THE DEPORTATION OF ALIENS

"Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, ... French and English who have taken up their residence here on the invitation of the Government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?"

To the reader of the daily press who has followed the recent discussion of certain proposed amendments to our deportation laws, the language quoted sounds familiar. But such a reader may be surprised to learn that this language is not taken from a radical weekly, but from the opinion of Justice Field of the Supreme Court of the United States in the case of Fong Ting Yue¹ decided in 1893. The familiar sound of the sentences quoted is due largely to the comment called forth in the papers by the recent proceedings for the deportation of certain persons of foreign birth accused of breeding trouble in the United States. On the one hand this "expulsion of an undesirable foreign element" has been hailed as a salutory rebuke to those who "abuse American hospitality." On the other hand it has been bitterly denounced as unconstitutional and un-American, as the "Prussianism of reactionaries bent on stifling free speech and all liberalizing sentiment."

¹ 149 U.S. 698.
Whatever political effect this controversy may produce, it has at least served to bring forward from comparative obscurity the legal phases of the topic of deportation. Old law has been brought forth from musty tomes; and a question arises: Is this law still sound and serviceable, or is it an old wine skin, once used and laid away, and again brought out to do service for the new vintage of another harvest?

So far as public or even professional interest has been concerned, deportation has not hitherto been a live subject. References have been made to certain deportation cases in American law writings to prove points connected with other topics. Deportation itself is treated in the encyclopedias as a minor subject under the titles of Immigration and Aliens. But it has always been regarded, apparently, as a complementary function to the exclusion process, never as a matter of much independent importance.

But certain conditions brought about or intensified by the war and certain recent legislation induced by those conditions, all leading up to the deportation of a considerable number of aliens from the United States, have combined to draw this subject out of its subordinate status in relation to immigration and have invested it with a considerable importance of its own in the category of current legal problems.

These problems are new in their importance in American politics. But, as coming events are said to cast their shadows before, these problems appear to have had their prototypes in American history which have produced a considerable body of law. That law is now being invoked by those who wrestle with the problems of today.

At the outbreak of the war, the results of our rather ineffective control of immigration and of our very ineffective direction of assimilation became alarmingly manifest. Large numbers of persons in America were known to be actively friendly to Germany. Larger numbers were suspected of being such. The Espionage Law was passed in an effort to meet this danger. The end of the War saw it fairly under
control, but revealed a new problem more complicated and difficult if not more dangerous, than the first. Lines of influence, apparently radiating from Russia, were actuating considerable numbers of persons in the United States to advocate, not the success of some foreign Government in the great struggle for existence, but the destruction of all organized Governments based upon the social and economic order now obtaining. It is not to be understood that this second problem is entirely separate from the first or that the one began and the other ended at any particular period. They interlaced and overlapped. But speaking broadly, in items of emphasis and of practical effect, the situation was about as herein stated.

Certain provisions of an Act passed on February 5, 1917, were applicable to the new situation and in an effort further to strengthen the hands of the Government, Congress, on October 16, 1918, passed an amendment to this law designed, according to its title, "to exclude and expel from the United States aliens who are members of anarchistic and similar classes."

Among other things these laws provide:

"At any time within five years after entry any alien who at the time of entry was a member of one or more of the classes excluded by law; . . . any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property or advocating or teaching anarchy, or the overthrow by force or violence of the Constitution of the United States or of all forms of law, or the assassination of public officials . . . shall upon warrant of the Secretary of Labor be taken into custody and deported." Act of February 5, 1917.2

2 The "excluded classes" mentioned in the first portion of the passage quoted are elsewhere in this act defined to be: idiots, imbeciles, feeble-minded persons, epileptics, insane persons, alcoholics, paupers, professional beggars, vagrants, persons afflicted with tuberculosis or other dangerous, loathsome or contagious diseases, those mentally or physically defective, those who have committed crimes involving moral turpitude, polygamists, anarchists or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law or who disbelieve in or are opposed to organized government or who advocate the assassination of public
The same statute further provides however, "that nothing in this Act shall exclude, if otherwise admissible, persons convicted or who admit the commission or who teach or advocate the commission of an offense purely political."

The latest enactment is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Aliens who are anarchists; aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all forms of law; aliens who disbelieve in or are opposed to all organized government; aliens who advocate or teach the assassination of public officials; aliens who advocate or teach the unlawful destruction of property; aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the Government of the United States or of all forms of law, or that entertains or teaches disbelief in or opposition to all organized government, or that advocates the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or that advocates or teaches the unlawful destruction of property shall be excluded from admission into the United States.

