DENIAL OF EXIT PERMITS TO ALIENS DURING A NATIONAL EMERGENCY

The present international situation has engendered a method of coping with aliens which is unique for a period in which there is no formal declaration of war with the alien's country. This addition to the usual methods of exclusion and deportation consists of indefinite detention within the State's borders of aliens who allegedly are dangerous to the national interest. During and after the Korean fighting, the United States Immigration and Naturalization Service prevented certain Chinese nationals who had received scientific and medical training from returning to Communist China, on the ground that the aliens' departure would be prejudicial to the interests of the United States.[1] This new policy raises two important questions: (1) whether detention is justifiable under the principles of international law; and (2) whether there are any constitutional or other safeguards which guide the use of the detention process.

Detention Under International Law

A settled principle of international law requires a State to deal justly with foreign residents.[2] The propriety of a restraint on resident aliens depends on whether the detaining nation is at war with or enjoys peacetime relations with the alien's country. Prevention of an alien's departure during peacetime has received little comment from the international law textwriters. One writer has stated, however, that:

> "Since a State holds only a territorial and not a personal supremacy over an alien within its boundaries, it can never, under any circumstances, prevent him from leaving its territory, provided he has fulfilled his local obligations, such as payment of rates and taxes, of fines, of private debts, and the like." [3]

The United States has alluded to this principle on two occasions in denying the right of foreign countries to prevent the return of American citizens.

1. The Immigration and Naturalization Service revealed the detentions on March 24, 1954. The Chinese had come to this country under Nationalist Chinese auspices to continue their studies. N.Y. Times, March 24, 1954, p. 29, col. 5. On May 29 the State Department press officer announced that 4500 Chinese students were in the United States when China entered the Korean War. Of these, only 450 wished to return to Communist China, and 120 were denied permission to leave. Four applications for departure were denied after October 1953. Those detained in the United States have complete freedom of movement and are free to accept any position of employment. N.Y. Times, May 29, 1954, p. 2, col. 5. On April 2, 1955, the State Department announced that all but approximately six of the detained Chinese students had been granted permission to return to Communist China. However, the granting of permission was a political measure invoked in the hope of inducing the Communist Chinese government to free Americans now imprisoned in China. N.Y. Times, April 3, 1955, § 1, p. 1, col. 1.

For the statute and regulations under which the detention was implemented, see text at notes 40-42 *infra*.

2. Brierly, Law of Nations 203-18 (4th ed. 1949).

3. 1 Oppenheim, International Law 629-30 (6th ed., Lauterpacht, 1947).

In 1915, in an instruction to the Consul General at Beirut, the State Department proclaimed that the Turkish Government had no right to interfere with the departure from Turkey of naturalized American citizens who had been Turkish subjects at one time.[4] In 1932, the State Department instructed the Teheran legation to inform Persian officials that they were without right in conditioning their grant of an exit visa to an American citizen on his transfer of a power of attorney to a Persian resident or in attempting in any manner to prevent the American's departure.[5] Thus, the United States' refusal to permit the Chinese citizens to return home appears to be in direct contradiction to the traditional peacetime international rule.

In sharp contrast to the peacetime rule is the recognized right to detain enemy aliens during wartime.[6] Historically, enemy aliens had no rights whatsoever and their goods were subject to confiscation.[7] Although several treaties were made during the eighteenth and nineteenth centuries to provide for the repatriation of enemy non-combatants within a reasonable time after the outbreak of war,[8] the practice of detaining such persons was widespread during both the First and Second World Wars.[9] Both Great Britain[10] and the United States,[11] although they repatriated some enemy aliens,[12] relied primarily on detention as a method of protecting national security interests.[13] The courts of both countries cooperated with the executive departments in matters concerning enemy aliens and generally refrained from judicial inquiry into action taken.[14] The United States

4. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 198 (1942).

5. 3 *id.* at 550.

6. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 35, provides that enemy aliens may be prevented from leaving a nation if such departure conflicts with the national interest. Unless prevented by security reasons, an explanation for the detention must be given to the protecting state. For the general rules regarding enemy aliens, see 2 OPPENHEIM, INTERNATIONAL LAW 306-18 (7th ed., Lauterpacht, 1952).

