Efstratios SAVELIS, Theodoros Fragidokis, and Photios Theofanou, Petitioners,

v.

E. VLACHOS, Master of the Greek S. S. Michalakis, E. O. Douglas, Jr., Immigration Inspector at Newport News, Virginia, Paul E. Johnson, Supervisory Immigration Officer at Norfolk, Virginia, and T. A. Esperdy, Deputy Regional Commissioner of Immigration at Richmond, Virginia, and Gilbert Zimmerman, Immigration Service, Richmond, Virginia, Respondents.

Misc. No. 460.

United States District Court
E. D. Virginia, Newport News Division.
Nov. 25, 1955.

Petitions for writ of habeas corpus, declaratory judgment or injunction to determine rights of alien seamen to change of status from temporary landing permit conditioned on their leaving on same vessel on which they arrived, to status of permit not so conditioned. The District Court, Hoffman, J., held that allowance of such change was discretionary with immigration officials.

Order for respondents in accordance with opinion.

1. Seamen ⇐1

Seamen are wards of the court and entitled to protection as such.

2. Habeas Corpus ⇐19
Injunction ⇐22

Where alien seamen were held in United States pending determination of habeas corpus and declaratory judgment proceedings to prevent question from becoming moot, but vessel on which they arrived had left the country, issues involving habeas corpus and injunction were probably moot but would be discussed together with declaratory judgment proceeding.

3. Declaratory Judgment ⇐91

Alien seamen were entitled to have their status with regard to conditional permits determined in declaratory judgment action though they had left the country.

4. Federal Civil Procedure ⇐810
Habeas Corpus ⇐83

Where petitioners, seeking habeas corpus, declaratory judgment and injunction, did not file traverse to return of vessel's master and answer of immigration officials pursuant to leave granted, court would treat case as though general traverse had been filed.

5. Treaties ⇐11

Reservations to the 1929 International Convention for Safety of Life at Sea do not confer on alien crewmen a substantive right to land in United States free of restraint and to reship on any vessel, contrary to provisions of subsequent statutes. International Convention for Safety of Life at Sea, art. 31(1), 50 Stat. 1306; Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.

6. Treaties ⇐7

Reservation to a treaty or convention confers no substantive rights, but merely serves as a limitation to provisions agreed upon.

7. Treaties ⇐11

If treaty or convention is inconsistent with act of Congress, the latest in date controls.

8. Treaties ⇐11

If Congress enacts legislation in contravention of express provisions of an earlier treaty, court must uphold such legislation if it is sufficiently clear and explicit and within exercise of constitutional power.

9. Aliens ⇐40

The 1952 Immigration and Nationality Act, governing landing of alien crewmen in United States, is constitutional. Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.

10. Aliens ⇐18

Power of United States to exclude aliens is a fundamental element of sover-

eignty, emanating not only from legislative power but also from inherent power of executive to control foreign affairs.

11. Aliens ⇐53

Alien may not seek admission under any claim of right, as privilege of admission is granted only upon such terms and conditions as may be prescribed by Congress. Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.

12. Aliens ⇐54(15)

In absence of clear showing of abuse of discretion in granting temporary landing permit to alien crewmen, it is not function of court to substitute its judgment for that of immigration official. Immigration and Nationality Act, § 252 (b), 8 U.S.C.A. § 1282(b).

13. Declaratory Judgment ⇐91

Validity of deportation order may be determined by declaratory judgment without necessity of actual detention, under same principles as would be applicable in habeas corpus proceedings if alien had been taken into custody.

14. Aliens ⇐54(16)

Action of immigration official in refusing to grant a change in status of alien crewman from that of permit conditioned on leaving on same vessel to that of permit not so conditioned is not final so as to preclude judicial review. Immigration and Nationality Act, §§ 212, and (d) (3, 5), 242, 252(a) (1, 2), (b), 253, 8 U.S.C.A. §§ 1182, and (d) (3, 5), 1252, 1282(a) (1, 2), (b), 1283.

15. Aliens ⇐54(1)

Alien crewmen have right to renew requests for change in status of temporary permit at any time prior to sailing of vessel upon which they came, upon satisfying immigration official of their ability to depart on another vessel. Immigration and Nationality Act, §§ 212, and (d) (3, 5), 242, 252(a) (1, 2), (b), 253, 8 U.S.C.A. §§ 1182, and (d) (3, 5), 1252, 1282(a) (1, 2), (b), 1283.

16. Aliens ⇐54(14)

Any abuse of discretion in denial of change of status of temporary permit to alien crewman must be affirmatively stated in pleadings, based upon factual averments rather than mere conclusions of law together with vague or ambiguous statements. Immigration and Nationality Act, §§ 212, and (d) (3, 5), 242, 252 (a) (1, 2), (b), 253, 8 U.S.C.A. §§ 1182, and (d) (3, 5), 1252, 1282(a) (1, 2), (b), 1283.

17. Aliens ⇐54(17)

Evidence did not support allegations that alien seaman's books and other personal effects were detained on board vessel, or that immigration officials sought to "terrorize and conspire" against seaman.

18. Aliens ⇐54(17)

Evidence required finding that immigration officials did not abuse their discretion in handling requests of alien seamen for hospitalization.

19. Aliens ⇐54(1)

The need for hospitalization does not call for a change of alien seaman's status from temporary permit conditioned on leaving on same vessel by which he arrived, to permit not so conditioned. Immigration and Nationality Act, §§ 212(d) (5), 254(a) (2), 8 U.S.C.A. §§ 1182(d) (5), 1284(a) (2).

