge who really decides the case, that is, the reviewing officer at headquarters, has to gather his estimates of the personal equations of the accused or of the accusers from the typewritten record of their words and from

the report by the officer who conducted the hearing. By statute the decision at police headquarters, if it is that the accused is guilty, is made final. The courts may not review the case to see whether on the evidence it was properly decided. The chief executive of the state may not issue a pardon. After the judgment of guilty has been rendered the defendant is subjected to a fixed and uniform penalty. No officer is permitted to consider the factors of prior good conduct, justification for the act, the possibilities for reform. When the courts do interfere, it is only where the officers have misinterpreted a statute, or gone beyond the fair limits of the procedure as outlined, or where the decision is on the evidence so unjustified that no reasonable man would see any ground for it.

It will at once be said that no such system of criminal justice exists anywhere. Traditionally we have incorporated into the administration of our criminal law a system of checks on the officers and of safeguards for the accused. Some of these we have placed in our constitutions and they are regarded as fundamental: a public trial, information to the accused as to the nature and cause of the accusation, the right to confront the witnesses against him, compulsory attendance of witnesses in his favor, trial by an impartial jury, counsel to assist him in his defense. At the trial the officers upon whom rests the duty of detecting offenders and preparing and presenting the cases against them are subject to the direction and control of a judicial officer whose duty it is to be impartial as between the executive prosecuting officers and the accused. The case, as presented by the executive officers, must be passed upon by the judgment of a person or persons not connected with the executive department, and not subjected to its traditions and practices, but to those of an entirely different branch of the government. In no case is the business of investigation and prosecution, on the one hand, and that of decision, on the other, entrusted to the same governmental group. This desire for safeguards in the administration of criminal justice must be based

in great part at least upon the seriousness of the results to the accused should he be found guilty. It is to protect him from the consequences of being unjustly found guilty through mistake, ignorance, prejudice, or stupidity.

Executive justice to enforce quasi-criminal law. The procedure thus described in terms of criminal justice is the administrative procedure for the expulsion of aliens. The courts call it administrative, civil and not criminal. In its essential elements, however, it partakes largely of the nature of criminal justice, in the nature of many of the charges made, the kind of facts which must be proved and the kinds of issues decided, and more especially in its effects on the interests of the persons against whom it is brought. The details of the process should be studied with this analogy in mind.

For the important task of enforcing this system of what has been called "quasi-criminal"[15] justice, we have devised a system of administrative procedure, of executive justice, with a maximum of powers in the administrative officers, a minimum of checks and safeguards against error and prejudice, and with certainty, care, and due deliberation sacrificed to the desire for speed.

A system of executive justice, such as this, used to enforce law which is in many respects "quasi-criminal," can be justified only on the grounds of practical necessity. "In a modern state, executive justice, beyond what is involved in a proper balance between law and administration, is an evil, even if sometimes a necessary evil."[16] As a matter of fact, little consideration has been given by the public and by Congress to the procedure in expulsion cases. Expulsion has been looked upon as incidental to exclusion. The two processes have been looked upon as the same. While a more or less elaborate machinery with substan-

[15] *Report of the Minority of the Committee on Immigration and Naturalization in Connection with H.R. 10078,* 70th Congress, 1st Sess., H.R. 484, p. 8.

[16] Pound, "Justice According to Law," 14 *Col. Law Rev.* 25.

tial safeguards to the interests of the applicants for admission has been developed by Congress for the enforcement of the exclusion process, all that has been done in connection with the more drastic and serious process of expulsion has been to add to the grounds for such action and to extend the time limits within which it may be exercised. At first the power was to be exercised within only a year after entry. Now it has been extended so that in some cases it may be exercised at any time before naturalization. Almost no consideration has been given by our public officers or by the public to the question of whether this system of executive justice is an "evil" or to whether, assuming that it is such, it is a "necessary evil."

Three possible grounds of justification. It is submitted that such a system of administrative procedure applied to the enforcement of such a system of law as our statutes for the expulsion of aliens have established, can be justified on only three possible grounds: first, the desire for speed in its enforcement; second, the need for the use of trained, technical experts in the administration of details which could not be handled as well by judicial process; and third, economy in the expenditure of public funds.

Need for speed. As has already been pointed out,[17] in the expulsion process the primary necessity is not speed but accuracy. Once the department has acquired jurisdiction by the arrest of the alien there is no more need for haste than there is in any judicial procedure. Unnecessary delay is of course to be deplored, but delay is less an evil than the banishment of innocent persons as a result of false charges and undue haste, carelessness, or mistake. There is no need that accuracy and justice be sacrificed to speed.

Need for technical experts. As to the second ground, the need for technical experts, this is true in cases which hinge on the opinions of physicians or surgeons as to the physical or mental

[17] See Chapter II, §3, p. 28.

conditions of aliens. In this respect the cases of expulsion do not differ from any others where expert medical opinion is needed. Moreover, in the cases of expulsion the medical experts do not make the decisions. They act only as witnesses as they do in cases of judicial justice. The decisions are rendered by immigrant inspectors or by administrative officers who are members of the office personnel of the Department of Labor at Washington. It is difficult to call such officers technical experts in a true sense. They must have knowledge of the statutes and of the immigration rules, and of the departmental customs and practices. Experience in the administration of the law gives them acquaintance with types of personality and certain racial characteristics. Such experience induces an attitude of scepticism and disbelief which is valuable in a detective or a prosecutor. In a judge its value is not so certain. In any event such technical knowledge as seems to be required by the immigration officers is not essentially different from that required of police officers, detectives, prosecutors, or judges, as the case may be, in the administration of judicial justice. The requirements for appointment to the position of immigrant inspector, the passing of an examination consisting of questions on the statutes and rules, and the passing of a mental test, indicate that these officers are hardly technical experts in a true sense. The one kind of technical expertness that seems most necessary for the proper administration of the expulsion process is sufficient legal training to secure the possession by the administrative officers of a "legal mind." The duties of the officers are of two kinds, detective and judicial. In so far as the latter are concerned, persons of a judicial temperament and with judicial training are better fitted to perform the task than are those who are well qualified for the former. As the procedure is at present designed and administered the two functions are combined in the same administrative organization.

