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## Deportation Law and the Social Interest

George Liviola, Jr.\*

FUNDAMENTAL CIVIL AND HUMANITARIAN RIGHTS are being denied to individuals in the United States because American courts cling to *stare decisis* in denaturalization and deportation proceedings. This article concerns itself with an examination of this policy, its history, progress, effect and possible reform.

Deportation is the removal of an alien to the country from which he came;<sup>1</sup> denaturalization is the revocation of citizenship.<sup>2</sup> Authority for those actions rests with the legislative branch of government; it never has been seriously questioned by United States courts.<sup>3</sup>

Denaturalization and deportation have become the last resort, the ultimate weapon of the legal process. When notorious criminals have won their battles in the courtroom, the prosecution turns to more effective means of "getting" its man.<sup>4</sup> First his citizenship is checked. If he is a citizen by naturalization rather than by birth, his pre-naturalization record is examined with great thoroughness. If some discrepancy is found in his record or in the naturalization proceeding, then, according to the letter of the law, he will be denaturalized.<sup>5</sup> Following this, he is subject to deportation proceedings.<sup>6</sup> If he is in fact deported, then the prosecution has finally won—through administrative procedure.

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<sup>1</sup> "In American Law—the removal or sending back of an alien to the country from which he came, the removal from the country of an alien considered inimical to the public welfare and without any punishment being imposed or contemplated." Black's Law Dict. 526 (4th ed. 1951).

<sup>2</sup> "To confer citizenship upon an alien; to make a foreigner the same, in respect to rights and privileges as if he were a native citizen or subject." Webster's New International Dictionary of the English Language (2d ed., 1931).

<sup>3</sup> See *Jordan v. DeGeorge*, 341 U. S. 223, 71 S. Ct. 703, 95 L. Ed. 886 (1951); *Carlson v. Landon*, 342 U. S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).

<sup>4</sup> See Murray, *Red Scare, a Study in National Hysteria 1919-20* (1955).

<sup>5</sup> *Schneiderman v. United States*, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

<sup>6</sup> Konvitz, *Civil Rights in Immigration* 109 (1953).

### Deportation

Deportation became a part of the United States legal system on June 25, 1798, with the passage of the Alien and Sedition laws.<sup>7</sup> It was expanded through a steady progression of further severe measures.<sup>8</sup> Finally, the Immigration and Nationality Act of 1952, popularly known as the McCarran-Walter Act, consolidated all immigration and deportation laws into a single code.<sup>9</sup> Along with its much attacked quota restrictions, the Act delineated the specific grounds for deportation of aliens. The classes of deportable aliens have been broken down into eighteen separate units, by one author,<sup>10</sup> into four major groups by another.<sup>11</sup>

After setting up the grounds for expulsion, the McCarran-Walter Act rigidly predetermines *what* administrative discretion the Attorney General will have in executing these laws. If an alien's acts fill any of eleven categories, the Attorney General is bound to deport him and is not allowed to exercise any discretion.<sup>12</sup> When the Attorney General does have authorization to suspend deportation, Congress must *approve* of the Attorney General's recommendation.<sup>13</sup> Once deportation is final the alien is not allowed to re-enter the United States.<sup>14</sup> The most severe feature of the Act is its retroactive application.<sup>15</sup> With the Supreme Court's backing, the law has erased the immunity previously granted by the statutes of limitation.<sup>16</sup>

### Human Rights Verboten

Deportation and denaturalization procedures are not to be interpreted as criminal proceedings; they are civil in nature and therefore the constitutional limitations guaranteed in criminal

<sup>7</sup> Act of June 25, 1798, 1 Stat. 570. Also see Miller, *Crisis in Freedom, The Alien and Sedition Acts* (1951), and Volney, *The United States From Wilderness to World Power* 178 (1953).

<sup>8</sup> Act of October 19, 1888, 25 Stat. 566; § 1, Act of March 3, 1891, 26 Stat. 1084; Act of February 5, 1917, 39 Stat. 874; Act of October 16, 1918, 40 Stat. 1012; Act of June 28, 1940, 54 Stat. 670; Act of September 23, 1950, 64 Stat. 987.

<sup>9</sup> Publ. L. 414, 82d Cong., 2d Sess., 66 Stat. 163 (1952).

<sup>10</sup> Gordon and Rosenfield, *Immigration Law and Procedure* (1959).

<sup>11</sup> Maslow, *Recasting Our Immigration Policy*, 56 Colum. L. Rev. 309 (1956).