20. Aliens ⇐54(1)

Upon production of certificate from reputable physician indicating need for medical treatment or hospitalization predicated upon actual examination of alien seaman, immigration authorities in proper exercise of discretion should give due weight to physician's opinion and under ordinary circumstances, should grant parole to end that immediate medical care may be afforded in interest of justice. Immigration and Nationality Act, §§ 212(d) (5), 254(a) (2), 8 U.S.C.A. §§ 1182(d) (5), 1284(a) (2).

21. Aliens ⇐54(1)

Alien seamen who stated that they did not intend to return to vessel on which they arrived, and who through counsel refused to submit to hospitalization, subjected themselves to legal revocation of landing permit conditioned on

their leaving on same vessel. Immigration and Nationality Act, § 252(b), 8 U.S.C.A. § 1282(b).

22. Seamen ⇐11(7)

Corresponding to shipowner's duty to provide hospitalization when necessary, seaman has duty to make himself available for such hospitalization within a reasonable time, and advice of his attorney is no excuse where treatment is tendered and there appears no valid reason why seaman should not submit to hospitalization.

23. Aliens ⇐54(17)

Evidence established that revocation of landing permits of alien seamen and subsequent detention on board vessel for purpose of deportation, constituted a valid exercise of discretion. Immigration and Nationality Act, § 252(b), 8 U.S.C.A. § 1282(b).

24. Aliens ⇐54(1)

Where alien seamen, in stating intention not to return to vessel on which they arrived and refusing to submit to hospitalization, relied upon advice of counsel and as individuals were ignorant of their rights, they should be granted right of voluntary departure to the same force and effect as though they had been injured in port and thereafter hospitalized for a period beyond time fixed for departure of vessel on which they arrived. Immigration and Nationality Act, §§ 212, and (d) (3, 5), 242, 252(a) (1, 2), 253, 8 U.S.C.A. §§ 1182, and (d) (3, 5), 1252, 1282(a) (1, 2), 1283.

Supplemental Opinion

25. Habeas Corpus ⇐112

In order to prevent habeas corpus issue in proceeding by alien seamen from becoming moot as result of departure of vessel whose master was deemed to be petitioners' custodian, court entered nunc pro tunc order for substitution of immigration officials having custody of such petitioners.

26. Courts ⇐405(16.3)

Motion requesting court to contract the transcript of testimony was denied, where much of the lengthy testimony was irrelevant, agreement between counsel as to proper contents appeared impossible, and counsel had not filed notice of appeal or attempted to designate what part of the transcript should be prepared for submission to Court of Appeals.

27. Courts ⇐405(14.9)

In absence of affidavit in forma pauperis, or of showing that petitioners were in fact paupers, or of necessity of evidence being transcribed for submission to Court of Appeals, request to permit transcript of testimony to be transcribed without necessity of payment by petitioner or their counsel would be denied, where matters involved were questions of law and facts had been clearly stated in court's opinion. 28 U.S.C.A. § 1915.

Morewitz & Morewitz, Newport News, Va., Jacob L. Morewitz, Newport News, Va., for petitioners.

William F. Davis, Asst. U. S. Atty., Norfolk, Va., and Gilbert Zimmerman, Richmond, Va., Regional Counsel for the Immigration and Naturalization Service, for the Government respondents.

Vandeventer, Black & Meredith, Hugh Meredith and Walter B. Martin, Jr., Norfolk, Va., for the Master and shipowner respondents.

HOFFMAN, Judge.

The three petitioners herein were, at the time of their arrival in this country, bona fide alien crewmen employed on board the Greek vessel Michalakis. The vessel was involved in a collision with a United States Navy ship on or about the 17th day of October, 1955, and immediately went to a shipyard at Newport News for repairs.

Petitioner, Savelis, applied for a writ of habeas corpus, an application for a declaratory judgment and/or an injunction in a proceeding instituted in this Court on November 1, 1955. Counsel for petitioner stated to the Court that the petitioner was not then being detained by the Immigration authorities or the Master of the vessel, but petitioner never-

theless insisted upon the issuance of an order to show cause on the petition for writ of habeas corpus. No notice of any hearing on an application for temporary injunction was given (although the pleading requested an injunction) and, for this reason, no hearing was scheduled. This Court declined to issue the order to show cause for the reason that petitioner admittedly was not being detained at the time. At the request of counsel for petitioner, the file in that case was forwarded to Chief Judge John J. Parker of the Circuit Court of Appeals for the Fourth Circuit. In a brief order the action of the District Court was affirmed, with the right reserved to petitioner to apply to the full Court for an order in the nature of a writ of mandamus. The Circuit Court of Appeals has not acted on petitioner's request. The District Judge therefore assumes that his action in refusing to sign the order to show cause was proper. It will be noted that the District Court was not requested to rule upon any phase of this case except the matter affecting habeas corpus, and the Court expressly reserved consideration of the declaratory judgment issue. Had a specific request, accompanied by a proper notice, been made as to a temporary injunction, this Court would have granted a hearing.

On November 9, 1955, the three petitioners, one of whom was the petitioner in the prior action, were taken into *actual physical custody* by the Immigration officials pursuant to 8 U.S.C.A. § 1282(b). Upon such showing on November 10, 1955, this Court issued an order to show cause on petitioners' application for habeas corpus, declaratory judgment and/or injunction. Notice of a request for temporary injunction was given the respondent Immigration officials and the Master of the vessel. The order to show cause and request for temporary injunction were made returnable at 3 P. M. on November 11, 1955, and the hearings followed.