"Sec. 2. That any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter a member of any one of the classes of aliens enumerated in section one of this Act, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act irrespective of the time of their entry into the United States.

"Sec. 3. That any alien who shall, after he has been excluded and deported or arrested and deported in pursuance of the

officials or who advocate or teach the unlawful destruction of property; persons who are members of or affiliated with any organization entertaining or teaching disbelief in or opposition to organized government or who advocate or teach the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized Government because of his or their official character or who advocate or teach the unlawful destruction of property; prostitutes, those likely to become a public charge and those assisted to come in by any person unless it is affirmatively shown they do not belong to any of the excluded classes.

3 Act of February 5, 1917.
provisions of this Act, thereafter return to or enter the United States or attempt to return to or to enter the United States shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for a term of not more than five years; and shall, upon the termination of such imprisonment, be taken into custody, upon the warrant of the Secretary of Labor, and deported in the manner provided in the immigration Act of February fifth, nineteen hundred and seventeen."

In addition to the causes already noted, certain other, particularly certain economic, factors have been active in bringing the subject of deportation into prominence. Until recent years, taken by and large, there has been no surplus of population, no great surplus of labor, in the United States. New lands, new treasuries of natural wealth, new inventions for exploitation have enabled this country to absorb, a little grumblingly at times, but effectually to absorb into the productive mass of its population all the immigrants who came. There was some opposition on the part of organized labor. But the opposition was never very violent and was not sufficient to overcome the traditional policy of the open door supported by the urging of employers to increase the supply of cheap labor. The only instance in which this economic question stirred up violent protest was in the case of the Chinese and it is not surprising to see that drastic and even arbitrary regulations were made for their exclusion.

Recent years have marked a change, however, in this state of affairs, and the indications point to a progressive future development. Overcrowding of the labor market is becoming more and more pronounced and the proportion of the resources of the country remaining unappropriated is yearly growing smaller. The time when America shall cease to be a country of "unlimited" possibilities is drawing measurably nearer. What is more natural, therefore, than that the demand for the exclusion and deportation of foreigners should progressively increase? We may confidently expect that efforts will be made, not only to perpetuate the existing restrictions upon aliens being added to our numbers, but also to erect barriers at our eastern gates against

\footnote{Act of October 16, 1918.}
the Europeans similar to those already erected at our western gates against the Asiatics. 5

Certain additional legislation concerning deportation was in contemplation at the close of the last session of Congress. It did not pass; indeed it did not publicly take definite form, and therefore can not be considered here, except in so far as the discussion of it tended to indicate the drift of Congressional thought. Suffice to say that that drift was apparently in the direction of extending rather than of restricting the use of deportation as a means of dealing with the movements of social unrest. 6

But, disregarding what was only talked of and confining our attention to what is now in effect, deportation has taken on a new importance in our law.

It still applies only to aliens. There is no such thing as deportation of citizens of the United States. It is true that while the status of citizenship is an absolute protection, so long as it obtains, certain provisions of these laws facilitate attacks upon the validity of accomplished naturalization proceedings and the deportation of “denaturalized” persons if those proceedings are annulled. For instance, the Act of October 16, 1918, expressly removes any limitation of time after entry within which the deportation machinery may be set in motion, and provides, further, that any alien who, irrespective of his status at the time of his admission, “is found . . . to have become thereafter, a member of any one of the classes enumerated . . . shall be . . . deported.” It has been held by the courts 7 that evidence of an immigrant’s state of mind at the time of entry may be inferred from his subsequent conduct. It has also been frequently held that naturalization papers may be revoked for fraud in their procurement. It follows, that a natural-

5 H. R. 563 introduced May 19, 1919; H. R. 8572 introduced August 20, 1919.
6 H. R. 563 and H. R. 8572 cited in note 5 provide for complete restriction of ordinary immigration for two years.
ized alien who, after becoming a citizen, is found to fall within any of the prohibited classes may possibly have his naturalization declared fraudulent and void and become thereupon subject to deportation. The question whether he does fall within any of the prohibited classes depends however upon the same principles that govern the deportation of aliens generally.