7. MCNAIR, LEGAL EFFECTS OF WAR 37 (3d ed. 1948); PAGE, WAR AND ALIEN ENEMIES 10-12 (1914).

8. PAGE, WAR AND ALIEN ENEMIES 10 (1914); 2 OPPENHEIM, *op. cit. supra* note 6, at 306.

9. See 2 OPPENHEIM, *op. cit. supra* note 6, at 307-09.

10. Section 1(b) of the British Aliens Restriction Act of 1914, 4 & 5 GEO. 5, c. 12, provided for restrictions on the embarkation of any alien. Order in Council of August 5, 1914, pursuant to this Act, restricted the embarkation of enemy aliens to approved ports with permission. PAGE, WAR AND ALIEN ENEMIES 51-56 (1914); PULLING, MANUAL OF EMERGENCY LEGISLATION 70-72 (1914) (Consolidation Order of Sept. 9, 1914).

11. See, *e.g.*, 1 STAT. 577 (1848) (authorizing the President to direct the confinement of enemy aliens). Implementing this was the Presidential Proclamation of December 11, 1917, providing for custody of aliens who did not obey controls established by presidential injunction. 40 STAT. 1729-31 (1919).

12. Kemper, *The Enemy Alien, Problem in the Present War,* 34 AM. J. INT'L L. 443 (1940). The United States' policy in World War I was to deport as many dangerous aliens as possible. REP. ATT'Y GEN. 26-27 (1918).

13. See Hoover, *Alien Enemy Control,* 29 IOWA L. REV. 396 (1944); Kemper, *supra* note 12, at 443-48; Harrison, *Alien Enemies,* 13 PA. B. ASS'N Q. 196 (1942).

14. Brandon, *Legal Control Over Resident Enemy Aliens in Time of War in the United States and the United Kingdom,* 44 AM. J. INT'L L. 385-86 (1950); Hoover, *supra* note 13, at 398-99.

courts will review the executive act only to determine the constitutionality of the applicable statute and to insure that the executive had jurisdiction under the statute to perform the act being reviewed.[15]

Working within this traditional wartime concept, one could argue that the detention of the Chinese while the Korean fighting continued was merely an application of the rule as to enemy aliens.[16] By usual definitions an enemy alien is one who is the subject of a foreign nation which is in a formal state of war with the detaining State;[17] the individual becomes an enemy alien with the formal outbreak of war.[18] This apparently was recognized by the United States in its practice both in 1917 and 1941 of applying no restrictions to nationals of potentially enemy nations until the declaration of war, although many of these nationals were under close surveillance for some time prior to that declaration.[19] During the Korean conflict no formal declaration of war was ever made, and indeed Communist China repeatedly asserted its lack of official participation. Therefore, the traditional definition of war would have to be modernized in order to regard Chinese citizens as enemy aliens during that period. However, in view of the lack of a formal declaration of war prior to and during present-day military action, there seems to be no reason why international legal principles should not recognize the Korean and other similar "incidents" as war and as giving rise to the legal consequences of a war.[20] Never-

15. Ludecke v. Watkins, 335 U.S. 160 (1948); Minotto v. Bradley, 252 Fed. 600 (N.D. Ill. 1918). See also Johnson v. Eisentrager, 339 U.S. 763, 775 (1950); Citizens League v. Clark, 155 F.2d 290, 294 (D.C. Cir. 1946). An enemy alien has no right to judicial review as to whether he received a fair hearing. Ludecke v. Watkins, *supra*. See also Kentucky Resolutions of 1798 and 1799 condemning the Alien and Sedition laws for failing to distinguish alien friends from alien enemies. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 178-84 (1949).