Respondent Immigration authorities urge the legality of petitioners' detention under 8 U.S.C.A. § 1282(b), which is as follows:

> "Pursuant to regulations prescribed by the Attorney General, any immigration officer may, *in his discretion,* if he determines that an alien is not a bona fide crewman, *or does not intend to depart on the vessel or aircraft which brought him,* revoke the conditional permit to land which was granted such crewman under the provisions of subsection (a) (1) of this section,[1] take such crewman into custody, and require the master or commanding officer of the vessel or aircraft on which the crewman arrived to receive and detain him on board such vessel or aircraft, if practicable, and such crewman shall be deported from the United States at the expense of the transportation line which brought him to the United States. Until such alien is so deported, any expenses of his detention shall be borne by such transportation company. Nothing in this section shall be construed to require the procedure prescribed in section 1252 of this title to cases falling within the provisions of this subsection." [2]

While the initial question concerned only the legality of petitioners' detention, the vessel left this country on November 12, 1955, and hence the ultimate question in this case as to the declaratory judgment and/or injunction is now before the Court and is admittedly far-reaching. The issue strikes at the discretionary power vested by Congress in the Immigration officers and the Attorney General's regulations prescribed. Title 8, U.S. C.A. § 1282(a) (1) and (2) provides:

> "(a) No alien crewman shall be permitted to land temporarily in the

1. This subsection refers to what is generally referred to as a D–1 permit.

2. Section 1252 provides for a cumbersome procedure relating to the apprehension and deportation of aliens (not alien crewmen), their arrest, custody, and review of determination of status by the Court.

United States except as provided in this section and sections 1182(d)(3), (5) and 1283 of this title.[3] If an immigration officer finds upon examination that an alien crewman is a nonimmigrant under paragraph (15) (D) of section 1101(a) of this title[4] and is otherwise admissible and *has agreed to accept such permit*, he may, in his discretion, grant the crewman a conditional permit to land temporarily pursuant to regulations prescribed by the Attorney General, subject to revocation in subsequent proceedings as provided in subsection (b) of this section, and for a period of time, in any event, not to exceed—

"(1) the period of time (not exceeding twenty-nine days) during which the vessel or aircraft on which he arrived remains in port, if the immigration officer is satisfied that the crewman intends to depart on the vessel or aircraft on which he arrived; or

"(2) twenty-nine days, *if the immigration officer is satisfied that the crewman intends to depart*, within the period for which he is permitted to land, *on a vessel or aircraft other than the one on which he arrived.*"

The so-called conditional permits referred to in section 1282 are commonly classified as D–1 and D–2 permits; the former indicating that the crewman must depart on the vessel on which he arrived; the latter stating that the crewman may depart on a vessel other than the one on which he arrived. It will be noted that Congress, in both instances, imposed a condition precedent to satisfy the Immigration officer of the crewman's intentions. How, then, is this requirement to be satisfied?

The economic effects of this decision could completely demoralize commerce between this nation and foreign countries. To deprive Immigration officers of the discretionary powers vested by Congress would spell disaster to foreign vessels visiting our ports. When and how should a crewman be permitted to signify his intentions? To allow the seaman to wait until immediately prior to the sailing of the vessel and then declare an intention to reship foreign on another vessel would result in foreign vessels' being stripped of their crews and would delay departure at great expense to the transportation company. Certainly this would be the case as to "key" employees. In short, the vessel and its owners would be subjected to unreasonable demands for the settlement of claims having little or no value which, in order to secure departure of the vessel, would have to be paid to assure a full complement of men in the crew.

[1] This Court is fully aware of the fact that seamen are wards of the court and entitled to protection as such. It is also recognized that Immigration officers are at times inclined to be arbitrary and unreasonable, thus leading to discriminatory acts in isolated instances.

3. The quoted sections of 1182 are not applicable. Section 1182(d)(3) makes provision for an alien applying for a nonimmigrant visa. Section 1182(d)(5) vests in the Attorney General certain discretionary parole rights for emergent or public interest reasons. Section 1283 has reference to an alien crewman afflicted, or suspected of being afflicted, with feeble-mindedness, insanity, epilepsy, tuberculosis, leprosy, or any dangerous contagious disease. No such contention is made in this case.

4. Section 1101(a)(15)(D) is as follows: "The term 'immigrant' means every alien except an alien who is within one of the following classes of nonimmigrant aliens——

* * * * *

"(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft *on which he arrived* or some other vessel or aircraft".

However, this is not a case apparently falling within this classification. The issue, simply stated, is this:

> "May an alien crewman, having previously been granted and having accepted a D–1 conditional permit, thereafter change his mind and elect not to depart on the vessel on which he arrived and, without satisfying the Immigration officer as to his ability to reship foreign on another vessel within the 29 day period, demand the issuance of a D–2 conditional permit?"