<sup>12</sup> *Supra* n. 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Galvan v. Press*, 347 U. S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

cases cannot be applied to them.<sup>17</sup> Congress has expressly denied the enforcement of deportation statutes by the courts; it has assigned this duty to administrative officials within particular departments.<sup>18</sup> The courts have, with few exceptions, held that the power of deportation and denaturalization is an exclusive expression of sovereignty.<sup>19</sup>

In *Fong Yue Ting v. United States*, the court affirmed the sovereignty theory.<sup>20</sup> Fong Yue Ting was a Chinese national who came to the United States in 1879 and lived continuously in the United States until 1893. On May 5, 1892, Congress passed a law which required all foreign persons who did not have proof of lawful residence in the United States to procure a certificate of residence from the Collector of Internal Revenue. Fong's application for such certificate was refused because his witnesses were persons of the Chinese race and therefore not deemed creditable. However, they were the only persons who could truthfully swear that Fong was lawfully in the Country on May 5, 1892. In accordance with the statute, Fong was brought before a federal judge who ordered him deported since he could produce no suitable witnesses. The Supreme Court affirmed the judgment, holding that Fong had no constitutional rights since he was a foreign national who could not prove lawful residence in the Country.<sup>21</sup> The Court added that deportation was not a punishment but simply a device for the maintenance of national sovereignty.<sup>22</sup> Justice Brewer, in his dissent, reasoned that deportation involves "arrest, deprivation of liberty, removal from home, family, business, property."<sup>23</sup> Justice Field, also dissenting, said, "The pun-

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<sup>17</sup> See, for a well reasoned and historical approach to this problem, *Nava-sky, Deportation as Punishment*, 27 U. of Kan. City Rev. (1959).

<sup>18</sup> Gordon and Rosenfield, *op. cit. supra* n. 10 at 513.

<sup>19</sup> *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 29 S. Ct. 671, 53 L. Ed. 1013 (1908); *Bugajewitz v. Adams*, 228 U. S. 585, 33 S. Ct. 607, 57 L. Ed. 978 (1913); *Belokumsky v. Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923). Recently the Court modified this stand in *Trop v. Dulles*, 356 U. S. 86, 78 S. Ct. 590, 2 L. Ed. 630 (1958) and in *Cort v. Herter*, 187 F. Supp. 683 (D. C. Cir. 1960). More recently, however, the Court distinguished its modifications made in *Trop v. Dulles* and appears to have reinstated the sovereignty theory in *Flemming v. Nestor*, 363 U. S. 603, 4 L. Ed. 2d 1435, 8 S. Ct. 1376 (1960) and in *U. S. v. Esperdy*, 375 U. S. 10, 84 S. Ct. 66, 11 L. Ed. 2d 47 (1963).

<sup>20</sup> *Fong Yue Ting v. United States*, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893).

<sup>21</sup> *Id.* at 731.

<sup>22</sup> *Id.* at 707.

<sup>23</sup> *Id.* at 739.

ishment is beyond all reason in its severity. It is cruel and unusual."<sup>24</sup> However the majority's ruling on punishment remains the law today.

From this initial line the courts moved to deny the rights to trial by jury,<sup>25</sup> to freedom of speech and assembly,<sup>26</sup> the freedoms from cruel and unusual punishments,<sup>27</sup> ex post facto laws,<sup>28</sup> and bills of attainder.<sup>29</sup> Today, there appears a trend towards liberalization of deportation and denaturalization policies,<sup>30</sup> but the potential for abuse of power and with it the threat to human rights remains. One need only look back to the hysteria of 1919-20 to realize that administrative "guarantees" mean nothing when power is available to those who would abuse it.<sup>31</sup> For instance, the Alien Registration Act of 1940 made violations of the narcotics laws of the United States a deportable offense, but *specifically* excepted convictions prior to the passage of the Act.<sup>32</sup> The McCarran-Walter Act of 1952 *specifically* stated that an alien could be deported if he had been convicted *at any time after entry* of violating any law dealing with illicit traffic in narcotics.<sup>33</sup>

Carlos Marcello, an alien who had come to the United States in 1910 at the age of eight months and had lived here continuously until his deportation hearing in 1955, could not claim that he had a right to be protected against an ex post facto law.<sup>34</sup> To illustrate the abuse of power that took place in this deportation hearing, the local newspapers carried front page stories quoting official sources in the Attorney General's office as stating that the "petitioner was an undesirable citizen for whose deportation the proceedings were 'specially designed' and that he was engaged in large scale slot machine operations and other gambling activities

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<sup>24</sup> *Id.* at 759.