So, passing this somewhat incidental feature of the matter, it is of greater interest to note the range and scope of the law in defining the classes liable to its provisions. It operates as we have observed, upon all who at the time of entry were, or who subsequently thereto became, members of the prohibited classes. These comprise, in addition to the long list of economic, physical, mental and moral undesirables, certain people whose political opinions, utterances or affiliations are deemed detrimental to the national welfare. The portions of the law quoted above bring at least four classes of such persons under the ban of its condemnation:

First, those who seek to accomplish certain unlawful purposes by force;

Second, those who do not believe in the present form of government and seek peacefully to persuade a majority of the electors to vote for a change;

Third, those who belong to societies or organizations whose objects are to propagate any of the beliefs or encourage any of the acts which are grounds for deportation, although individually, these persons may do nothing and say nothing beyond the act of joining the society; and

Fourth, those who simply "disbelieve in" all organized government.

Deportation procedure, furthermore, is both swift and summary. Upon the warrant of the Secretary of Labor the alien is "taken into custody and deported." The officer conducts a hearing and determines the facts. No judicial hearing is necessary, or indeed often possible. The decision of the administrative officer is final.
The wide reach of the law, and the importance of the interests involved—interests for which our Government has always shown solicitude, namely the freedom of thought, speech and action of the individual—immediately call to mind certain constitutional questions. Have they been decided or are they yet to be decided as they arise? The very conception of deportation, as distinguished from exclusion, raises a question when its implications are perceived. It is one thing to forbid the entrance of persons whose presence among our people is deemed to be detrimental to our welfare; it is another thing to allow persons to come in, to settle among us, to make friends, to rear families, to acquire property, to contract the manifold relationships of life, and then summarily to send them across the seas and forbid them ever to return. That hardship and suffering may often result from such procedure is, of course, no sufficient legal reason for its invalidity. But such considerations would lend cogency to legal reasons if they were found to exist in the Constitution.

The first deportation legislation in the United States was passed in 1798 and has come down to us under the name of the "Alien and Sedition" laws. These laws gave the President power to order all such aliens as he should judge dangerous to the peace and safety of the country or should have reasonable ground to suspect were concerned in any treasonable or secret machinations against the Government to depart out of the territory of the United States within such time as should be expressed in the order.

They created great excitement. Jefferson and Madison attacked them bitterly. The legislature of Virginia passed a resolution condemning them. President Adams, however, defended them as a war measure.

By their own terms they expired in two years from the date of passage and their constitutionality was never passed on by the Supreme Court. But they came down in history as odious and unpopular laws and no further similar legislation was passed until 1892.
The Act of 1892 compelled all Chinese laborers in the United States to secure from the Collectors of Internal Revenue of their respective districts, before a certain date, certificates of residence and provided that any such person as should fail, neglect or refuse to obtain such certificate or should thereafter be found without one should be arrested and taken before a United States Judge, whose duty it was to order such person's deportation, unless by affirmative and satisfactory proof he could show his right to remain. This Act raised the precise question here involved. It was passed on in the case of Fong Ting Yue, decided May 5, 1893. The brief for the relator was written by Mr. Joseph H. Choate. The decision was by a divided court. Mr. Justice Brewer, dissenting from the majority, vigorously denied the existence of the constitutional right to deport an alien who had come lawfully into the country with the intention permanently to remain. Said he:

"That those who have become domiciled in a country, are entitled to a more distinct and larger measure of protection than those who are simply passing through or temporarily in it, has long been recognized by the law of nations. . . . The writers upon the law of nations distinguish between a temporary resident in a foreign country for a special purpose and a residence accompanied with an intention to make it a permanent place of abode (citing Vattel, pp. 92-93, Phillimore International Law Ch. XVIII, p. 347). There is some force in the contention that these persons have become 'denizens' within the true meaning of that word as used in the common law. . . . It is said the power here asserted is inherent in sovereignty . . . the expulsion of a race may be within the inherent powers of a despotism. Whatever may be true as to exclusion, I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens. What, it may be asked, is the reason for any difference? The answer is obvious. The Constitution has no extra-territorial effect and those who have not come lawfully within our territory can not claim any protection from its provisions. . . . Its (the Act's) grievous wrong suggests this declaration of wisdom coming from the dawn of English history: 'Verily he who dooms a worse doom to the friendless and the comer from afar than to his fellow, injures himself.' (Laws of King Cnut, 1 Thorpe Ancient Laws and Inst. of England, 397)."