Economy of expense. In favor of the third ground, that of economy, more can be said. The system of expulsion under

the present statutes and rules has that merit. In the conduct of a hearing, only three government employees are necessary, an inspector, an interpreter, and a stenographer. In many of them the inspector performs the functions of all three. In cases where accused aliens are confined in hospitals or in prisons, one inspector can often by a visit to the institution secure sufficient evidence to justify a decision to deport. In many cases the issue is largely a matter of record, such as the court record of the conviction of a crime and the sentence thereon. To bring such cases to a court would greatly increase the expense of the proceedings. The time of judges, prosecuting officers, and counsel would be consumed. Witnesses would have to be summoned. More formality as to evidence would be necessary. Instead, the time of one inspector (whose salary when at the maximum is according to the present law $3,000 and by that law this maximum cannot be enjoyed by more than 50 per cent of the force[18]) and of one member of the Board of Review is consumed by the proceedings. Additional economy is secured by having the same inspector investigate the case, recommend that proceedings be started, conduct the hearing, take and transcribe the testimony, and make the finding and recommendation. In a great many of the cases the issues are so simple that there is no real conflict of evidence to be resolved. A study of such cases tends to the conclusion that the economy is justified. It is the possibility that in the case which, on the record as prepared by the single inspector as a part of his routine, looks so simple, there may be facts which have been overlooked or considerations which have been disregarded that make the argument of economy one to be questioned. In many of the cases, however, there is no such appearance of simplicity. There is a sharp conflict of testimony and as much an issue of fact as may be found in many criminal cases or civil cases where it seems desirable to utilize the time of judges and prosecutors, both higher paid

[18] Act of 1917, Sec. 24.

than immigration officers, not to mention juries, witnesses, court attendants and employees, etc. This argument of economy makes a nice problem of the reconciliation of the interests of resident aliens and those of the public in general in keeping down the costs of government.

Effects of the preliminary examinations. Certain tendencies and practices in the actual administration of the expulsion cases studied need evaluation. The first of these is the practice of holding wherever possible a preliminary examination of accused aliens before application has been made for the warrant of arrest and before the immigration officers have acquired jurisdiction, and in these preliminary examinations covering the entire case so that the later formal hearing becomes a mere form. This practice virtually nullifies the provision of the immigration rules in these cases that the alien may have counsel during the hearing. It is almost impossible for counsel, when later on they come into the case, to combat successfully the testimony contained in the first hearing. In effect the hearing is conducted before the warrant of arrest has been issued. This seems hard to reconcile with the spirit of the immigration rules which provide that the alien shall be arrested on a warrant and that this warrant shall be shown to him at the hearing. Many of the aliens proceeded against are ignorant persons with little or no knowledge of English. The fairness and accuracy of such hearings depend entirely on the integrity and carefulness of the individual inspector who conducts them. As between his word and that of the alien as to mistakes in the record and allegations of misunderstanding, it is but human nature that in most cases the reviewing officer will believe the inspector.

Warrants on insufficient evidence. It appeared that in many cases warrants of arrest were issued on too little evidence without adequate investigation. As a result innocent aliens were put to trouble, anxiety, and expense and the cost of administering the law increased. The officers were too prone to accept accusation by letter, telephone, or word of mouth from public

officers, police or charity, local or federal, or even from private individuals as justifying the issuance of a warrant. Telegraphic applications and warrants were used in a great many cases. In such cases the evidence on which the application was made did not come before the officer issuing the warrant until after it had been issued and served. The practice made it more difficult to keep an adequate check on the local officers in such cases.

Use of the element of surprise. The procedure seems designed to give the accused alien a minimum of time and opportunity to prepare a defense. There is nothing which performs the office of a bill of particulars to advise the alien or his counsel before the hearing of the exact nature of the charges against him. Under the former rules the inspector was required to exhibit to the alien at the beginning of the hearing the evidence on which the warrant had been issued. This served to some extent to advise him of the exact nature of the case against him. Under the present rules the warrant must be shown, but there is no reference to the supporting evidence. The warrant contains only a general charge in the words of the statute. Moreover, at any time during the hearing the inspector may introduce new charges, if he thinks the evidence brought out justifies them, and call upon the alien then and there to meet them. Often the best counsel can do under these circumstances is to ask for a postponement of the hearing which he is not entitled to as a matter of right. When there is no attorney, and this means in about four-fifths of the cases, the alien has to meet the new charges without time to secure witnesses or to plan a defense. It might be argued that such conditions of surprise prevent the concoction of false defenses. There is observable in the cases a strong desire on the part of the administrative officers to prevent accused aliens from having the opportunity for such concoction. On the other hand, these conditions of surprise may lead to confusion and misunderstanding and hinder the making of an adequate defense when there is one.