As to this issue the evidence presented is not in dispute. The three petitioners retained the same counsel. None of them furnished any oral or written statement indicating his ability to reship foreign on another vessel within the 29 day period. One petitioner, Fragidokis, testified that he held a letter from the Assistant Engineer of the Michalakis permitting him to obtain employment on another vessel owned by the same transportation company. The letter was never exhibited to the Immigration officials, nor were its contents mentioned by the petitioner, although Fragidokis stated that his counsel knew of the letter. The letter was not introduced in evidence. In short, there is no contention by any of the petitioners or their counsel that any oral or written statement was made indicating their ability to reship foreign at any time. The sole contention urged is that any alien crewman has an absolute right to accept a D–1 permit and thereafter, at any time prior to the sailing of the vessel, the alien crewman may insist upon a change of status and obtain a D–2 permit without indicating any evidence of his ability to reship foreign within 29 days. If such is the law, there would be no need for the use of D–1 permits. They would, in effect, be meaningless.

[2, 3] This case is one of a series of similar actions instituted by the same counsel representing different Greek seamen. To prevent this question from being moot, the Court elected to hold the petitioners in this country pending determination of the habeas corpus and declaratory judgment proceedings. Since the vessel has left the country, it is likely that the issues involving habeas corpus and injunction have become moot, but the Court will discuss the same together with the declaratory judgment proceeding. That petitioners are entitled to have their status determined in a declaratory judgment action, even though they may have left the country, is apparently settled in this Circuit in Kokoris v. Johnson, 4 Cir., 195 F.2d 518.

[4] Counsel for petitioners asked leave to traverse the return of the vessel's Master and the answer of the Immigration officials, which leave was granted. The traverse has not been filed but, overlooking the formalities required in pleading, the Court will treat the case as though a general traverse has been filed.

[5–8] The main contention asserted by counsel for petitioners is that paragraph 1 of the "Reservations of the United States" to the 1929 "International Convention for the Safety of Life at Sea", 50 Stat. pt. 2, 1306 (1937), confers on alien crewman a substantive right to land in the United States free of restraint, and permits such crewmen to reship on any vessel. This contention is without merit. The reservation to a treaty or convention confers no substantive rights; it merely serves as a limitation to the provisions agreed upon in the treaty or convention. It is only necessary to examine the provisions of the convention to ascertain that no such substantive rights were conferred. Even if inconsistent with an Act of Congress, the latest in date controls. Lakos v. Saliaris, 4 Cir., 116 F.2d 440, 444; Horner v. United States, 143 U.S. 570, 578, 12 S. Ct. 522, 36 L.Ed. 266; Rainey v. United States, 232 U.S. 310, 316, 34 S.Ct. 429, 58 L.Ed. 617; State of Arizona ex rel. Arizona State Board of Public Welfare v. Hobby, 94 U.S.App.D.C. 170, 221 F.2d 498, 500. If Congress enacts legislation in contravention of the express provisions of an earlier treaty, it is the duty of the Court to uphold such legislation

if it is sufficiently clear and explicit and within the exercise of its constitutional power. Hijo v. United States, 194 U.S. 315, 24 S.Ct. 727, 48 L.Ed. 994. As the Immigration and Nationality Act was enacted by Congress in 1952 and regulations were issued pursuant thereto, it follows that the 1929 Convention would not control the present action but, as previously indicated, there does not appear to be any conflict or any provision of that Convention that would afford petitioners any substantive right.

[9–11] Counsel for petitioners insist that the Act of 1952 is unconstitutional. They cite no authority to support this legal theory and, in the opinion of this Court, the contention is again without merit. The Immigration and Nationality Act of 1952 has been construed by many courts in the last three years. At no time has there been any suggestion that the Act is unconstitutional. While the constitutionality of the Act of 1952 does not appear to have been expressly passed upon, the particular sections involved in this case are similar to the Act of 1917, 39 Stat. 874, the constitutionality of which latter Act has been upheld on numerous occasions. The power of the United States to exclude aliens from entering the country is a fundamental element of sovereignty, emanating not only from legislative [illegible] the inherent power of the executive to control the foreign affairs of the nation. Any alien who seeks admission to this country may not do so under any claim of right as the privilege of admission is granted only upon such terms and conditions as may be prescribed by Congress. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 317; Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576; Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S.Ct. 625, 97 L. Ed. 956. The constitutionality of the prior Act relating to the control of the admission or detention on board vessels of seamen arriving in the United States has been upheld in Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013; The City of Athens, D.C., 73 F.Supp. 362; United States v. Arnold Bernstein S. S. Lines, D.C., 44 F.Supp. 19. It is perfectly apparent that the particular portions of the Immigration and Nationality Act of 1952 which are pertinent to this case in no sense violate the constitutional powers of Congress.

Sec. 252(a) of the Immigration and Nationality Act, 8 U.S.C.A. § 1282(a), expressly places the responsibility upon the Immigration officer to determine whether an alien crewman occupies a bona fide status, ready, able and willing to reship. Upon proper inquiry the Immigration officer "may, in his discretion" grant a D–1 or D–2 landing permit. If granted a D–1 permit, the alien crewman may apply for a change in status to obtain a D–2 permit under Sec. 252.41, Title 8, Code of Federal Regulations, U.S.Code, Congressional and Administrative News, 83rd Congress, 1st Session, 1953, Vol. 2, p. 2596, as follows:

> "If the immigration officer to whom an alien crewman applies for change of his landing is satisfied that the alien will depart as a member of the crew of a vessel or aircraft other than the one on which he arrived, he may, in his discretion, grant the alien crewman's request and permit him to remain in the United States for such period as the immigration officer shall determine, not to exceed twenty-nine days from the date of the crewman's arrival in the United States. In such case the immigration officer shall prepare a new set of Forms I–95 and shall note thereon landing under clause (a) (2) of section 252 of the Immigration and Nationality Act (8 U.S.C.A. § 1282) and the date to which the crewman has been granted permission to land. The new Form I–95A shall be given to the crewman and the Form I–95A previously issued to him shall be surrendered. As amended Sept. 30, 1953, 18 F.R. 6235."