16. See Comment, 67 HARV. L. REV. 341, 343 (1953).

17. Kemper, *supra* note 12, at 443; BATY & MORGAN, WAR: ITS CONDUCT AND LEGAL RESULTS 306 (1915).

18. See 2 OPPENHEIM, *op. cit. supra* note 6, at 306.

19. REP. ATT'Y GEN. 57, 59, 60 (1917); REP. ATT'Y GEN. 14 (1941); Hoover, *supra* note 13, at 399.

20. A determination that enemy alien status could exist in the absence of a declared war would not be entirely unprecedented. In 1941 a federal court, while holding that an Italian was not an enemy alien for the purpose of incapacity to sue since he was a citizen of a country with which the United States was not at war, recognized that a formal declaration of war was not necessary to create an enemy alien status if the condition of war was tacitly recognized by acts of the political branches of the Government. Verano v. De Angelis Coal Co., 41 F. Supp. 954 (M.D. Pa. 1941). See also Hamilton v. McClaughry, 136 Fed. 445 (C.C. Kan. 1905), in which the Boxer Rebellion was found to be a war for the purpose of validating a courtmartial under Article of War 58 (offenses in time of war). Furthermore, termination of an enemy alien status depends on recognition by the political branch that the condition of war no longer exists, even though the actual fighting has ceased. Ludecke v. Watkins, 335 U.S. 160, 168-70 (1948). The United States Alien Enemy Act related to nationals of any state at war with the United States or threatening invasion or predatory incursion against the United States. 40 STAT. 531 (1918), 50 U.S.C. § 21 (1952). See also 2 OPPENHEIM, *op. cit. supra* note 6, at 299, where the author states: "It is certain that States which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency; but they are nevertheless engaged in war. Again, war is actually in existence if the other party forcibly resists acts of force undertaken by a State by way of reprisals, or during a pacific blockade, or an intervention. Now, in all these and similar cases, all the laws of warfare must find application, for a war is still war in the eyes of International Law. . . ."

theless, the continuance of alien detention after the Korean war had ceased cannot be justified under this theory.

Even though the post-Korean detention cannot be ruled legal under traditional wartime or peacetime rules, a third hypothesis remains to be considered. No matter what name is to be accorded it, the present international situation has little similarity to the previous era in which the terms "war" and "peace" were adequate to describe any relationship between nations. The concept of an indefinite national emergency seems not to have been contemplated. In 1921, the Attorney General stated that the terms war and peace were "mutually exclusive" and the affirmation of one necessarily was a denial of the other.[21] Thus, international law has developed no rules for situations and relationships, as exist at present, which cannot be termed either wartime or peacetime.[22] In the sole case on the appellate level testing the legality of the detention of one of the Chinese citizens, the Government argued that:

> "The suggestion that peacetime concepts must be applied to the world of 1953 is unrealistic. Despite the absence of a declared war, the hot and cold conflicts that engage the United States all over the globe, and the gigantic efforts we are expending to assure our safety, indelibly have marked this as a time of emergency." [23]

The most recent expressions of international thought stem from United Nations action following World War II. In 1948 the General Assembly adopted a Universal Declaration of Human Rights in which Article 13(c) provides that "everyone has the right to leave any country, including his own, and to return to his country." [24] This absolute declaration was passed after consideration of proposals advocating restrictions on the freedom of movement for security reasons.[25] However, in 1952 an indication that the traditional peacetime absolute right to leave a country is no longer practical arose in the United Nations' Draft Covenant on Human Rights. Article 10(1) provides:

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21. 32 OPS. ATT'Y GEN. 509 (1921).

22. "The question may be posed whether it would not be useful to break away from the old dichotomous approach, acknowledging in law as in fact that there is a third legal status intermediate between peace and war." "The basic question to which these suggestions are addressed is whether our concepts, our terminology, our law, have kept pace with the evolution of international relations. . . ." Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 AM. J. INT'L L. 98, 100, 102 (1954). See also GROB, THE RELATIVITY OF WAR AND PEACE (1949), particularly pp. 15-36.

23. Brief for Appellee, p. 18, Han-Lee Mao v. Brownell, 207 F.2d 142 (D.C. Cir. 1953).

24. 1948-49 YEARBOOK OF THE UNITED NATIONS 535-37. Of course, the Declaration does not have any binding legal force but is intended as "a common standard of achievement for all peoples and all nations," according to its preamble. The Declaration was adopted by the General Assembly on December 10, 1948. *Id.* at 537.

25. See U.N. Doc. No. E/CN.4/SR. 9 (1947). Probably of some influence on the draftsmen was the proposal in LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 129 (1945): "The right of emigration and expatriation shall not be denied."

"Subject to any general law of the state concerned which provides for such reasonable restrictions as may be necessary to protect the national security, public safety, health or morals or the rights and freedom of others, consistent with the other rights recognized in this Covenant:

". . .