The examining inspector. There is another serious defect, a matter of practice and not inherent in the procedure. That is the practice of using the same inspector to make the investigation, report the facts on which the warrant is applied for, serve the warrant, conduct the hearing, make the recommendation, and in some cases prepare the typewritten record of the testimony which he himself has taken in shorthand during the hearing. In theory the inspector in such cases is not a prosecutor and is not a judge. He is a subordinate gathering information for the action of a superior officer, the Secretary of Labor. In practice he is a prosecutor whose duty it is to develop the government's case, and to cross-examine the witnesses who appear for the accused. At the same time he acts in the rôle of master, presiding at the hearing, controlling the course of the proceedings, and reporting his conclusions to his superior. Usually he is the only one who sees the witnesses and his comments on them will have effect on the reviewer of the record. In cases where before the warrant was issued he conducted the investigation, he has already interviewed the complaining witnesses and recommended to his superior officer that a warrant be applied for. It is in the nature of things very difficult for the inspector in such a situation to approach the hearing with an open mind. He is likely to be convinced already that the alien is guilty. To overcome that conviction already established is a difficult task.

Related to this problem is the fact that few inspectors have legal training. When the salary scale is considered, the nature of the work, and the qualifications for appointment, it is inevitable that many of them will have only a minimum of general education. The handicap of this condition is apparent in the records of many expulsion cases, for what the inspector has to do is to conduct a trial under involved statutes and rules, sometimes involving close and difficult controversies of fact and difficult inferences to draw in the application of indefinite

standards. The rule as to the conduct of hearings is unfortunately phrased:

> Upon receipt of a telegraphic or formal warrant of arrest, the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.[19]

A person approaching the case with a fresh point of view and one with at least a moderate amount of legal training could avoid interpreting a rule so phrased as indicating that the alien is to be regarded as guilty of the charges unless he can prove himself innocent. One who has already made up his mind as to the alien's guilt finds it more difficult.

Counsel in expulsion cases. In expulsion cases the question of counsel to represent the alien furnishes a problem of great seriousness. The administrative officers do not look with favor on lawyers. There seems evident a desire to reduce their presence to a minimum. The ideal case is one where the officers are free from their interference. Hence the practice of holding preliminary hearings is followed whenever possible. The rule of the department as to counsel does not contain the words, "at the beginning of the hearing," as did a former rule. It does, however, provide that counsel when selected may be present during the hearing. As at present administered, it allows counsel during the entire hearing if the alien so desires. The omission from the rule of the words, "at the beginning," is unfortunate, since it leaves room for an interpretation less favorable to the alien's securing the advantage of counsel. The importance of counsel to represent the alien in some cases cannot be overemphasized. No doubt they make the work of the officers more difficult. Yet from this very difficulty comes the necessity for more care in the preparation of the case and more painstaking deliberation about it. The presence of counsel

[19] Immigration Rule 19, subd. D.

makes it less likely that a case will run along in a routine manner to a decision to expel, with important witnesses overlooked and not questioned, to be followed by frantic eleventh-hour presentation of new evidence which gives the case an entirely different appearance. It could hardly prevent deportation when the facts justify it. The significant fact is that although the rules permit counsel they are secured by aliens in only a small minority of the cases. In most, the entire matter from first to last is in the hands of the administrative officers. Aliens, ignorant of our language and our customs, and usually of the less fortunate class economically who have had little opportunity to gain knowledge or training, must conduct their own defense if they have any. Even a person of experience and intelligence is likely to be at a disadvantage when suffering from the anxiety and humiliation caused by his arrest and the knowledge that his deportation is sought. The presence of counsel, even in such a case, is desirable if justice is to be secured.

Limitations on the use of the subpoena. Connected with the problem of the need for adequate protection resulting from the presence of counsel, is the fact that the use of the *subpoena* to summon witnesses on behalf of the alien is restricted by the rules. Without counsel it is unlikely that the accused alien will be able to comply with the requirements of the rule that he apply for a *subpoena* in writing showing that he has already made diligent efforts to secure the attendance of the witness, indicating what he intends to prove, and showing that it is material. This requirement, coupled with the others that the examination of the witness if he is called shall be limited to the matters stated in the application and that *subpoenas* shall be used only when absolutely necessary, and with the further fact added that there is no provision for compensation of witnesses, tends to reduce the use of the *subpoena* to a minimum. The result is that in many cases only part of the evidence is available. In the course of the administrative routine the immigra-

tion officers do not call witnesses who might throw additional light on the issues. Without the presence of counsel the chances of their being called are slight, especially when they are at a distance or are occupied with their business or employment. Cases were found where the procedure had moved along to an order to expel, in a perfectly routine way. Then at the last minute counsel was secured by relatives or friends and through his efforts the missing evidence which would have made all the difference was secured.