[12] The wording of the Act and the quoted regulation thereunder is plain and

unambiguous. Congress vested certain discretionary powers in the immigration officials, one of which was to require some showing of the alien crewman's intention and ability to reship foreign on another vessel within the required time of twenty-nine days. While it is true that such discretion may be abused in some instances, in the absence of a clear showing of such abuse it is not the function of the Court to substitute its judgment for that of the Immigration official. The Navemar, D.C., 41 F.Supp. 846; United States ex rel. Arkin v. Reimer, D.C., 22 F.Supp. 771; British Empire Steam Navigation Co. v. Elting, 2 Cir., 74 F. 2d 204, certiorari denied 295 U.S. 736, 55 S.Ct. 648, 79 L.Ed. 1684; United States v. National Surety Co., D.C., 20 F.2d 972. In United States ex rel. D'Istria v. Day, 2 Cir., 20 F.2d 302, Judge Learned Hand stated that an alien crewman is only entitled to a summary, but fair, examination by the Immigration officer in determining whether the seaman seeks to enter the country solely in pursuit of his calling or whether he intends to abandon same, and that the burden rests upon the seaman to establish these facts to the satisfaction of the officer. To hold otherwise would literally flood our ports with alien crewmen desiring to avail themselves of extended shore leave and with no reasonable opportunities to reship foreign on another vessel.

[13] The recent case of Shaughnessy v. Pedreiro, 349 U.S. 48, 75 S.Ct. 591, 99 L.Ed. 868, decided April 25, 1955, casts some doubt as to the extent of judicial review permitted by Sec. 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Undoubtedly this case is authority for permitting judicial review of deportation orders in an action for declaratory judgment, whereas Heikkila v. Barber, 345 U.S. 229, 73 S.Ct. 603, 97 L.Ed. 972, held that deportation orders were not the subject of judicial review under the Administrative Procedure Act and that habeas corpus was the only remedy available. Heikkila was decided under the Immigration Act of 1917, while Pedreiro involved the Act of 1952. Considering these two cases, as well as Rubinstein v. Brownell, 92 U.S.App.D.C. 328, 206 F.2d 449, affirmed per curiam by an equally divided court in 346 U.S. 929, 74 S.Ct. 319, 98 L.Ed. 421, it appears that the law now existing does not require an actual detention but the validity of the deportation order may be determined by declaratory judgment under the same principles as would be applicable in habeas corpus proceedings if the petitioner had been taken into custody.

[14–16] In the instant case it can hardly be urged that the action of an Immigration official in refusing to grant a change in status from D–1 to D–2 is "final" within the meaning of Pedreiro and Heikkila. The right exists to petitioners to renew their requests at any time prior to the sailing of the vessel upon satisfying the Immigration official of their ability to depart on another vessel. In the absence of clear abuse of discretion there certainly does not appear to be any right of judicial review in such a case. Additionally, such an abuse must be affirmatively stated in the pleadings based upon factual averments rather than upon mere conclusions of law together with vague or ambiguous statements.

[17] The petition alleges that the seamen's books and other personal effects were detained on board the vessel. As a matter of fact, the seamen's books were deposited with the Court at the same time the petition was filed. Further reference to the existing factual situation will reveal that this allegation is not supported. In paragraph 8 of the petition it is asserted that respondents sought to "terrorize and conspire" against petitioners to the end that they were arrested. Such an allegation is without foundation in fact as will be revealed by the evidence.

[18] It becomes essential to summarize the factual situation as it is improbable that the entire transcript will ever be reviewed in detail. Irrelevant testimony exists throughout a hearing marked with bitterness between counsel occa-

sioned by counsel for petitioners joining as a party respondent the Regional Counsel for the Immigration and Naturalization Service, one Gilbert Zimmerman.. In the answer to the petition the respondent Immigration authorities make the charge that:

> "Attorney Jacob L. Morewitz willfully and maliciously obstructed the performance of duty of officers of the Immigration and Naturalization Service in this cause, and acted as an agent herein of the petitioners, seeking to frustrate and impede the lawful execution of the laws of the United States".

The Court declined a motion to strike this averment from the answer, but granted the motion of Mr. Morewitz to be dropped as a party to the proceeding in view of the fact that no affirmative relief was sought against Mr. Morewitz. It is regrettable that the Court does not feel justified in striking the rather unusual averments in the answer, but the contention of Mr. Morewitz that Immigration officials abused their discretion in handling petitioners' requests for hospitalization requires a finding by the Court that such discretion was not abused in this case by reason of the insistence of Attorney Morewitz to the effect that petitioners would not be sent to the hospital for examination and treatment until it suited the convenience of Mr. Morewitz.

As heretofore indicated, the petitioner, Savelis, instituted a proceeding in habeas corpus, declaratory judgment and/or injunction in this Court on November 1, 1955, at a time when he was not actually being detained. At the same time Savelis commenced an admiralty action in this Court, and a proceeding by way of attachment in the state court at Newport News, both seeking the same relief. It appears that Savelis was examined by Dr. E. W. Buckingham on October 22, 1955, and re-examined on November 5, 1955, on which latter date the physician prepared a written report as to his condition. In essence, this report recommends "a few days in the hospital under close observation". The contents of this report were communicated to Immigration Inspector Douglas on or about November 6, 1955, and arrangements were made immediately with counsel for the shipowners to care for the hospitalization of Savelis. For reasons hereinafter noted Savelis did not enter the hospital until November 10, 1955, and then under an order of this Court.