<sup>25</sup> Galvan v. Press, *supra*, n. 16.

<sup>26</sup> Turner v. Williams, 194 U. S. 279, 24 S. Ct. 719, 48 L. Ed. 979 (1904).

<sup>27</sup> Polites v. Sahli, 302 F. 2d 449 (6th Cir. 1962).

<sup>28</sup> Tehmann v. Carson, 353 U. S. 685, 77 S. Ct. 1022, 1 L. Ed. 2d 1122 (1957).

<sup>29</sup> Quattrone v. Nicolls, 210 F. 2d 513 (1st Cir. 1954).

<sup>30</sup> See Gordon and Rosenfield, *op. cit. supra*, at 539, for a very thorough study of deportation proceedings.

<sup>31</sup> See, Dunn, The Palmer Raids (1948) and Wickersham, Report on the Enforcement of the Deportation Laws of the United States (1931).

<sup>32</sup> Act of June 28, 1940, *supra*, n. 8.

<sup>33</sup> Publ. L. 414, *supra*, n. 9.

<sup>34</sup> Marcello v. Bonds, 349 U. S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).

in Louisiana.”<sup>35</sup> The papers also quoted the source as saying that “the action was another step in the Attorney General’s program of denaturalization and/or deportation of undesirable persons of foreign birth who are engaged in racketeering or other criminal activities.”<sup>36</sup> The facts show that Marcello was never *convicted* of any of the gambling or racketeering activities that he was supposed to be involved in.

In this case, Justice Douglas, dissenting, disputed the logic of the majority of the court in their acceptance of the *ex post facto* provision of the McCarran Act.

I find nothing in the constitution exempting aliens from the operations of *ex post facto* laws . . . The conclusion is inescapable that the act merely adds a new punishment for a past offense.<sup>37</sup>

### Denaturalization

Denaturalization first became a part of American law in 1865 when the increasing numbers of Civil War deserters called for severe measures. The law forfeited the citizenship of both foreign born and native who deserted the military service of the United States.<sup>38</sup> Forty-one years later, another denaturalization law was passed which affected only naturalized citizens.<sup>39</sup> Cancellation of citizenship certificates was made permissible if they were “illegally procured” or obtained by fraud.<sup>40</sup> This Act of 1906 was based upon the idea that fraud-gained citizenship was void *ab initio*.<sup>41</sup> The Supreme Court in *Johannessen v. United States* ruled that though the 1906 Act was passed fourteen years after Johannessen’s naturalization, the *ex post facto* clause of the constitution was not applicable to him because he had obtained his citizenship by the perjury of two witnesses.<sup>42</sup> The Court reasoned that the naturalization was an *ex parte* one and that the naturalization order was not to be given conclusive effect as

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<sup>35</sup> *Id.* at 315.

<sup>36</sup> *Id.* at 316.

<sup>37</sup> *Id.* at 319-320.

<sup>38</sup> 13 Stat. 490 (1865).

<sup>39</sup> Nationality Act of 1906, 34 Stat. 601.

<sup>40</sup> Konvitz, *The Alien and the Asiatic in American Law* 117 (1946).

<sup>41</sup> *Id.* at 116 ff.

<sup>42</sup> *Johannessen v. United States*, 225 U. S. 227, 32 S. Ct. 613, 56 L. Ed. 1066 (1912).

against the public.<sup>43</sup> It compared the certificate of naturalization to a public grant of land or a patent for an invention—all three revocable for fraud.<sup>44</sup> The Court explained that the ex post facto aspect was beyond consideration because denaturalization is no punishment but a deprivation of an “ill gotten privilege.”<sup>45</sup>

These decisions emphasize that a denaturalization suit is predominantly civil in nature.<sup>46</sup> Service of process must be made as in any other civil action and the one upon whom process is made is not subject to arrest or imprisonment.<sup>47</sup> The defendant is not entitled to a jury trial or to any benefit that a criminal statute of limitations might give him.<sup>48</sup> It has been argued that denaturalization is not a penalty but only the correction of an error in the original proceeding.<sup>49</sup> Another and more effective argument has been that a denaturalization is only a cancellation of a citizenship to which the alien was never lawfully entitled.<sup>50</sup> Recently, however, the Supreme Court has determined that a denaturalization proceeding is a hybrid between a criminal and a civil action. In *Brown v. United States*, the court affirmed the contempt conviction of the defendant who, testifying in her own behalf refused to answer questions on her membership in the Communist Party.<sup>51</sup> Since the Court likened the denaturalization hearing to a criminal case, the defendant was denied protection against self-incrimination after initial waiver which she would have had, if the action had been considered civil.<sup>52</sup> Justice Black, dissenting, said that the defendant in a denaturalization proceeding has *no way* of knowing whether the proceeding will be treated as criminal or civil.<sup>53</sup>

Frank Costello had denaturalization proceedings presented against him in 1956.<sup>54</sup> After a dismissal on a technicality, he was

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<sup>43</sup> *Id.* at 241.