No counsel and no rules of evidence. The absence of counsel in so many of the cases is also prejudicial to the interests of accused aliens because of the latitude permitted in the matters of evidence and the uncritical attitude of many officers as to its credibility. This is a problem in the case of hearsay and opinion testimony, especially where federal or local public officers appear as witnesses. It extends to testimony given by social workers, officers of charities, and officers and physicians of hospitals. The tendency to rely on such evidence is marked. This is the case when it is presented in the form of letters, reports, or certificates, and when the officers who made the statements are not called for any oral examination, by which the statements could be tested. The same problem is presented by great informality and looseness in the matter of documents which are often placed in evidence with little or no questioning as to their past history. In the absence of counsel there is little critical examination of their sources and in the majority of cases there is no counsel. In the case of much of the evidence obtained *ex parte* in the form of reports of immigration officers, of interviews with witnesses, or of affidavits, or of letters, telegrams, newspaper clippings, etc., no cross-examination is possible because of the practical difficulties of securing the attendance of the persons making the statements. In most cases, however, there is no counsel to conduct the cross-examination if the witnesses were available for that purpose. A related problem is the practice of including in the reports of local officers

or in department memoranda, items of evidence which are matters of their own knowledge but were not brought out at the hearing. Department memoranda are a natural part of an administrative procedure. Where such grave results are involved as in these expulsion cases they present the dangers of mistake and consequent injustice. When there is no counsel and the interests of the accused are entirely in the hands of the administrative officers and become involved in the network of departmental procedure, there is danger of error even when those in charge have the best of intentions.

Detailed discussion has been given[20] of the practice in three different types of expulsion cases: those where the ground is that the alien has become a public charge within five years after his entry "from causes not affirmatively shown to have arisen since the entry"; those where it is claimed that at the time of entry he was likely to become a public charge; and those where the ground alleged for expulsion is entry without inspection. In the first group, partly because of the provisions of the law and partly because of the departmental routine, occur cases of great hardship and injustice. In the second and third groups, there was evidenced an effort to stretch indefinite provisions of the statute far beyond their reasonable meaning to bring additional cases within them.

Public charges within five years. An alien in the first group, who has become a public charge within five years after his entry, is in a serious predicament. He must satisfy the officers that the causes of his disease or insanity, or of his economic difficulties were not potentially present when he was admitted to the country. The period covered may be, and often is, only a few weeks short of five years. In most cases this burden of showing affirmatively conditions nearly five years before and proving a negative from those conditions is impossible to sustain. The difficulty, moreover, is increased manyfold by the

[20] See Chapter IV, §12, a, p. 113, c, p. 119, and f, p. 131.

routine way in which the cases are handled. The officers place almost complete reliance on the medical certificates. These certificates issued from the local hospitals and charitable institutions are unsworn. They usually contain few if any details as to the facts upon which the officer who signs them bases his conclusions that the causes for the disability did not arise subsequent to landing. The clinical histories are often not even signed. Usually the physician is not called for any questioning by the immigration officer. Once the certificate has been secured, the case goes along as a matter of routine. This reaches a climax in those cases where the officers have assumed that the alien has become a public charge and failed to ascertain that in fact his bills have been paid, or that his relatives have made *bona fide* attempts to secure and pay them. Even the most vigorous efforts of counsel are usually not sufficient to convince the department and in most cases there are no counsel. In most cases, becoming a public charge is tantamount to expulsion. For an alien to be admitted to a hospital which is supported in whole or in part by public funds is likely to result in the same way even though he or his family may have ample means to pay his expenses.

Likely to become a public charge at the time of entry. The stretching beyond reason of the category "likely to become a public charge" in exclusion cases has already been discussed.[21] In expulsion cases when the attempt is made to apply this ground for exclusion retroactively over a period of, in many cases, nearly five years, the stretching process is even more pronounced. If in the opinion of the officers the aliens ought to be deported as undesirable persons, the ground for expulsion, "likely to become a public charge at the time of entry," is used. Relatively insignificant difficulties with the police, family rows leading to unproved accusations by angry spouses, parents, or relatives, violations of the moral code by young men and

[21] See Chapter III, §11, a, p. 53.

women, which by the law of the place where they occurred are not crimes, or for which in any event they would not be punished by action of the criminal law, are although they may have occurred several years after entry, sometimes nearly five, held to be evidence of "criminal tendencies" or of a "weak moral nature" existing at the time of entry. From the possession of these "tendencies" it is inferred that at that time the alien in question was likely to become a public charge. In cases such as these, there appears from time to time evidence of a tendency on the part of some of the immigration officers to regard themselves as charged with the duty and the authority of exercising a general supervision of conduct and morals over our alien population. Sometimes misfortunes such as the death of a husband and father, the desertion of a family bread-winner, or the loss of employment are treated in the same way and the unfortunates deported as likely to become a public charge at the time of entry, although in fact their condition of poverty is due to changes occurring since their entry. Such interpretations of the statute subject every alien in the country, however desirable at the time of entry he may have been, to the danger that some physical or financial misfortune to himself or to some member of his family, or some false accusation of immoral conduct or dishonest practices may cause his deportation after a residence of several years, with great loss and hardship. This stretching of a cause for expulsion by such an interpretation far beyond any reasonable meaning of the words or the purposes, is attempting to add to the statute additional grounds, a power which Congress alone has the power under the Constitution to exercise. The duty of the officers is to apply the statutes, not to amend them by adding new grounds. In no place in the statute can such a broad power be found conferred upon the officers to deport on the ground of general undesirability or misfortune, or because they think the alien ought to be deported. Nor is deportation legally established as a punishment to be administered by administrative

process to those who have strayed from the strait and narrow path, except when such straying becomes so serious that it results in conviction in criminal proceedings and sentence for at least a year. The practice of the department in interpreting the words, "likely to become a public charge at the time of entry," is administrative usurpation of a legislative function which belongs to Congress. It has resulted in the adoption of a code of law as to aliens much more strict than Congress has ever, either by vote or by debate, indicated an intention of adopting. The mental process by which the events occurring three, four, or almost five years after entry are treated as evidence of conditions existing at that time is *post hoc* reasoning with a vengeance.