"(b) Everyone shall be free to leave any Country, including his own." [26]

This rule appears to be a clear recognition of the fact that interests of national security now may require a limitation on an alien's freedom to depart from a country. Detention would not seem to be an unreasonable restriction when it is for the purpose of preventing a hostile nation from utilizing the talents or knowledge of the repatriated citizens in a manner inimical to the interests of the detaining State; and this is the basis of the State Department's refusal to permit the return of the Chinese citizens.[27] But since detention is an extreme measure and imposes a great hardship on the affected alien, adoption of the practice must be guarded carefully to insure that its use in each instance is a reasonable one. Thus, it is necessary to examine what safeguards surround the implementation of the detention policy of the State Department.

SAFEGUARDS SURROUNDING DETENTION PROCEDURE

Since the term "person" in the Fifth Amendment is deemed to include an alien who is in the United States, as well as a citizen,[28] it is relevant to consider the scope of the citizen's right to emigrate. Many scholars, beginning with Cicero, have declared that a citizen has the right to leave his country.[29] Constitutions of several nations have recognized this prin-

26. U.N. ECONOMIC AND SOCIAL COUNCIL OFF. REC., 14th Sess., Supp. No. 4 (Doc. No. E/2256) (1952). For a summary of and citations to discussion, see *id.* at 28-29.

27. See regulations cited in text at notes 41-42 *infra.*

28. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953). See also Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion). See text at note 49 and note 49 *infra.*

29. Cicero stated that every citizen had the privilege either to remain in or to leave his State if he so wishes. CICERO, PLEA FOR BALBUS xiii. Grotius found a right to leave one's country from the citizen's contract with society, unless an obligation such as military service or a debt of money remained unfulfilled, or unless a whole company wished to leave at once, to the country's depletion. GROTIUS, DE JURE BELLI AC PACIS bk. 2, at 253-54 (Libri Tres, Kelsey transl. 1925). Pufendorf also found a general right to leave, subject to the special interest of the State. PUFENDORF, ON THE LAW OF NATURE AND NATIONS bk. 8, at 1348-52 (Oldfather transl. of 1688 ed. 1934). See also 1 BL. COMM. 134. Vattel, finding a right to emigrate in the contractual nature of society, would generally limit it to cases not endangering the welfare of the State, although where the State was not fulfilling its obligation to the citizen he considered the right to leave absolute. VATTEL, LE DROIT DES GENS. bk. 1, at 88-91 (Fenwick transl. of 1758 ed. 1916). Francis Lieber, nineteenth century liberal, stressed the importance of the right to move out of a country at will, subject to limitation in cases of special hardship to the State. 1 LIEBER, MANUAL OF POLITICAL ETHICS 195 *et seq.* (Woolsey ed. 1911). The consensus of this political thought is that the State has the burden to justify any restriction on a citizen's right to leave his country.

ciple,[30] and the United States often has asserted that it is a basic right of every citizen.[31] However, as a practical matter, the right of a citizen to leave the United States at present is controlled strictly by the passport requirements.[32] The McCarran Act provides that it shall be unlawful for a citizen to leave without a valid passport if the President declares a national emergency and proclaims that the interests of the United States require restrictions, in addition to those imposed elsewhere in the Act, on the departure of persons from this country.[33] The necessary declaration[34] and proclamation[35] have been made. Under the Passport Act[36] and regulations,[37] the Secretary of State "in his discretion" may refuse to issue a passport. However, in *Bauer v. Acheson*[38] a three-judge district court held that the right to emigrate is an attribute of personal liberty within the Fifth Amendment and that, therefore, the State Department does not

30. CONST. OF AUSTRIA, April 24, 1934, Art. 18(1); CONST. OF CZECHOSLOVAK REPUBLIC, Feb. 29, 1920, Art. 110; CONST. OF THE UNITED STATES OF MEXICO, Jan. 31, 1917, as amended to November 5, 1942, Art. 11, contained in ILO, CONSTITUTIONAL PROVISIONS CONCERNING SOCIAL AND ECONOMIC POLICY (1944). Many post-World War II constitutions guarantee the right to emigrate, *e.g.,* Italy, Bolivia, Venezuela and Nicaragua.

31. In 1949 the United Nations General Assembly adopted a Resolution recommending that the Soviet Union withdraw measures whereby Soviet wives of foreign citizens were being prevented from leaving the Soviet Union. The Resolution, introduced by Chile because of the detention of a Russian wife of a Chilean citizen, was supported by the United States on the ground of a basic right to leave a country. Resolution 385 (III), April 25, 1949, adopted U.N. GENERAL ASSEMBLY OFF. REC., 3d Sess., 2d pt., 157 (1949). The legal basis alleged for the Resolution was: Preamble to U.N. CHARTER arts. 1, 3, 55(c), and International Draft of Human Rights, providing a right to leave the country and to marry. See text of report, U.N. GENERAL ASSEMBLY OFF. REC., 3d Sess., 2d pt., annexes 17 (1949).

