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Constitutional Law—Aliens—Right of Due Process in Exclusion Proceedings

An alien, who had resided in the United States for twenty-five years, had married an American citizen and had purchased a home in the United States, left this country to visit his dying mother in Roumania.¹ Upon his return, he was excluded from the United States by order of the Attorney General for "security reasons," without a hearing and without being advised of the reason for his exclusion.² After detention on Ellis Island for twenty-five months, while attempts to deport him failed because other countries refused to accept him,³ he sought release by habeas corpus, alleging unlawful confinement. The District Court⁴ and the Court of Appeals⁵ sustained the writ. Upon certiorari to the United States Supreme Court, *held*: reversed, four justices dissenting.⁶ The alien's prior residence in the United States was immaterial since his present status was that of an entering alien; so denial of a hearing was not violative of due process.

As to aliens, the Supreme Court has strictly construed the word "person" in the Fifth Amendment.⁷ In the following cases the Court has held an alien to be a "person" entitled to due process: (1) a resident alien living within the territorial United States;⁸ (2) an alien who has entered the United States unlawfully;⁹ (3) an alien detained

¹ *United States v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952) (It was pointed out, in regard to his loyalty to the United States, that the alien had purchased war bonds, donated blood to the Red Cross, and acted as a civilian defense air raid warden in the last year.).

² 40 Stat. 559 (1918), as amended 22 U.S.C. § 223 (1946), granted the President authority to prescribe rules and regulations regarding the entry of aliens. The President, in Exec. Order No. 2523, 22 Code Fed. Regs. § 32.1 (1941), delegated authority to the Secretary of State and Attorney General to promulgate regulations regarding the entry of aliens. In accordance with regulations in 8 Code Fed. Regs. § 175.57 (Cum. Supp. 1945), the Attorney General may deny an alien a hearing if he has material of a confidential nature ". . . the disclosure of which would be prejudicial to the public interest." See its constitutionality upheld in *United States v. Shaughnessy*, 338 U.S. 537 (1950).

³ England and France refused him permission to enter. He also unsuccessfully applied for admission to twelve Latin-American countries.

⁴ *United States v. Shaughnessy*, 101 F. Supp. 66 (S.D.N.Y. 1951).

⁵ *United States v. Shaughnessy*, 195 F.2d 964 (2d Cir. 1952).

⁶ *Shaughnessy v. United States*, 345 U.S. 206 (1953).

⁷ U.S. Const. Amend. V: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ."

⁸ *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Cf. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). It was argued in the instant case that Ellis Island was within territorial United States and thus due process was imperative; however, this argument was rejected.

⁹ *Wong Yang Sung v. MacGrath*, 339 U.S. 33 (1950); *The Japanese Immigration Case*, 189 U.S. 86 (1903). In the latter case the Court reserved the question as to the rights of due process to an alien who entered the United States clandestinely. The Nationality Act of 1940, 54 Stat. 1143 (1940), 8 U.S.C. § 707 (1946), provided that continuous service by a seaman on an American vessel

outside geographic United States who has a resident alien's status "assimilated" to him.¹⁰

The Supreme Court has denied that an alien is a "person" entitled to due process in the following cases: (1) an alien entering the United States for the first time;¹¹ (2) a resident alien who, as in the instant case, after leaving this country is treated as an entering alien when he attempts to return.¹²

The theory of the instant case that entering aliens are not "persons" within the due process clause seems indistinguishable from a previous Supreme Court decision. It has been held that an alien with property in this country and residing in another country cannot be deprived of his property without due process of law.¹³ In principle this decision is indistinguishable from the instant case. The reasoning that an alien in another country cannot be deprived of his property in this country without due process of law forces the conclusion that he must be a "person" within the meaning of the Fifth Amendment, since only "persons" are entitled to due process. This doctrine contrasted with the holding in the instant case creates an anomalous situation: if the government seizes an alien's "property," he is a "person" under the Fifth Amendment and has the right of due process; if, on the other hand, the government seizes the same alien's "liberty," he is not a "person" under the Amendment and does not have a right of due process.

However, the instant case is probably in accord with the English common law doctrine prevailing at the time of the adoption of the Constitution.¹⁴ Even aliens within territorial England were aptly termed "rightless," with the exception of alien merchants who were deemed to have a license from the King.¹⁵

does not break the five-year residence requirement for citizenship required by the Naturalization Laws. See 66 Stat. 251, 8 U.S.C.A. § 1441 (Supp. 1952).

¹⁰ *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (plaintiff, having taken out naturalization papers, remained on American vessel). This case was distinguished from the instant case on the grounds that the alien's departure to Europe in the instant case broke the continuous residence requirement under the Naturalization Law, while the journey of the alien in the *Colding* case did not. See note 9 supra.

¹¹ *United States v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("... [w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.").

¹² *Shaughnessy v. United States*, 345 U.S. 206 (1953).

¹³ *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1930); see *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 580 (1908).

¹⁴ 9 Holdsworth, *History of English Law* 94 (1926). Aliens could not bring personal or real actions since they were deemed incapable of holding real estate.

¹⁵ *Ibid.* Section 41 of the Magna Carta guaranteed foreign merchants safe entry and exit from England. Prior to adoption of the American Constitution alien merchants had rights similar to subjects of the King.

It is submitted that the Fifth Amendment should not be given the narrow interpretation that it receives in the instant case. By this opinion the Attorney General is given nearly dictatorial powers.¹⁶ He may refuse a hearing, even *in camera*,¹⁷ thus affording the alien no opportunity to rebut the confidential charges. Consequently, when other countries refuse to accept the alien, he is a virtual prisoner at Ellis Island, regulated at the discretion of the Attorney General and without constitutional protection.

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¹⁶ See Justice Jackson's dissent in the instant case, 345 U.S. at 218.

¹⁷ Justice Jackson pointed out in his dissent in the instant case, 345 U.S. at 228 n. 9, that the Attorney General refused even to inform the alien of the confidential information in an *in camera* hearing suggested by the trial court.