Entry without inspection. In a similar way, the charge that the alien entered without inspection is stretched to cover cases where there was an inspection, but the officer was deceived by "false and evasive or misleading statements." This is not limited to intentionally false testimony or to testimony given formally under oath. It covers cases where because the questions asked by the inspector did not go far enough, all the facts did not come out or where the only fault was in not volunteering information. The present statutes do not make the giving even of intentionally false testimony a ground for exclusion, but rely upon the criminal sanction, where in a criminal trial perjury has to be proved. The interpretation of an inspection at which false and misleading statements were made, even when made intentionally, as no inspection at all, is attempting again to add to the statute by administrative fiat another ground for expulsion. The law-making function should in such cases be left to Congress.

This tendency to stretch and extend, by a forced and intricate interpretation of terms of the statutes, the powers which Congress has conferred upon the department has a gentler side. This is to be seen in those expulsion cases where the officers on grounds of humanity have, in order to avoid excessive hardship

in meritorious cases, delayed the execution of the warrant of deportation or ordered the cancellation of the proceedings, even though facts requiring expulsion had been technically established. The cases where such action was taken were such that the public interest was in no way injured by the assumption of the power to exercise discretion. Such a power should no doubt be lodged in the administrative officers under proper restriction and safeguards. Few would blame them for taking the power in some of the cases where they have seen fit to do so. The cases where although the evidence fails to show a ground for expulsion they attempt to retain jurisdiction over accused aliens by holding their cases in abeyance, and even to put them on probation and make them report at intervals, cannot be so well justified.

§3. JUDICIAL REVIEW

Extent of judicial intervention. In his annual report for the fiscal year ending June 30, 1929, the Secretary made this statement as to judicial review in immigration cases.

> The tendency of the federal courts in some districts to supplant the administrative prerogatives which the law accords to the Secretary of Labor in matters relating to the admission and expulsion of aliens continued to increase during the year.[22]

During the fiscal years ending June 30, 1928 and 1929, "the Government was compelled to defend" 2,911 petitions for judicial review of the administrative action in immigration cases through the writ of *habeas corpus*.[23] The decision of the administrative officers was reversed in 220 of these cases. During the same period there were issued by the department 27,044 warrants of deportation in expulsion proceedings and 5,559 ap-

[22] *Report of the Secretary of Labor for the Fiscal Year Ending June 30, 1929*, p. 18.

[23] *Annual Report of the Commissioner-General of Immigration, etc., 1929*, p. 2.

plicants for admission were rejected on appeal to the Secretary. Because of the lack of counsel, the lack of a good case, insufficient money, or other reasons, judicial intervention is sought in only a small minority of the cases. There would seem to be in the number of cases handled little indication of any danger of the court's usurping the administrative functions.

Review of statutory construction. In one field, that of statutory construction, the courts have exercised almost complete control over the administrative functions of the Secretary. The liberal attitude adopted by the courts toward statutory construction by some administrative tribunals is missing in immigration cases.

Review of procedure. As to the review of procedure, since that is tested by the general standard of fairness instead of by specific rules, considerable variation is found in the decided cases in the different circuits and districts. Some judges adopt a liberal attitude toward the officers, while others are more critical. There may be found in some opinions vigorous adverse criticisms of the administrative procedure provided for by the statutes and rules. This has more often been directed toward the expulsion process. In some the administrative practices themselves have been criticized. These cases where a more strict attitude has been adopted account in part for the opinion expressed by the Secretary of Labor in regard to the action of the court in some of the districts.

In spite of the variations in the application of the standard of fairness to the administrative procedure, some more definite requirements have been worked out. The practice of review of the procedure has been of value for that reason and no doubt as a check and deterrent upon arbitrary action. It has also remedied injustice in individual cases. The application of this general standard seems an adequate check. It would not be thought advisable to attempt to restrict the administrative officers by many definite technical rules.

Review of evidence. In the testing of the evidence a standard is also applied, that of reasonableness. Here it is difficult to find any more specific requirements. Some courts are very lenient in their scrutiny and will support the action of the officers on very little evidence. Others examine so carefully that they come close to a consideration of the weight of the evidence and to a retrial of the issues of fact on the record. Some judges in their review of the evidence show anxiety over and lack of confidence in the system of administrative procedure. Others are more complacent about it and are inclined to give the immigration officers almost free rein. The review of the evidence is of considerable value as a safeguard. Yet in the case of some judges who take with great seriousness the mandate of the statute that the decision of the Secretary shall be final and hesitate to entrench upon the "administrative prerogatives," there is left a considerable margin within which the court will feel itself powerless to interfere, even should it think the decision of the officers wrong. To that extent the safeguard is limited.

Judicial Hearings of Claims to Citizenship: Exclusion cases. The refusal of the Supreme Court to extend in exclusion cases the protection of a judicial hearing to a claim of American citizenship even when it is based on substantial evidence has left citizens who travel abroad subject to the potential danger of having their citizenship denied by the administrative officers without any redress. The decision of the court in *U.S.* v. *Ju Toy*[24] that a person who claims the right to admission to the country as a citizen is not entitled to a judicial hearing on the issue raised by the claim, has met with adverse criticism. There was in the case a vigorous dissent by Mr. Justice Brewer, concurred in by Mr. Justice Peckham. Logically the first argument against the decision is that the power of the officers to exclude depends upon the fact that the person is an alien. Therefore,

[24] 198 U.S. 253.

alienage is a jurisdictional fact. It has usually been held that the decision of a tribunal as to the existence of a fact upon which its own jurisdiction depends is open to inquiry in any proceedings where the judgment of the tribunal is relied upon as conclusive. This is true of the judgments of courts and has been held true in cases where the jurisdiction of other administrative tribunals was questioned. It has been so held in the case of the federal land office[25] and in cases where persons before military tribunals claimed that as civilians they were not subject to the jurisdiction of the tribunal.[26] Moreover, the statute provides that the decision of the Secretary shall be final in every case where an *alien* is excluded. It does not in terms apply to citizens.