8 149 U. S. 698.
This vigorous language was approved by Chief Justice Fuller who joined in the dissenting opinion; and Justice Field, who had himself pronounced the judgment of the Supreme Court in favor of the constitutionality of exclusion laws in the pivotal case of Chae Pan Ping,\(^9\) also wrote a dissenting opinion in which he said: "... but between legislation for the exclusion of Chinese persons, ... and legislation for the deportation of those who have acquired a residence in the country ... there is a wide difference. ... The power of the Government to exclude foreigners from the country has never been denied, but its power to deport from the country persons lawfully domiciled therein by its consent and engaged in the ordinary pursuits of life has never been asserted by the legislative or executive departments except for crime or as an act of war in view of existing or anticipated hostilities, unless the Act of June 25, 1798,\(^10\) can be considered as recognizing that doctrine."

Notwithstanding this spirited dissent the majority of the Supreme Court, speaking through Justice Gray, sustained the law as the exercise of a power inherent in sovereignty and essential to the self-preservation of a Government. "If it could not exclude aliens it would be, to that extent, subject to the control of a foreign power." This decision was rendered notwithstanding the warning of Justice Brewer: "It is true this statute is directed only against the obnoxious Chinese, but if the power exists who shall say it will not be exercised tomorrow against other classes and other people"; and of a similar remark by Justice Field, quoted at the beginning of this article, "Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the Government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?"

\(^9\) 130 U. S. 581.
\(^10\) The Alien and Sedition Laws.
This decision having been upheld in a line of subsequent cases involving the rights both of Chinese and of Occidentals, the constitutional validity of deportation laws as distinguished from exclusion laws may probably be taken as settled.

Granting for the present that it is settled, although certain comments on the point will be offered further along, there are other constitutional questions involved. Freedom of political thought and expression has long been cherished in America. Yet we have noted at least four classes of persons whose exclusion is predicated upon political considerations.

The first class, those who seek to instigate the overthrow of the Government or the destruction of life and property by force, presents but little difficulty. The use of force strikes at the root of Government by the consent of the governed. It seeks to establish authority to rule upon coercion and not upon popular consent and is, therefore, in itself, the essence of despotism.

But the Act of 1918 provides for the deportation of "anarchists." The term is not defined. It is entitled, therefore, to the broadest interpretation. Such an interpretation fairly includes the so-called "philosophical anarchists" whose belief is counter to the use of force for any governmental purpose and who seek to persuade others by the use of the ballot to bring about a reform in our Government that shall correspond to their ideas of public policy. The existence of this class of persons has long been recognized and at different times the tolerant attitude of the Department of Justice toward them has been plainly set forth by the Attorneys General. Nevertheless they are proscribed by the

11 The official viewpoint of the Department of Justice is evidenced from the following excerpt of an address on "The Suppression of Anarchy" by Hon. James M. Beck, Attorney General of the United States, on January 21, 1902:

"On the threshold of the discussion it is necessary to define the term 'anarchy.' The word imports nothing more than disbelief in the efficacy of any form of government. The vagaries of the human mind are like the ways of Providence, 'mysterious and past finding out,' and there is unquestionably a class of honest and law-abiding visionaries, who in a nebulous and semi-lucid way, believe that the interest of society would be promoted by the abolition
Act. These classes of persons are now being deported. Is their deportation on such grounds in violation of constitutional guaranty? In the case of U. S. ex rel Turner v. Williams the question was raised and passed on by the Supreme Court. Section 2 of the Act of 1903 provided for excluding “anarchists” and Section 38 for the exclusion of persons “who disbelieve in or are opposed to all organized government.” The accused, an Englishman, had made speeches advocating an anarchistic regime. He denied the constitutionality of the law on the ground that the term anarchist really means “philosophical anarchist” and not one who advocates the use of force or violence. He also set up the First Amendment to the Constitution: “Congress shall make no law . . . . abridging the freedom of speech or of the press.” Justice Fuller in delivering the opinion of the Court said:

“If the word anarchist should be interpreted as including aliens whose anarchistic views are professed as political philos-

of all government whatever. These doctrinaires do not believe in war, or the taking of human life for any cause whatever. Violence has no part in their propaganda, which is purely educational in character. This class of so-called philosophical anarchists is small in number, and does not ordinarily fall within the commonly accepted definition of the word, which in common speech and to the common understanding is applied to those who seek the abolition of government by violence. To prevent, however, any criticism or question of constitutionality any legislation should preliminarily define anarchy as a movement or conspiracy to subvert and destroy organized government by violent and unlawful means.”