The petitioners, Fragidokis and Theofanou, were examined by Dr. Buckingham on November 8, 1955, and the physician recommended hospitalization "if only for a short period of time". The physician makes the rather remarkable statement concerning the entire crew of the vessel involved in the collision (although he examined only the three petitioners) that "they will *all* show the same definite nervous and shock phenomena". Dr. Buckingham was not called as a witness in the case. Following the Court's order of November 10 sending the three petitioners to the United States Public Health Service Hospital, Fragidokis and Theofanou were ready for release on November 14 but remained in the hospital until November 16, at which time they were presented in court. The Medical Officer testified that he could detect nothing wrong with these petitioners and it is apparent that there is a sharp conflict in findings as related to the report of Dr. Buckingham. As to Savelis, he was retained at the hospital to complete certain tests and was discharged on November 18. No report from the hospital has thus far been presented on Savelis.

On November 8, 1955, petitioners, accompanied by their attorney, applied to Inspector Douglas for a change in status from D–1 to D–2. No written or oral evidence was presented indicating that they, or either of them, had any position offered them, or any immediate prospects of their obtaining any position, on any vessel (other than the Michalakis) and that they felt in need of hospitalization. The requests for change in landing permits were refused without prejudice to their

right to reapply while the vessel was still in port.

[19, 20] The need for hospitalization does not call for a change of status from D–1 to D–2. The authority is granted to the Attorney General (in turn delegated to Immigration) to permit, in his discretion, any alien to be paroled into the United States for "emergent reasons". 8 U.S.C.A. § 1284(a) (2); 8 U.S.C.A. § 1182(d) (5). It is the opinion of this Court that, upon production of a certificate from a reputable physician indicating need for medical treatment and/or hospitalization predicated upon an *actual* examination of the seaman, the Immigration authorities, in the proper exercise of discretion, should give due weight to the opinion of the physician in such cases and, under ordinary circumstances, should grant the parole to the end that immediate medical care may be afforded in the interest of justice. Unfortunately, in this particular case, counsel for petitioners stated in rather emphatic language that the petitioners would not be permitted to go to the hospital until he, the attorney, sanctioned such a move. Repeated efforts on the part of Immigration to ascertain when petitioners would be permitted to go to the hospital brought forth the attorney's answer, "It is none of your d——— business".

[21] Faced with this dilemma, what could Immigration do? The petitioners could not be arrested under such circumstances while holding D–1 landing permits. They could hardly have been forcibly taken to the hospital. If, in fact, they were in need of hospitalization, the need was then existing and not at such time in the future as might satisfy the whim of their counsel. If their presence was required for the purpose of signing legal papers, counsel could have readily designated the time when petitioners could have been made available. The interest of the shipowner must likewise be considered. Without knowledge as to whether petitioners will return to the vessel by reason of possible need for hospitalization, the Master would never know when to secure replacements. The petitioners, having stated that they did not intend to return to the vessel and through their counsel having refused to submit to hospitalization, subjected themselves to legal revocation of the D–1 landing permit under the provisions of 8 U.S.C.A. § 1282(b). On November 9, 1955, petitioners were requested to appear at the Immigration office, together with an interpreter. They were individually asked (1) whether they intended to depart from this country on the Michalakis, to which they replied in the negative, and (2) whether they intended to enter the hospital for treatment, to which they replied that they would do so upon receiving instructions from their attorney. In fact the petitioner, Savelis said, "Without my lawyer I won't go anywhere".

Acting upon instructions of the Supervisory Immigration Officer and the Regional Counsel (to whom the Deputy Regional Commissioner had delegated authority to act) Inspector Douglas revoked the D–1 landing permits, took petitioners into custody, and ordered them detained and deported on the Michalakis. The issuance of the order to show cause on the petition for a writ of habeas corpus followed.

[22] The duty of the shipowner to provide hospitalization when necessary is fully recognized, but there is similarly a corresponding duty on the seaman to make himself available for such hospitalization within a reasonable time. The advice of his attorney affords no excuse to the application of this rule where treatment is tendered and there appears no valid reason why the seaman should not submit to hospitalization. 79 C.J.S., Seamen, § 181(b), pp. 646, 647.

[23] Under the factual situation presented herein the revocation of the D–1 landing permits and the subsequent detention on board the vessel for the purpose of deportation constituted a valid exercise of discretion on the part of Inspector Douglas pursuant to 8 U.S.C.A. § 1282(b). While the vessel has now left the country and the legality of the deten-

tion has become moot by reason of the order of this Court transferring petitioners to the United States Public Health Service Hospital, the writ of habeas corpus would be discharged if the vessel was still in port and petitioners were being detained thereon under orders to deport.

[24] There remains for consideration the matter of the disposition of these petitioners. In relying upon the advice of counsel they would ordinarily be bound by their acts. The Court is, however, inclined to the belief that as individuals they were ignorant of their rights. It is the opinion of this Court that they should be granted the right of voluntary departure to the same force and effect as though they had been injured in this port and thereafter hospitalized for a period beyond the time fixed for the departure of the vessel on which they arrived in this country. Whether the Court has the right to grant them a reasonable time to secure employment on another vessel shipping foreign is extremely doubtful, but the Court requests the Immigration authorities to consider same in light of the views expressed herein. Since their release from the hospital the petitioners have been paroled in custody of their counsel. They must now be surrendered to Immigration for such further proceedings as may be required.