Again it has been argued that the administrative process is so lacking in safeguards that, as to the decision of so important an issue as citizenship, it is not due process of law. The administrative process of exclusion is by a private hearing without counsel. The appeal to the Secretary is a paper trial. The evidence is not subject to cross-examination. Evidence of the most informal kind may be considered. The safeguards of a judicial trial are conspicuously lacking. The right of an alleged citizen to enter his country is involved, and if it is decided against him the case means his forcible removal and banishment. Thus the liberty of citizens may be involved in the most serious way possible, second only to danger to life itself. It is true, as stated by Mr. Justice Holmes in the *Ju Toy* case, that due process of law does not always involve a judicial trial. It does not follow, however, that because of its greater safeguards it ought not to be a necessary ingredient of due process in cases where so important an issue as the possible banishment of a citizen is involved. That the final determination of so important a matter should be left to such a process has excited much adverse comment.

[25] *Smelting Co.* v. *Camp,* 104 U.S. 636; *Doolan* v. *Carr,* 125 U.S. 618.
[26] *Johnson* v. *Sayre,* 158 U.S. 109.

Logically the arguments against the decision are strong. Perhaps on strictly logical deductions from the traditional legal premises they are stronger than are arguments for it. The majority opinion disposed of the case briefly. The statute makes no exception as to the claim of citizenship when it makes the administrative decision final, and as the constitutionality of the statute has been sustained, no such exception can be read into it. Also, even admitting that the Fifth Amendment is applicable, "due process of law" does not require a judicial trial. The finding of the department on the question of citizenship is simply a finding on an alleged ground of a right to be admitted, and all grounds are equally within the administrative process, membership within an excluded class, domicile, and citizenship.

> It is established as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile and the belonging to a class excepted from the exclusion acts.[27]

It seems that back of this is the idea that in the last analysis the same kind of question is involved in all cases, that is, a decision of an issue of controverted fact, involving a finding as to place and time of birth or the issuance of naturalization papers, and that such findings can as fairly and accurately be made by administrative process as can questions of ability to earn a living or conduct. There seems also present the underlying idea that the case is not one to be decided by strictly logical deductions or by analogies. There is, on the one hand, the interest of the citizen who may possibly be excluded from the country; on the other hand, there are the public interests which require a rapid, strict enforcement of the laws as to exclusion of aliens, which enforcement a constant recourse to the courts might seriously hamper. If a judicial hearing were allowed on every substantial claim to citizenship alleged as a

[27] Mr. Justice Holmes in *U.S.* v. *Ju Toy*, 198 U.S. 253.

ground for a right to enter, there would be this constant recourse to the courts. Thus we have in this important case a conflict between arguments based on analogy and logical deduction on the one side, and a balancing of interests with little argument on the other. The case is most vulnerable to attack on the ground that in this balancing of interests too little weight was given to the interests of the alleged citizen and too much to the public interests in excluding immigrants regarded as undesirable.

Claims to Citizenship: Expulsion cases. Since the decision in the *Ju Toy* case was rendered, there has been a great extension of the expulsion process. Causes for expulsion have been added and the period of time after entry within which the power may be exercised has been lengthened. By recent legislation it has been provided that persons expelled from the country by the administrative process may never return. Economic and social views over which strong public opinion is beginning to be aroused have been included in the statutes as grounds for expulsion. The danger of injury to the interests of citizens would be vastly greater if the power of the officers to decide conclusively the jurisdictional fact of alienage were recognized in the case of persons resident within our borders. This danger the Supreme Court has avoided by its decision in *Ng Fong Ho* v. *White*[28] that a person resident within the country was entitled to a judicial trial of his claim to citizenship. The distinction between exclusion cases and those where expulsion is sought on which the court relied does not seem so clear when tested logically. It must rest upon the principle that in view of the necessity for speed and strict enforcement of the exclusion laws, leaving to the administrative officers final decision in all matters of fact, whether citizenship or otherwise, is a reasonable exercise of the power of Congress to regulate immigration, and therefore "due process of law," whereas in expulsion cases the same need for summary action is not present. Therefore, in the

[28] 259 U.S. 276.

latter there is no need for making an exception to the usual rule that questions of jurisdictional fact may not be decided conclusively by the tribunal whose jurisdiction is involved. Whatever may be the arguments pro and con this distinction has been made the basis of different treatment in the two kinds of cases. It will, however, be difficult for the Supreme Court to go much further in providing for persons who make a claim to citizenship the protection of a judicial trial. In *Quon Quon Poy* v. *Johnson,*[29] decided in 1927, it reiterated the principle of the *Ju Toy* case in exclusion cases so definitely, that as to them it will be difficult to avoid it without overruling it. Perhaps a distinction, however, may be built up later on the words "and had never resided in the United States" which the court used in this later case, just as the effect of the *Ju Toy* case was partially avoided by building up a distinction upon the words of Mr. Justice Holmes that "the petitioner although physically present within our borders is to be regarded as stopped at the limit of our jurisdiction and kept there."[30] By such a distinction between a returning resident who claims to be a citizen and one who has never resided here but claims citizenship on the fact of being a child born abroad of an American citizen, the protection of judicial process could be extended to the former. Yet this distinction would in effect, perhaps, overrule the *Ju Toy* case since there the petitioner claimed to be a citizen returning from an absence abroad.