An interview with Attorney General Palmer published under date of April 4, 1919, purports to define the attitude of the Department of Justice under the present administration. He says:

“There are two principles to be kept in mind, that we must, on the one hand, preserve the ancient liberties guaranteed by the Constitution of freedom of the press and freedom of speech, and that, on the other hand, we must not permit the enlargement of those liberties.

“As long as efforts are made in the exercise of these guaranteed rights looking to reforms, however radical, through the political method—that is, by the education of the people along the lines proposed in the reforms—and looking to a result from the action of the people under these methods as fixed by our laws, no interference is necessary.

“But when the effort looks to the direct method—by force or other means not recognized under our laws—to accomplish such alleged reforms, conduct of that sort will be carefully scrutinized and ought to be nipped in the beginning.” Washington Post, April 4, 1919. See also Von Gerichten v. Seitz, 84 N. Y. Supp. 968; Encyc. Britannica, vol. 1, 11th Ed. 917.

12 Case of Frank R. Lopez arrested in Boston. Opinion Judge John C. Knox, December 9, 1918; Case of Bartolomeo Massulo, hearing December, 1917, Seattle before Inspectors Fischer and Burford; Case of George Pawick, Seattle, ibid. 13 194 U. S. 279.
ophers, innocent of evil intent, it would follow that Congress was of the opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and in the light of previous discussion, the Act even in this aspect would not be unconstitutional.

As to freedom of speech the Court said:

"But it is said the Act violates the First Amendment. . . . We are at a loss to understand in what way the Act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech nor of the press. . . . It is of course true that if an alien is not permitted to enter the country, or having entered contrary to law, is expelled, he is in the fact cut off from worshipping, or speaking or publishing or petitioning in the country. But that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are guaranteed by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it, power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise."

As the law now stands, therefore, those in class two may be constitutionally deported.

Those in class three, i. e.; those who belong to organizations which exist for forbidden purposes should probably be judged by the same standards as those who actually carry out such purposes.

As to those in class four—difficulties of proof as well as the great probability that belief will be evinced either by speech or action make it unlikely that many cases will arise where mere naked "disbelief in organized government" will form the basis of deportation. Nevertheless some such cases have arisen. Freedom of belief is so intimately bound up with freedom of speech that the two will probably stand or fall together. The question has never yet been squarely passed on by the Supreme Court, but in view of its past holdings it is fairly safe to prophesy what the Court's holding would be. There are, however, certain points of difference which will also be commented upon hereafter.
But turning from the substantive to the adjective side of the law, is the procedure prescribed free from constitutional infirmity?

Judged solely by its effect upon the alien it would seem indisputable that deportation is a deprival of liberty and, perhaps, of property. The person is taken into custody, deprived of his freedom to go and come. He may be suddenly taken away from business, from the management of his property and compelled to leave it behind. The result of such compulsion is very likely to be great financial loss. He may be severed from the ties of home, of relatives, of friends. Again, judged by its effects, he is subjected to punishment.

Is it permissible under the Constitution to subject a person within the jurisdiction of the United States to these things by the mere order of an executive officer?

Referring again to the dissenting opinion of Justice Brewer in the Fong Ting Yue where a Chinese laborer had failed to secure a certificate of residence, it is stated:

"Section 6 (Act of 1892) deprives of 'life, liberty and property' without due process of law. It imposes punishment without a trial and punishment cruel and severe. . . . Deportation is a punishment. It involves first, an arrest, a deprival of liberty, and second a removal from home, from family, from business, from property . . . . it needs no citation to support the proposition that deportation is punishment . . . and that oftentimes most severe and cruel. . . . But punishment implies a trial. . . . Due process requires that a man be heard before he is condemned and both heard and condemned in the due and orderly procedure of a trial as recognized by the common law from time immemorial."

This view of the matter did not prevail, however, the majority of the court, speaking through Justice Gray, saying:

"The proceeding . . . is in no sense a trial and sentence for a crime or offense. . . . The order of deportation is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. . . . He has not therefore been deprived of life, liberty or property without due process of law and the provisions of the Constitution securing the right of trial by jury and prohibiting
unreasonable searches and seizures and cruel and unusual punishments have no application."