An exchange of communications between the State Department and the Soviet Union between October, 1949 and February, 1950, concerning the Soviet's refusal to grant exit permits to American citizens in Russia, assumes the right of a citizen to depart. Quoting the Universal Declaration, Art. 13, a State Department press release commented: "The United States Government holds this to be one of the most basic of human rights and deplores the unwillingness of the Soviet Government to permit persons possessing both American and Soviet citizenship to reside where they themselves desire." Reported in 22 DEP'T STATE BULL. 433-41 (1950).

Numerous state constitutions have guaranteed the right of emigration, beginning with the Pennsylvania Constitution of 1776, Declaration of Rights, clause 15.

Judicial decisions have affirmed the right of free egress from, or transit through, a state. Joseph v. Randolph, 71 Ala. 499 (1882); Williams v. Fears, 179 U.S. 270 (1900). See Note, *Depression Migrants and the States,* 53 HARV. L. REV. 1031, 1034 (1940); Bowman, *The United States Citizens' Privilege—State Residence,* 10 B.U.L. REV. 459 (1930).

32. See Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review,* 61 YALE L.J. 171 (1952).

33. 66 STAT. 190 (1952), 8 U.S.C. § 1185(b) (1952). This provision contains the same language as section 224 of the Passport Act, which the provision superseded. 40 STAT. 559 (1918).

34. The emergency was declared in 1941, Presidential Proclamation No. 2487, 6 FED. REGS. 2617 (1941), and for this purpose is still in effect. Presidential Proclamation No. 3004, 18 FED. REG. 489 (1953).

35. Presidential Proclamation No. 2523, 6 FED. REG. 5821 (1941).

36. 44 STAT. 887 (1926), 22 U.S.C. § 211a (1952).

37. 22 CODE FED. REGS. § 51.75 (1949).

38. 106 F. Supp. 445 (D.D.C. 1952).

have absolute discretion to deny a passport. The court required that the applicant be given notice and opportunity to be heard.[39]

The McCarran Act also provides a criminal penalty for aliens who leave the country after a declaration of national emergency and a proclamation of the need for additional restrictions on departure from the country.[40] The pertinent regulations provide that:

> "No permit to depart . . . shall be issued to an alien if the issuing authority has any reason to believe that the departure will be prejudicial to the interests of the United States." [41]

The departure of an alien is prejudicial if, *inter alia:* (1) he possesses and is likely to disclose information concerning the national defense of the United States or its allies; (2) he is leaving for the purpose of engaging in, or is likely to engage in, activities likely to impede or delay the national defense of the United States or its allies; or (3) he is departing for the purpose of organizing or directing war or rebellion against the United States.[42]

Since the resident alien has the same Fifth Amendment right to procedural due process as a citizen,[43] detention of an alien in this country should be preceded by notice and the opportunity to be heard. In *Han-Lee-Mao v. Brownell*[44] plaintiff, a Chinese alien, desired to return to his native country in 1951. He had studied for four years in the United States and had earned a master's degree in oceanography. Although he received no hearing other than a brief interrogation by an immigration inspector, plaintiff was denied an exit permit on the ground that if he returned to Communist China his scientific training and knowledge might be used to impede the national defense efforts of the United States. A three-judge district court held that the pertinent provision of the Mc-

39. Following this decision the State Department issued regulations providing that in security cases a passport applicant be given a hearing and be notified of the reason for the refusal as specifically as the Department feels that security limitations permit. 22 CODE FED. REGS. §§ 51.137-51.139 (Cum. Supp. 1952), 102 U. OF PA. L. REV. 539 (1954). See also Nathan v. Dulles, 23 U.S.L. WEEK 2453 (D.D.C. Feb. 28, 1955) (memorandum opinion); Clark v. Dulles, 23 U.S.L. WEEK 2453 (D.D.C. Feb. 28, 1955) (memorandum opinion).