The writ of habeas corpus is discharged as moot. The relief prayed for in the petition for declaratory judgment is denied. The temporary restraining order is dissolved. Counsel for respondents will prepare and present an order in accordance with this opinion, which is adopted by the Court as its findings of facts and conclusions of law.

Supplemental Opinion

Following the entry of the Court's final order on November 28, 1955, counsel for petitioners filed a motion to correct the order and enter the same nunc pro tunc. This motion was filed on December 3, 1955, and is made a part of the record.

The attention of the Court was never directed to Rule 49 of the Supreme Court Rules, 28 U.S.C.A., which reads in part as follows:

> "1. Pending review of a decision refusing a writ of habeas corpus, or refusing a rule to show cause why the writ should not be granted, the custody of the prisoner shall not be disturbed, except by order of the court wherein the case is then pending, or of a judge or justice thereof, upon a showing that custodial considerations require his removal. In such cases, the order of the court or judge or justice will make appropriate provision for substitution so that the case will not become moot.
>
> "2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, or discharging a rule to show cause why such a writ should not be granted, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court in which the case is pending, or to a judge or justice thereof, may appear fitting in the circumstances of the particular case."

The petition for writ of habeas corpus, application for declaratory judgment and/or injunction, was filed in this Court on November 10, 1955. On the same date the Court entered an order directing that the petitioners be transferred by the respondent, E. Vlachos, Master of the Greek S. S. Michalakis, to the United States Public Health Service Hospital at Norfolk, Virginia, irrespective of any orders previously issued by the Immigration officials. It will be noted that, prior to the entry of the Court's order, the petitioners were being held in custody on board said vessel under orders from the Immigration authorities to detain and deport. It would appear that it would have then been proper for the Court to enter an order in accordance with Rule 49, subd. 1, making appropriate provisions for substitution so that the case would not become moot.

[25] Both counsel for the petitioners, counsel for the Master of the vessel, and counsel for the Immigration authorities are desirous of preventing the issue of habeas corpus from becoming moot if such is now possible under the circumstances. While the petitioners were in the United States Public Health Service Hospital, the vessel sailed. Since the Master of the vessel could no longer be considered the custodian of the petitioners, it would have been appropriate to enter an order providing for the substitution of the Immigration officials as parties respondent having actual custody of the petitioners during their stay at the United States Public Health Service Hospital, and thereafter until they shipped foreign on another vessel.

For these reasons an order is this day being entered, nunc pro tunc as of November 10, 1955, making appropriate provision for the substitution of the respondent Immigration officials having custody of said petitioners in order that, if possible, the issue of habeas corpus will not become moot.

[26] Counsel for petitioners have likewise filed a motion requesting the Court to contract the transcript of the testimony now being transcribed by the official court reporter to eliminate everything in the transcript except the actual testimony of the witnesses, the rulings of the Court relating thereto and such motions as may have been entertained and acted upon by this Court. It took approximately nineteen hours to hear the testimony and argument of counsel in this case. As significantly pointed out in the opinion of the Court, much of the testimony is entirely irrelevant and the argument of counsel went beyond reasonable limitations. To impose the duty upon the Court to contract the transcript of testimony would probably require as much time as it would to hear the entire case, this due to the fact that there is much bitterness between counsel and it is generally conceded that agreement is impossible. Furthermore, the matter seems to be covered by Rule 9, subd. 2, of the Revised Rules of the United States Court of Appeals for the Fourth Circuit, the pertinent portion of which is as follows:

> "If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so."

Counsel for petitioners have not yet filed the notice of appeal and have made no attempt to designate what part of the transcript of the testimony should be prepared for submission to the Circuit Court of Appeals. At an informal conference on December 12, 1955, the Rule of the Circuit Court of Appeals was directed to the attention of counsel and counsel indicated that this procedure would be followed. For the reasons stated the request of petitioners to require the Court to contract the transcript of testimony is denied.

[27] Petitioners have also requested the Court to permit the transcript of testimony as prepared by the official court reporter to be transcribed without the necessity of payment by petitioners or their counsel. No affidavit in forma pauperis in accordance with 28 U.S.C.A. § 1915, has been filed. There has been no showing to the Court that the petitioners are in fact paupers. There has been no showing to the Court of the necessity of any evidence being transcribed for submission to the Circuit Court of Appeals. It is this Court's opinion that the matters involved are those of law and that the facts have been clearly stated in the Court's opinion. In the case of Adamowski v. Bard, 3 Cir., 193 F.2d 578, certiorari denied 343 U.S. 906, 72 S.Ct. 634, 96 L.Ed. 1324, it was held that the provisions with respect to seamen's suits being prosecuted without the prepayment of fees and costs did not apply to "transcript fees". Counsel for petitioners urge that Rule 54, subd. 2, of the Supreme

Court Rules is applicable, but it will be noted that this rule is entirely foreign to the issue involved. Petitioners' request to have the costs of the transcript paid by the United States or anyone other than the petitioners is denied.

PLASTIC PRODUCTS CORPORATION, a Corporation, Plaintiff,

v.

FILTROL CORPORATION, a Corporation, Defendant.

Murdock Tank & Manufacturing Company, a Corporation, Additional Defendant.

Civ. No. 3504.

United States District Court
N. D. Oklahoma.
Dec. 27, 1955.