It has uniformly been held that deportation proceedings are not criminal proceedings. The order of expulsion is not a sentence of punishment.14

But although the guaranty of a judicial trial provided in the Sixth Amendment for those accused of crime is not applicable, the fact remains that deportation does deprive of liberty and property. Does the procedure provided comply with the necessity for due process of law? Such compliance is admitted to be necessary. So long as the procedure followed is in good faith, and does not amount to an abuse of process and provides the means for an inquiry into the merits of the case the courts have held the requirement of due process to be satisfied. Due process does not necessarily imply judicial process.15

Some courts, indeed, have gone to great lengths in upholding the validity of proceedings in deportation. In Kaorn Yamataya v. Fischer16 it was held that the proceeding was not wanting in due process where the alien had a notice—although not a formal notice—of the institution of proceedings against her and although (she claimed) she could not understand the language or the meaning of the notice. Lack of power to compel the attendance of witnesses is not lack of due process.17

In Ekiu v. U. S.18 it was held that in reaching a decision whether an alien is lawfully entitled to enter the country, it is not necessary for the administrative officer to take testimony.

If the alien is given a hearing in good faith, although not present in person, or by counsel, nor informed of the

14 Fong Ting Yue, 149 U. S. 698; Zakonarte v. Wolfe, 226 U. S. 272; Choy Yun v. Bockus, 223 Fed. 487. Where a law provides for punishment at hard labor in addition to deportation it is not constitutional.
16 189 U. S. 86.
17 Low Wah Suey, 225 U. S. 460.
18 142 U. S. 651.
nature of the testimony, the requirements of due process are observed.19

These latter holdings have been modified however by the later case of Ex parte Petkos.20 In that case it was held that a fair hearing before an immigration officer means a hearing in accordance with the fundamental principle that there be due process of law and implies that the alien shall not only have the opportunity to present evidence in his favor but that he shall be apprised of the evidence against him. It is not enough that the officer meant to be fair.

The extent to which the doctrine, that final decision of questions involving liberty or property may be vested in administrative officer, has been carried, is indicated by the Ju Toy case.21 This case was preceded by the case of U. S. vs. Sing Tuck22 in which the contention was made that the question whether the person seeking admission was an alien, went to the foundation of the immigration officer's jurisdiction to act at all, and that this jurisdictional question was triable only in the courts. The Supreme Court avoided passing on this question in this case by holding that the petitioner had not carried his appeal to the highest administrative officer authorized to hear it and therefore had no right to invoke the aid of the court. But in the Ju Toy case the appeal was duly prosecuted to the limit of administrative authority and then taken into court. The Supreme Court thereupon held that even the fundamental question of whether the petitioner was an alien could be finally determined by the immigration officer and the case was accordingly dismissed.

It may be noted in passing that if the question of alienage is a question of law and not a question of fact, the courts will take jurisdiction. In Gonzales v. Williams23 the question was raised, whether a native of Porto Rico who was an inhabitant of the island at the time of its cession to the

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19 In re Can Pon, 168 Fed. 479.
20 212 Fed. 275.
21 198 U. S. 253.
22 194 U. S. 161.
23 192 U. S. 1.
United States was upon her arrival at a port of this country to be treated as an alien immigrant. The point in issue was one of law and the Court took jurisdiction of the case and decided it.

In general, however, where jurisdiction to determine an alien's rights is vested by Congress in administrative officers, the courts will not interfere except to inquire whether the essential procedural requirements of due process have been followed. Something more than good faith is required however. Thus in Ex parte Petkos the immigration officer had ordered the exclusion of an alien upon a finding made erroneously although apparently in good faith, that psoriasis, with which the alien was afflicted, was a noisome, ill-smelling disease that would disable the alien to make a living. The Court held that it was not sufficient that the erroneous finding was made in good faith. If the controlling fact was of such nature that its determination was not a matter of judgment but a matter capable of scientific demonstration, an erroneous determination was an abuse of process sufficient to vest jurisdiction in the judicial tribunal. The court held this to be such a case.

Present indications point to a good deal of litigation over the exclusion and deportation of aliens in the near future. New and more drastic legislation is likely to give rise to further testings of constitutional authority.

The law, as it has been developed by the cases that have already arisen, places in the hands of the federal government almost unlimited authority, actual or potential. Under the rulings of the Supreme Court, the right to exclude aliens is inherent in territorial sovereignty. The power to provide such exclusion is vested in Congress. The limits within which the power may be exercised are bounded only by the discretion of Congress and the guaranty of due process of law. This power may be vested by Congress in administrative officers and the courts will only interfere to prevent an abuse of discretion in carrying out the due process of the law. This power of exclusion applies as well to aliens
who have taken up residence here with intent permanently to remain as to those just arriving or to transients. The power to exclude does not depend upon the commission of any offense and it is not a punishment for crime although the commission of certain acts or the uttering of certain words may be made the ground for deportation. Aliens cannot therefore invoke the constitutional guaranty of a judicial or jury trial. Aliens are here by sufferance and not by right and can not claim, as protection against deportation, the constitutional provisions of free speech, free press, freedom of worship or of the right to assemble or to petition for redress of grievances.