Competing principles underlying judicial review. In their handling of immigration cases, the courts seem to have been struggling with three competing principles. The first of these is the principle of national sovereignty, the right of a nation in accordance with international law to refuse to admit aliens within its borders, to admit them subject to regulations, to admit some and exclude others, and to expel those admitted when such expulsion seems to it necessary for its own interests.

[29] 273 U.S. 382. [30] *U.S.* v. *Ju Toy,* 198 U.S. 253 at 263.

Corollary to this is the undoubted right under principles of international law to exercise this national sovereignty through the political or executive branch of the government, the well-established practice in other countries of exercising it in that way, and the practical requirement that many phases of the power cannot be exercised in any other way. The second is the principle established by the Supreme Court in *Yick Wo* v. *Hopkins*[31] that an alien, residing in this country, is a "person" within the terms of the Fifth Amendment, and entitled to the constitutional protection of due process of law as to his life, his liberty, and his property. This principle is a competing one with the right of sovereignty to treat aliens as guests on sufferance and to terminate the period of their stay at will. It also introduces the problem of whether the methods of dealing with the rights of aliens by executive action, especially those aliens who have already been admitted to our borders, are in accordance with the procedural requirements of due process of law, and whether or not in some situations this standard of procedure does not require that there be secured to them the safeguards traditionally connected with judicial action, even the use of the judicial process. The third principle comes into play because the exercise of power over aliens inevitably is likely to involve the rights of citizens. It will also involve the decision whether a particular individual is or is not a citizen. The right of an American citizen in the custody of American administrative officers or before an American court to the full measure of the constitutional protection of the Fifth Amendment cannot be doubted.

All three of these principles have had their effect in the decisions on the power of the courts to review the actions of the immigration officers. For the most part the first, that of the right of a sovereign nation to expel or exclude aliens, has seemed to have the greater weight. To this may be traced the

[31] 118 U.S. 356.

decision of the Supreme Court that although a resident alien was entitled to the constitutional protection of his life, his liberty, and his property under the requirement of due process of law, his right to remain in residence was not so protected.[32] It was also at the bottom of the decision that the power to expel could be entrusted to executive officers and their decisions made final,[33] and of the extreme decision in *U.S.* v. *Ju Toy*,[34] that the final decision on a claim of citizenship made by a person applying for admission could be left to administrative officers without an appeal to the courts. It was also apparent in the cases where the Supreme Court held that an alien might be excluded or expelled on the sole ground of political or economic views,[35] and that administrative fines might by departmental action be imposed on ship companies for failing by reasonable efforts to detect disease from which an alien passenger was found to be suffering at the time of his arrival at a port of entry.[36] On the other hand, the effect of the other two principles has appeared in numerous cases. It appeared when the Supreme Court held unconstitutional the provisions of the statute that a Chinese person found in proceedings before a United States commissioner to be unlawfully within the country should be imprisoned at hard labor;[37] when it held that the hearings before the administrative officers were subject to the standard of fairness as a necessity of due process of law,[38] that there must be substantial evidence to support the findings of the officers,[39] and that the decisions of the officers on matters of interpretation of the statutes were at all times subject to review.[40] It was also apparent in the court's retreat from the rule

[32] *Fong Yue Ting* v. *U.S.*, 149 U.S. 698.
[33] *Ekiu* v. *U.S.*, 142 U.S. 651; *Japanese Immigrant Case*, 189 U.S. 86.
[34] 198 U.S. 253. [35] *Turner* v. *Williams*, 194 U.S. 279.
[36] *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 36.
[37] *Wong Wing* v. *U.S.*, 163 U.S. 228.
[38] *Japanese Immigrant Case*, 189 U.S. 86.
[39] *Kwock Jan Fat* v. *White*, 253 U.S. 454.
[40] *U.S.* v. *Wong Kim Ark*, 169 U.S. 649.

of the *Ju Toy* case by its decision in *Ng Fong Ho* v. *White*[41] that the substantial claim of a resident of this country to American citizenship was entitled to a judicial hearing. This war of competing principles accounts for the apparent inconsistencies of the decisions.

§4. SUGGESTIONS

The conclusion that in certain particulars the present methods of exclusion and expulsion of aliens are defective and do not properly safeguard the interests of the aliens involved leads to recommendations which might bring improvement. Therefore the following are offered.

Strengthening of boards of special inquiry. In the case of the exclusion procedure, efforts should be made to strengthen the boards of special inquiry by improving their personnel and increasing their sense of responsibility. Three experienced inspectors should be provided for each board and a separate secretary or stenographer to take the record of the testimony, so that the attention of one member of the board shall not be distracted by the mechanical work of acting as secretary. The other necessary clerical work could then be divided among the three members and the boards be less one-man courts. The boards should be encouraged to use their own judgment in difficult and doubtful cases and to decide them and not to pass the responsibility to the department on the appeal.