40. "When the United States is at war or during the existence of any national emergency proclaimed by the President . . . and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—(1) for any alien to depart from . . . or attempt to depart from . . . the United States except under such reasonable rules, regulations, and orders . . . as the President may prescribe." 66 STAT. 190 (1952), 8 U.S.C. § 1185(a) (1952). This provision contains the same language as section 223 of the Passport Act, which this provision superseded. 40 STAT. 559 (1918), as amended, 55 STAT. 252 (1941).

41. 8 CODE FED. REGS. § 175.24 (1949).

42. 8 CODE FED. REGS. § 175.25 (1949). The other grounds for refusing a permit to depart are also included in this section.

43. See note 28 *supra.*

44. 207 F.2d 142 (D.C. Cir. 1953).

Carran Act was constitutional, over the objection that the standards were void for vagueness and that the statute was an invalid delegation of legislative power.[45] Although the executive branch is given broad discretion in determining what aliens shall be permitted to leave the country, it seems that this decision would have been affirmed by the Supreme Court, which has upheld similar grants of broad discretionary power.[46]

The case was then returned to a single-judge district court which dismissed plaintiff's claim that the Attorney General had acted outside the scope of his statutory authority and thereby had violated plaintiff's constitutional right.[47] On appeal to the Court of Appeals for the District of Columbia, it was held that due process required that a full and fair hearing be granted and that, therefore, the statute must be read as providing for such a hearing.[48] The court reasoned correctly that an alien need not be a permanent resident in order to be protected by the Fifth Amendment.[49]

One problem which the Court of Appeals did not discuss is how specific the Government must be in presenting its reasons for denial of an exit permit. It appears that Han-Lee-Mao was cognizant of all of the facts on which the refusal of his request was based,[50] but there are many instances in which an applicant may be ignorant of the grounds for detention. For example, a foreign national might come to the United States to study Greek philosophy, and upon receiving a degree be refused an exit permit on the ground that he possesses and is likely to disclose information concerning the national defense of the United States. The Government often has maintained that it cannot divulge the evidence on which it bases the restriction of an alleged right asserted by the petitioner because disclosure of its confidential sources of information would be involved.[51] In *Knauff v. Shaughnessy*[52] the Supreme Court held that an excluded alien was not entitled to disclosure of the specific charges on which the action taken against her was based, and in *Bailey v. Richardson*[53] the Court divided four to four in reviewing the denial by the Court of

45. See Han-Lee-Mao v. Brownell, 207 F.2d 142, 145 (D.C. Cir. 1953).

46. Carlson v. Landon, 342 U.S. 524 (1952); Knauff v. Shaughnessy, 338 U.S. 537 (1950); Mahler v. Eby, 264 U.S. 32 (1924). See also Shaughnessy v. Mezei, 345 U.S. 206 (1953).

47. See Han-Lee-Mao v. Brownell, 207 F.2d 142, 145 (D.C. Cir. 1953).

48. *Ibid.*

49. See Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), citing with approval, Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion): ". . . [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution. . . ." See also Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Fourteenth Amendment); Comment, 67 HARV. L. REV. 341 (1953).

50. Brief for Appellant, p. 24, Han-Lee-Mao v. Brownell, 207 F.2d 142 (D.C. Cir. 1953).

51. See N.Y. Times, March 4, 1955, p. 14, col. 3; Elder v. United States, 202 F.2d 465, 469 (9th Cir. 1953); Parker v. Lester, 112 F. Supp. 433, 443 (N.D. Cal. 1953); Hoover, *A Comment on the Article "Loyalty Among Government Employees,"* 58 YALE L.J. 401, 404 (1949).

52. 338 U.S. 537 (1950).

53. 341 U.S. 918 (1951).

Appeals for the District of Columbia of a similar right asserted by a Government employee.[54] However, both cases are distinguishable from the detained aliens situation; in *Knauff* the Court said that an alien who is outside the country is not entitled to due process, and in *Bailey* the circuit court held that Government employment is neither life, liberty nor property within the meaning of the Fifth Amendment. Although the right to a full and fair hearing would not in itself entitle an alien to the specific reasons for his detention,[55] it seems that he should be given this information unless the Government can prove that to do so would hamper its system of obtaining security information. Normally this harm could be avoided because in most cases it probably would be possible to disclose the specific charges against the alien without disclosing their source.[56]