It will thus appear that most of the major propositions have apparently been settled in the cases developed by the prototypes of our present problems.

These propositions have been settled at a time when public sentiment was comparatively little aroused or, if aroused at all, was practically unanimous against the contentions of the relators. Most of the principles have been established in cases where Chinese were concerned and, although lawyers like Mr. Choate and Judges such as Justices Brewer, Field and Fuller uttered their protests against the establishment of certain doctrines, the sovereign and impeccable power of Congress to deal with aliens at its own discretion has been repeatedly affirmed.

It would not be true to state that these cases were decided without due and mature consideration. Still they were decided under circumstances considerably different, in times considerably less troubled than the present. In a very real sense, therefore, old law is being applied to new problems.

However, if a plebiscite were taken upon the subject it is likely that a considerable majority of the American people would today regard the principles thus established as sound and proper. The sense of public danger, aroused by the war, is still upon us and the elemental instinct of self-defense calls forth a demand for strong and effective
regulation of those who seek to remove the ancient landmarks.

Without seeking to decry this feeling which is proper and indeed necessary to national solidarity, it may still be well to pause to consider one or two of the principles here involved.

Schooled from infancy to the belief that this nation was "conceived in liberty" Americans must never relax that eternal vigilance which is its price.

If we concede the constitutional power of Congress to deport a person whose offense consists in persuading our citizens to change, by the peaceful means of the ballot, the form of our Government, or consists simply in disbelief in Government, is the exercise of such power consonant with American principles?

The statement of the Attorney General quoted in the note, supra, indicates that for the present at least the policy of the Government is not to invoke this power.

"As long as efforts are made in the exercise of these guaranteed (constitutional) rights, looking to reforms, however radical, through the political method—that is by the education of the people along the lines proposed in the reforms—and looking to a result from the action of the people under these methods as fixed by our laws, no interference is necessary.

"But when the effort looks to the direct method—by force or other means not recognized under our law—to accomplish such alleged reforms, conduct of that sort will be carefully scrutinized and ought to be nipped in the beginning."

But the law still stands. If it is constitutional it may at any time be used—indeed has been used. But is it constitutional?

Let us again consider whether the Court is on tenable ground in its holding that deportation and exclusion are governed by the same principles. Such reconsideration may appear less presumptuous when it is recalled that Justices Brewer and Field, in carefully reasoned opinions dissented from the majority holding and that Chief Justice Fuller joined in their dissent.

The decision of the majority, that permissive entry, followed by lawful residence, accompanied by an intention
permanently to remain in the country confer no constitutional protection upon the alien, is placed upon the ground that the right to deport is inherent in sovereignty, and that the lack of such right would subject the government to the dominion of foreign powers.

Taking up the latter phase of this proposition first: It is said that to deny Congress this power would place the United States pro tanto under foreign dominion. This, it is submitted, is a non sequitur. If an alien commits or attempts to commit by word or act any offense against our laws or is guilty of treasonable conduct or of conspiracy, he is amenable to the same control and the same punishment as that provided for citizens. The criminal laws of the United States apply as well to aliens as to citizens.24 It is uniformly held that while aliens are within our territory they are subject to our laws. And on the other hand it is difficult to see how conduct on the part of an alien which would not be punishable if indulged in by a citizen can necessarily endanger the sovereignty or independence of the land.

Turning now to the first phase of the proposition, that the right is inherent in sovereignty:

It may be granted that the right to deal with aliens is inherent in sovereignty so far as international law is concerned. The citations from writers on the law of nations are sound for the purpose for which they were written, i.e., as tenets of international law. But the exercise of many rights inherent in sovereignty is limited by our Constitution. Unfettered by such limitation, sovereign power may regulate religion, speech and the press; may impair the obligation of contracts and do any of the things provided against in the Constitution. To say therefore that the exercise of a power is valid because the power is inherent in sovereignty is to ignore the purposes for which the constitutional limitations were framed.