A statutory tribunal of review. The Board of Review should be given statutory authority instead of being merely an advisory body with no powers except as the administrative heads give it. It should be elevated into a tribunal instead of a group of administrative assistants. A more regular procedure should be developed under which the right to the presentation of oral argument should be established as a matter of law. This procedure should provide for conferences among members as a

[41] 259 U.S. 276.

matter of course. A regular procedure for the placing of cases on the calendar for hearing should also be established so that one or more members may be familiar with the cases when they are called for argument. Requirements for education and training and experience for the members of the Board should be set. A certain amount of legal training and experience should be one of these requirements.

Judicial hearings in claims to citizenship. In cases where applicants for admission present substantial evidence to support a claim to American citizenship, they should have secured to them by statute the right to a judicial review of the evidence on the issue of fact. To this suggestion the arguments of delay and expense and the crowding of the courts would be made. It cannot be shown conclusively that this would follow to the extent feared. A substantial showing of evidence to support the claim would be necessary. There would be little incentive to seek such a review if there were no hope that it might succeed. In so far as petitions for judicial review might be made for the purpose of delay the possibility of that exists in the system of review already established. The answer, however, to such arguments is that the claim of an American citizen to be admitted if it is supported by substantial evidence is too important to be left to the routine of administrative action for conclusive and final decision without the protection of judicial review of the justice of the decision on the evidence in the record.

The judicial process in expulsions. In the case of the expulsion process many arguments can be advanced for the substitution of a judicial process for the present administrative process. The similarity of these cases in their essential nature, and especially in their effects, to criminal cases has been pointed out. The publicity and the greater formality of the judicial process would tend to counteract the difficulty that aliens are represented by counsel in only a small minority of the cases. We

have seen fit to provide a judicial process for the naturalization of new citizens and for the revocation of naturalization, and for the forfeiture and destruction of books and other printed matter, the admission of which to the country is forbidden by federal statute.[42] The safeguards of judicial action seem more suited to the process of banishment of persons resident in the country, some of them for many years. The Supreme Court has secured to residents whose expulsion the administrative officers are seeking, the right to a judicial trial of a claim to citizenship if it is supported by substantial evidence. In many of these cases other interests as important are involved. The parents, wives, or husbands of citizens are often caught in the toils of the administrative procedure. Vital interests of residents of many years are often affected. As has been pointed out, the necessity in expulsion cases is not speed but accuracy. It is important that aliens be deported if they come within the provisions of the statute. It is just as important that through undue haste, carelessness, stupidity, prejudice, or an unreasonable suspicion of all aliens, innocent persons who are not subject to deportation under the law be not banished. The principal arguments against the use of the judicial process are that it would result in delay, added expense, and a great addition to the burden of the courts, already suffering from the congestion of their calendars, and that in many expulsion cases the issues involved, such as a court record of the conviction of crime, are admirably fitted to the administrative procedure. Such cases have been pointed out. These arguments for economy have considerable weight. Perhaps, however, they are overbalanced by the consideration of the paramount interest that adequate justice should be secured for aliens already resident within our borders.

Improvements in the administrative process of expulsion. In any event, certain changes should be made in the administra-

[42] Tariff Act of 1930, Sec. 305.

tive process of expulsion. At present it does not have the safeguards established by statute for the exclusion process. It should have at least as many. The hearings should be conducted, not before the inspector who has made the investigation and prepared the case for the government, but before another officer, if possible a board of special inquiry, preferably made up of officers who have had legal training. Before the date of the hearing the alien should be advised in writing of the charges against him and be permitted to secure the assistance of counsel as he could do if indicted in criminal proceedings or if sued civilly. The presence of counsel during the entire hearing should be permitted as a matter of course and the right should be secured by statute and not left to the discretion of the rule-making power. The provisions of the law for the summoning of witnesses for the accused and the right to cross-examination should be administered liberally, not grudgingly. In all expulsion cases the right to judicial review on issues of fact should be established by statute. By judicial action we have seen fit to establish this right in the case of the decision of public utility commissions. There is no reason to fear that the grant of the right would result in the failure to secure the expulsion of guilty persons. It would safeguard innocent persons against the serious consequences of mistake. What is just as important, it would give the procedure an appearance of greater fairness. To the same argument mentioned against the extension of judicial review or the use of the judicial process, that is, the delay and clogging of the courts and the resulting extra expense, the same answer as before may be given. Speed is not an important consideration in expulsion cases. Moreover, there would be thousands of cases where there would be no attempt to seek judicial review. Many cases are so clear that there would not be much utility in doing so. There is at present a right to seek court intervention on the ground of unfair procedure or inadequacy of the evidence. The additional step of permitting a court to go over the record with the question in mind of whether on the

evidence the officers decided properly, is not a serious one. In the cases where there is a substantial defense offered by the accused alien it seems important that the trial of the issue be subject to this safeguard.

Conservative interpretations of statutes. The practice of attempting to extend by a stretched interpretation based upon an involved and intricate casuistry some of the grounds for exclusion and expulsion provided by the statute should be discontinued. "Likely to become a public charge" and "likely to become a public charge at the time of entry" should not be used in cases far beyond any reasonable meaning to secure the exclusion or the expulsion of persons not covered by the statutes. Zeal for the performance of their duties ought not to lead the immigration officers to attempt to add to the grounds for exclusion or expulsion. This matter belongs to Congress. Even where the officers feel that in the individual case the alien is of little merit, the details of the law should be followed. Strained and almost fantastic interpretations of the terms of the statute will in the long run tend to discredit its administration.

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