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Aliens - Exclusion or Expulsion - Constitutionality

K. L. Gilchrist

RECENT CASES

ALIENS — EXCLUSION OR EXPULSION — CONSTITUTIONALITY — A *habeas corpus* proceeding was brought by an alien against whom a deportation order had been issued. The finality and propriety of the order was not questioned, but relief was requested under a statute authorizing the United States Attorney General to withhold deportation in any case where, in his opinion, the alien would be subject to physical persecution in his native country.[1] The United States District Court denied relief from the deportation order holding that the statute does not require an adjudication to be determined on record after opportunity for agency hearing. The matter is committed to agency discretion and an alien is not entitled to a hearing and determination of his application for a stay.[2] The United States Supreme Court vacated the judgment and remanded the case to the District Court with directions to dismiss the petition upon the ground that the cause was moot. *Chiu But Hao v. Barber,* 350 U.S. 878 (1955).

It appears to be well settled that an alien is entitled to judicial review of a deportation order under the provisions of the Administrative Procedure Act.[3] Here, however, the appellant questions neither the order nor the procedure preceding it, but instead prays for the favorable exercise of an executive's discretionary power through judicial intervention. It is equally well settled that he is not so entitled.[4] Despite the severity of the penalty the courts have unanimously held that deportation matters are entirely civil in nature.[5] Due process protection may hence be of a more restricted nature than that which applies to criminal proceedings,[6] and strict adherence to judicial procedure is not required in a hearing in deportation proceedings.[7]

The power to expel an alien is essentially within the plenary power of the political branches of the government.[8] Here, Congress has placed the power to suspend deportation in the hands of the Attorney General to exercise at his discretion. He is made the sole and exclusive judge of the existence of the facts, and no other tribunal can re-examine or controvert the sufficiency of the evidence upon which he acted.[9] Congress did not make suspension of deportation a legal right. It is manifest that the Attorney General's procedural regulations could not establish a right that Congress was unwilling to bestow.[10]

The Congressional intent seems clear. A prior statute *requiring* the withholding of deportation if the Attorney General should *find* that the alien

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1. 66 Stat. 212 (1952), 8 U.S.C. §1253 (1952).
2. Chiu But Hao v. Barber, 222 F.2d 821 (9th Cir. 1955).
3. Kristensen v. McGrath, 340 U.S. 162 (1950); Prince v. Mackay, 185 F.2d 578 (6th Cir. 1950); Podovinnidoff v. Miller, 179 F.2d 937 (3rd Cir. 1950).
4. U. S. *ex rel* Weddeke v. Watkins, 166 F.2d 369 (2d Cir. 1948), *cert. denied* 333 U. S. 876 (1948); U. S. *ex rel* Zabaduja v. Garfinkel, 77 F.Supp 751 (W.D. Pa. 1948) (When a statute has conferred discretionary power on an executive department the court cannot interfere with this exercise of discretion).
5. *E.g.* Carlson v. Landon, 342 U. S. 524 (1952).
6. Zakonaite v. Wolf, 226 U. S. 272 (1912).
7. U. S. v. Zimmerman, 94 F.Supp. 22 (E.D. Pa. 1950).
8. Fong Yue Ting v. U. S., 149 U. S. 698 (1893); Nishimura Ekui v. U. S., 142 U. S. 651 (1892) (This power is founded upon the international sovereign right to regulate foreign affairs).
9. Nishimura Ekui v. U. S., 142 U. S. 651 (1892).
10. 62 Yale L. J. 846.

would be subjected to physical persecution[11] was modified by the present statute so as to *authorize* the action if the Attorney General's *opinion* was that the facts existed. This would indicate that the withholding of deportation under such circumstances rests wholly within the administrative judgment and opinion of the Attorney General or his delegate.[12] The courts may intervene when an alien has been denied appropriate procedural due process or a fair consideration of his application,[13] but, if these requirements have been met, they are powerless to modify the Attorney General's final decision.[14]

It has never been contended that the judiciary may pardon or mandamus the executive to pardon. It seems equally certain that the Attorney General's power of clemency in this instance is one which has been placed beyond the reach of the courts.[15]

K. L. GILCHRIST

CONSTITUTIONAL LAW — DUE PROCESS — DISBARMENT OF ATTORNEY FOR INVOKING PRIVILEGE AGAINST SELF — INCRIMINATION — The Circuit Court ordered disbarment of an attorney for invoking the privilege against self-incrimination before a Senate sub-committee, when questioned in connection with alleged membership in the Communist Party. On appeal to the Supreme Court of Florida it was *held,* one justice dissenting, that the order be reversed. The mere invocation of the constitutional privilege against self-incrimination, is not sufficient to justify disbarment. *Sheiner v. State,* 82 So.2d 657 (Fla. 1955).

A state can dismiss certain types of employees for exercising the constitutional privilege against self-incrimination.[1] For example, the exercise of the privilege by a police officer is deemed incompatible with his prescribed

11. 64 Stat 1010 (1950), 8 U. S. C. §156 (1950).

12. U. S. *ex rel* Leong Choy Moon v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954); U. S. *ex rel* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953) (The courts may not substitute their judgment for his). See also a communication to the Yale Law Journal from Senator Pat McCarran (D. Neb.), 17 January 1953: "The change in the language of the provision as it now appears in the Immigration and Nationality Act was motivated by a desire to clarify the provision to make it perfectly clear that a determination of whether or not the deportation of an alien should be withheld in such cases is solely within the discretion of the Attorney General."

13. U. S. *ex rel* Accardi v. Shaughnessy, 347 U. S. 260 (1954); U. S. *ex rel* Leong Choy Moon v. Shaughnessy, 218 F.2d 316 (2d Cir. 1954); U. S. *ex rel* Dolenz v. Shaughnessy, 206 F.2d 392 (2d Cir. 1953).

14. Barreiro v. Brownell, 215 F.2d 585 (9th Cir. 1954) (Attorney General need not have suspended deportation even if alien had court judgment declaring eligibility); Sleddens v. Shaughnessy, 177 F.2d 363 (2d Cir. 1949).

15. U. S. *ex rel* Accardi v. Shaughnessy, 347 U. S. 260 (1954) (dissenting opinion).

1. The Fifth Amendment to the Federal Constitution provides that no person shall be compelled in any criminal case to be witness against himself. Similar provisions are found in all the state constitutions with the exception of Iowa and New Jersey, where the privilege against self-incrimination exists as part of the common law. State v. Height, 177 Iowa 650, 91 N.W. 935 (1902); State v. Miller, 71 N.J.L. 527, 60 Atl. 202 (1905); See 8 Wigmore, Evidence, §2252, p. 320, n. 1 & 2 (3rd ed. 1940). If the Fifth Amendment was literally interpreted the privilege could be inovked only in criminal actions. However, the courts have liberally construed both the federal and the state provisions, giving the clauses the same effect as the privilege had at common law. It can therefore be invoked in both civil and criminal proceedings. Christal v. Police Comm'n. of San Francisco, 33 Cal. App. 2d 264, 92 P.2d 416 (1936); *In re* Lemon, 15 Cal. App. 2d 82, 59 P.2d 213 (1936). A witness may not be contumacious in his refusal . To justify silence it must appear that the answer which might be given would have a direct tendency to incriminate. United States v. Weisman, 111 F.2d 260 (2d Cir. 1940); United States v. Flegenheimer, 82 F.2d 751 (2d Cir. 1936). However, a witness is not required to show that the testi-