Since the requirement of a hearing conforming to due process would not alone afford the alien sufficient protection, he also would be entitled to judicial determination of whether the particular hearing accorded him was a full and fair one under the circumstances.[57] However, it is not clear whether judicial control will extend beyond this point to a review on the facts of the executive's final decision. Neither the language nor the legislative history of the McCarran Act is of any aid in ascertaining Congressional intent.[58] Since detention is a matter committed by statute to agency discretion,[59] judicial review under Section 10 of the Administrative Procedure Act[60] appears to be unavailable. In addition, the courts are very reluctant to interfere with political action by the executive branch.[61] However, where judicial review is not expressly negatived by the applicable

54. 182 F.2d 46 (D.C. Cir. 1950).

55. The requirements for a fair hearing vary according to the circumstances of each case. FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949).

56. See Donovan & Jones, *Program for a Democratic Counter Attack to Communist Penetration of Government Service,* 58 YALE L.J. 1211, 1235 (1949). See also Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953).

57. Bridges v. Wixon, 326 U.S. 135 (1945). See United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103, 106 (1927).

58. In deportation cases both prior to and after the Administrative Procedure Act, the Supreme Court has limited judicial review to habeas corpus proceedings because the immigration statute prior to 1952 stated that the Attorney General's order shall be "final." See Note, *The Right to Judicial Review of Deportation Orders under the Administrative Procedure Act,* 62 YALE L.J. 1000 (1953). Habeas corpus would not be available to detained aliens because they are free to move about the country and thus are not "in custody" as required by the Judicial Code. 28 U.S.C. § 2241 (1952). See Lynch v. Hershey, 208 F.2d 523 (D.C. Cir. 1953), *cert. denied,* 347 U.S. 917 (1954). *But cf. Ex parte* Fabiani, 105 F. Supp. 139 (E.D. Pa. 1952).

59. See note 40 *supra.*

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

61. In Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Court said: "However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers." *Id.* at 591. See also Galvan v. Press, 347 U.S. 522 (1953). See generally United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936); Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948).

statute, courts sometimes will assume that Congress could not have intended to invest the agency with an absolute discretion, and some measure of review on the facts will be granted.[62] Also, the judiciary will review and reverse a decision when it is shown that the administrator acted outside the scope of authority granted him by the statute and the implementing regulations.[63] The courts could apply these doctrines to establish their reviewing power in the detention cases. Since detention infringes the alien's right to leave the country and imposes a grave hardship, courts will probably realize the need for controlling administrative discretion in this area and will thus grant some measure of review on the facts.

However, it is difficult to predict the scope which the judicial review will assume. It is no doubt desirable that there be some form of control over an agency which has the power to deprive an alien of his basic right to leave the country. But the bases for detention involve political determinations as to security matters and their relation to the nation's defense policy. These are essentially executive concerns, and the check on these activities lies with the voting public. A prompt check is needed only when the executive acts arbitrarily, and the judiciary is properly equipped to serve this function. To perform this, courts need not weigh the evidence and make an independent finding; it is sufficient if they require the administrator to have before him some evidence to support his conclusion. This is the doctrine followed by the United States Supreme Court in the analogous deportation field,[64] and there appears to be no reason why the same formula should not be applied in the detention cases.

CONCLUSION

The refusal to permit aliens to return to their native lands has been one of the practices employed by the United States in the effort to deal with the novel international problems which have arisen in the present era of indefinite national emergency. Although there are no settled principles of international law to guide action in a period which cannot be termed either "wartime" or "peacetime," one can predict with some assurance that international law will not condone wholesale detention. The administration of the standard "prejudicial to the interests of the United States" must be accomplished always with the thought that detention in the absence of a declared war is a harsh, unprecedented method. However, since the detention policy is a discretionary, political one, the judiciary should intervene only to test the constitutionality of the applicable statute and to insure that action under the statute is neither arbitrary nor outside the authority delegated to the administrator by Congress. Checks on this type of political action should come from the body politic.

62. Carlson v. Landon, 342 U.S. 524 (1951); see DAVIS, ADMINISTRATIVE LAW 821-31 (1951).

63. Bridges v. Wixon, 326 U.S. 135 (1945); Mahler v. Eby, 269 U.S. 32 (1924).

64. United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103 (1927); Tisi v. Todd, 264 U.S. 131 (1924). See also Carlson v. Landon, 342 U.S. 524 (1952).