Yet this doctrine, of a power inherent in sovereignty by the exercise of which the deportation of aliens is com-

24 Corpus Juris—Article on Aliens. Wharton, Conflict of Laws, Sec. 819.
pletely removed from the operation of certain guarantees in the Constitution, underlies the entire structure of the cases heretofore cited.

The Constitution provides that Congress shall make no law abridging the freedom of speech or of the press.

Justice Fuller says that a law directing the deportation of an alien because of what he has spoken or published is not a law abridging the freedom of speech or of the press because the alien, being subject to exclusion or deportation as such, can not claim the protection of this provision.

Now it may be true that the alien, by his status, is estopped to contest the validity of the law. But the prohibition is upon Congress. "Congress shall make no law, etc." If an alien is disabled to contest the constitutionality of such a law, may not a citizen whose interests are adversely affected by its operation make such a contest? Does a law, which does what the Constitution says a law may not do, cease to contravene the Constitution because the alien has no standing in court? Can the constitutional limitation of governmental policy regarding free speech be ignored in passing laws because the person against whom the laws operated can not be heard to protest? This result can only follow if the "inherent in sovereignty" doctrine is sound. It is submitted that the validity of the court's holding on this point is at least questionable.

Again consider the cases of those who are to be excluded simply because they "disbelieve in all organized government." They may simply believe that a state of society where there is no government is preferable to one where any form of organized government exists. If Congress has power to pass a law excluding persons for such a state of mind alone, may it not also by similar law exclude those who believe or disbelieve any proposition of fact? May it not exclude them for belief or disbelief in the existence of God? And may it not declare that all aliens now in America who either believe in or disbelieve in God shall be deported? According to the reasoning of the majority opinions in the cases cited this conclusion would seem inevitable. Yet would
not such a law so closely approximate a law prohibiting the free exercise of religion that distinction would be impossible? Again it is submitted that there is food for thought.

The combination of forces generated by motives of political expediency with forces resulting from increasing economic pressure will tend to strain every stay upon the deportation powers of Congress. The law as now expounded has already cleared the way; has in fact cut into certain fundamental American tenets. But, "life is more than meat and the body is more than raiment." There are things even more important than economic prosperity. These are the basic liberties guaranteed by the Constitution. Once more, in the cycle of time, we are passing through conditions, remembered by the framers of our Government, in which the temptation is strong to encroach on principle to achieve particular ends; to save us in these crises the constitutional guaranties were framed. In just such times as these they are needed.

Now it is true that the cases already decided seem in point; they construe statute law in some cases practically identical with that now in force. Nevertheless, they rest, as has been suggested, on reasoning fundamentally questionable. And they were decided, moreover, in an atmosphere of popular sentiment and for the accomplishment of a popular purpose quite different from the conditions of the present. The great, underlying ratio decidendi of the Chinese cases was economic and social. The Chinese were undesirable because they worked for wages and lived in conditions unbecoming to American workmen. Political considerations, the right to free speech and free belief were not much concerned. The present effort is of a different nature. It is true that economic considerations are intermingled and complicate the problem, but the emphasis of the law, particularly of the portions here dealt with, is upon political considerations. The economic forces are temporarily behind the scenes. Their strength is merged in the effort to deport aliens for political reasons.
Here lies danger. It is not contended that the efforts of the Government to restrain unlawful attacks upon its existence should be weakened. On the contrary its vigilance should be redoubled and its strength renewed. But the preservation of "free" government can not be permanently accomplished by the abridgment of the fundamentals of freedom. Is it hardly thinkable that the Supreme Court in laying down the rules above noted had in contemplation any such object? It had in view an entirely different purpose, the serving of an economic end. In spite of the warnings of Justice Brewer, the majorities apparently did not contemplate the rise of present circumstances. It is submitted that these decisions go a little too far. Not only do they rest upon questionable logic, but they are now being applied to a purpose radically different from that for which they were made.

Close examination of our deportation laws will be called forth by coming events. This is fortunate. Every proper means should be used to prevent persons evilly disposed from doing violence to the ark of our covenant, the perpetuation of our democratic Government. But in our zeal to protect that ark from the spoliation of the stranger we must not ourselves stretch forth an impious hand to touch the sacred shrine. Freedom is our greatest possession; our free institutions, our greatest heritage. Neither the en- cystation of old law settled in a time of popular lethargy nor the engrafting of new law in a time of heat and passion should be allowed to mar the growth of our free institutions in this land of liberty.

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