<sup>44</sup> *Id.* at 239.

<sup>45</sup> *Id.* at 242.

<sup>46</sup> *Knauer v. United States*, 328 U. S. 654, 66 S. Ct. 1304, 90 L. Ed. 1500 (1946).

<sup>47</sup> *Luria v. United States*, 231 U. S. 9, 34 S. Ct. 10, 58 L. Ed. 101 (1913).

<sup>48</sup> *United States v. Mansour*, 170 F. 671 (S. D. N. Y. 1908).

<sup>49</sup> *Sourino v. United States*, 86 F. 2d 309 (5th Cir. 1936).

<sup>50</sup> *Luria v. United States*, *supra* n. 47.

<sup>51</sup> *Brown v. United States*, 356 U. S. 148, 78 S. Ct. 622, 2 L. Ed. 539 (1958).

<sup>52</sup> *Id.* at 157.

<sup>53</sup> *Id.* at 159.

<sup>54</sup> *United States v. Costello*, 145 F. Supp. 892 (D. C. S. D. N. Y. 1956).

finally denaturalized in the Federal District Court of New York on the ground that he had procured a certificate of naturalization by wilful misrepresentation and fraud.<sup>55</sup> The United States Court of Appeals<sup>56</sup> and the Supreme Court affirmed the decision.<sup>57</sup> Costello had become naturalized thirty-one years before the hearing. Denaturalization hinged on a technicality in the naturalization printed form. Costello had listed "real estate" as his occupation, which, in part, it was, although his major source of income was "bootlegging." In their dissenting opinion, Justices Douglas and Black pointed out:

The forms of naturalization in use at the time did not ask for disclosure of all business activities of an appellant of all sources of income . . . The fact that this real estate business was secondary in petitioner's regime did not make it any the less his 'occupation.' Petitioner answered truthfully when he listed 'real estate' as his 'occupation.'<sup>58</sup>

A sovereign nation surely must be able to control the quantity and quality of its immigrants. Still, the deportation of long-time residents or naturalized citizens violates fundamental justice. In most instances these men and women have spent the greater part of their lives in this country.<sup>59</sup> Only by the accident of birth can they be distinguished from other Americans. Their ties to the countries of their birth are for the most part purely sentimental, and they may have little, if any, knowledge of their history, culture, civilization, or way of life. From the sociological standpoint, the American environment is as decisive in the creation of their personalities as in the environment of whatever foreign country served as their birthplace.<sup>60</sup> To ignore the role of cultural environment in the molding of criminals and undesirables is to deny all the contributing forces which sociologists, psychiatrists and historians have long recognized to exist.<sup>61</sup>

### The Evil Created by These Laws

The hunting down and singling out of long-time residents or naturalized citizens forces these people to live under a constant

<sup>55</sup> *United States v. Costello*, 247 F. 2d 384 (2d Cir., 1957).

<sup>56</sup> *United States v. Costello*, 171 F. Supp. 10 (S. D. N. Y. 1959).

<sup>57</sup> *Costello v. United States*, 365 U. S. 265, 81 S. Ct. 534, 5 L. Ed. 551 (1961).

<sup>58</sup> *Id.* at 288-289.

<sup>59</sup> See Konvitz, *supra* n. 6 at 112.

<sup>60</sup> Cavan, *Criminology* 701 (2d ed. 1955).

<sup>61</sup> *Id.* at 677-706.



threat of retroactive and ex post facto laws that undermines the security on which they rely. They come to realize that, if they are naturalized, their citizenship is only of second or third class, subject to the scrutiny of anyone who would wish them harm. They must be careful in what they say and how they say it,<sup>62</sup> knowing that they expose themselves to revocation of citizenship for technicalities that occurred possibly half a century before. Yet, under the constitution, there is but one distinction between native and naturalized citizens: their eligibility for the office of President of the United States.<sup>63</sup> Native citizens are not denaturalized and deported for their crimes; why then should naturalized citizens be so treated? The history of our country is replete with fine deeds of naturalized citizens and with the war sacrifices of immigrants and their sons. No laws are justified which reduce the certificate of naturalization to the status of a visitor's card.

Another effect of indiscriminate deportation is the hardship wrought in particular cases. Often, it is the family who suffers more than the deportee.<sup>64</sup> Children are uprooted from the land of their birth so that they may follow their deported parent.<sup>65</sup>

In this day of televised congressional hearings, though we are now three or four generations removed from the great immigration waves, each publicized deportation fans prejudice against nationality groups. This has a divisive effect upon our national entity. The costs of disunity cannot be balanced by the potential benefits we may receive by getting rid of undesirable persons. The American penal system should be adequate to protect society against them. The search for substitutes is an admission of inadequacy.

Perhaps the most far reaching effect of American denaturalization and deportation policy is its impact on our foreign relations. It is an insult to a sovereign country to return an individual who was born there but has spent the greatest part of his life in the deporting country. Perhaps this feeling is best expressed in the alleged remark of an Italian official:

We do not want another Lucky Luciano. He lived in Italy a short time and then spent most of his time in the United

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<sup>62</sup> *Schneiderman v. United States*, *supra* n. 5.

<sup>63</sup> The Constitution of the United States, Art. 2.

<sup>64</sup> *Ex Parte Sentner*, 94 F. Supp. 77 (D. C. E. D. Mo. 1950).

<sup>65</sup> *Coleman v. McGrath*, 342 U. S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

States . . . It's not blood that makes a man delinquent; it's society . . .<sup>66</sup>

The enmity that grew between Japan and the United States over the Oriental Exclusion Act of 1924 is too well remembered to perpetuate a xenophobic deportation and denaturalization policy.<sup>67</sup>

### Reform

The key to a reform of these policies is to recognize that deportation is in fact criminal punishment.<sup>68</sup> Every man who maintains his home for twenty, thirty or forty years, suffers deprivation and anguish, more severe than prison, by deportation.<sup>69</sup> Civil rights must be guaranteed to prospective deportees as they are to all other accused persons.<sup>70</sup> As long as the prosecutor can work in the penumbra of a hearing without civil rights, a fundamental inequity will exist. Civil rights laws were written to prevent exactly what happens in these administrative hearings.<sup>71</sup> The courts have refused to digress from the policy set by Congress. It is, therefore, Congress which has the task of making American civil rights available for all who live within the American frontiers.<sup>72</sup>

It will also be necessary to place a statute of limitations upon the McCarran Act. The Constitution recognizes naturalization as an absolute right; yet, the McCarran Act turns it into a self-renewing visitation right subject to cancellation. A statute of limitations would help to blunt the force of the injustice that stems from this law.<sup>73</sup> It would be more fair to abolish deportation for those who have been accepted as bona fide residents or naturalized citizens; to place conditions upon naturalized citizenship renders that citizenship second class.<sup>74</sup> We may not be ready

<sup>66</sup> New York Times, January 2, 1953, p. 3.

<sup>67</sup> Mayer & Forster, *The United States and the Twentieth Century* 362 (1958).

<sup>68</sup> See Navasky, *supra* n. 17.

<sup>69</sup> *Shaughnessy v. United States ex rel. Mezei*, 345 U. S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953).

<sup>70</sup> Navasky, *op. cit. supra* n. 17.

<sup>71</sup> Maslow, *op. cit. supra* n. 11.

<sup>72</sup> Navasky, *op. cit. supra* n. 17.

<sup>73</sup> See *Heikkila v. Barber*, 345 U. S. 229, 73 S. Ct. 603, 97 L. Ed. 972 (1953).

<sup>74</sup> II Carman, Syreet and Wishy, *The History of the American People* 797 (2d ed. 1961).

yet for such a sweeping reform, but as a starter a statute of limitations is needed.<sup>75</sup>

At the same time there should be a closer screening of applicants for entry and citizenship. A thorough investigation of the immigrant's life, background, family relationships and court records prior to entry would eliminate the fears that dictate the expulsion of foreigners who fail to "assimilate."

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<sup>75</sup> Unique among the Anglo-Saxon nations, Australia, in the Citizenship Act of 1958, placed a 10 year statute of limitations on revocation of naturalization for any cause including fraud in the procurement. See Parry, Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland 1134 (1960).