Action against buyer by assignee in interest of seller's rights under sale of four plastic tanks to recover alleged unpaid balance of purchase price, wherein buyer counterclaimed against assignee and cross-claimed against seller for breach of express and implied warranties of sale. The District Court, Wallace, J., held, inter alia, that evidence established that failure of tanks was due to faulty design and manufacture rather than careless erection, that preponderance of evidence contravened theory that seller and buyer were joint adventurers in experimental operation, under which theory seller contended that buyer could not be heard to assert that warranty of fitness accompanied sale, and that evidence established that seller had breached both expressed and implied warranties of sale.

Judgment rendered for buyer against seller on cross-claim.

1. Sales ⇐441(3)

In action against buyer by assignee in interest of seller's rights under sale of four plastic tanks to recover alleged unpaid balance of purchase price, wherein buyer counterclaimed against assignee and cross-claimed against seller for breach of express and implied warranties of sale, evidence established that failure of tanks was due to faulty design and manufacture rather than careless erection.

2. Principal and Agent ⇐159(1)

Where seller of four plastic tanks furnished construction specialists to insure competent installation and erection of tanks for buyer was done under direct supervision of such specialists, if any of failures of tanks were traceable to negligent installation, negligence would be imputable to seller through channel of its agents, and assignee of seller's rights would stand in no position to successfully insist on purchase price payment for products unusable because of such careless erectings.

3. Joint Adventures ⇐1.15

In action against buyer by assignee in interest of seller's rights under sale of four plastic tanks to recover alleged unpaid balance of purchase price, wherein buyer counterclaimed against assignee and cross-claimed against seller for breach of express and implied warranties of sale, preponderance of evidence contravened theory that seller and buyer were joint adventurers in experimental operation, under which theory seller contended that buyer could not be heard to assert that warranty of fitness accompanied sale.

4. Sales ⇐441(3)

In action against buyer by assignee in interest of seller's rights under sale of four plastic tanks to recover alleged unpaid balance of purchase price, wherein buyer counterclaimed against assignee and cross-claimed against seller for breach of express and implied warranties of sale, evidence established that seller breached both express and implied warranties of sale.

VALENTINE, POLICE COMMISSIONER OF NEW YORK CITY, ET AL. *v.* UNITED STATES EX REL. B. COLES NEIDECKER.*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 6. Argued October 12, 13, 1936.—Decided November 9, 1936.

1. The Executive has no power to extradite fugitive criminals save such as is conferred by treaty or by Act of Congress. P. 7.
2. The Act of Congress defining the procedure in extradition cases confers no power on the Executive to surrender any person to a foreign government where no extradition treaty or convention provides for such surrender. P. 9.
3. By Article I of the extradition treaty (1909) with France, the two governments mutually agree to deliver up "persons" charged with any of the specified offenses. Article V declares that neither party "shall be bound" to deliver up its own citizens under the stipulations of the convention. *Held:*

   (1) That citizens of the respective parties are thus excepted from the agreement to deliver. P. 10.

   (2) No grant to our Executive of discretionary power to surrender citizens of the United States can be implied from anything in the treaty. *Id.*

   (3) History and practice negative the existence of such implied discretionary power. P. 13.

81 F. (2d) 32, affirmed.

CERTIORARI, 298 U. S. 647, to review judgments which reversed judgments of the District Court dismissing writs of *habeas corpus* sued out by the respondents and remanding them to the custody in which they were held under preliminary warrants of extradition.

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* Together with No. 7, *Valentine, Police Commissioner, et al.* v. *U. S. ex rel. George W. Neidecker;* and No. 8, *Valentine, Police Commissioner, et al.* v. *U. S. ex rel. Aubrey Neidecker.* On writs of certiorari to the Circuit Court of Appeals for the Second Circuit.

Mr. Porter R. Chandler for petitioners.

Mr. Frederic R. Coudert, Jr., with whom *Messrs. Frederic R. Coudert* and *Mahlon B. Doing* were on the brief, for respondents.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Respondents sued out writs of *habeas corpus* to prevent their extradition to France under the Treaty of 1909. 37 Stat. 1526. They are native-born citizens of the United States and are charged with the commission of crimes in France which are among the extraditable offenses specified in the treaty. Having fled to the United States, they were arrested in New York City, on the request of the French authorities, under a preliminary warrant issued by a United States Commissioner and were held for extradition proceedings. By the writs of *habeas corpus* the jurisdiction of the Commissioner was challenged upon the ground that because the treaty excepted citizens of the United States, the President had no constitutional authority to surrender the respondents to the French Republic.

The controlling provisions of the treaty are as follows:

"Article I. The Government of the United States and the Government of France mutually agree to deliver up persons who, having been charged with or convicted of any of the crimes or offences specified in the following article, committed within the jurisdiction of one of the contracting Parties, shall seek an asylum or be found within the territories of the other: Provided That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her

apprehension and commitment for trial if the crime or offence had been there committed.

. . . . . .

"Article V. Neither of the contracting Parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

The Circuit Court of Appeals, reversing the orders of the District Judge, sustained the contention of the repondents and directed their discharge. 81 F. (2d) 32. This Court granted certiorari.

First. The question is not one of policy, but of legal authority. The United States has favored the extradition of nationals of the asylum state and has sought—frequently without success—to negotiate treaties of extradition including them.[1] Several of our treaties have made no exception of nationals.[2] This is true of the treaties with Great Britain from the beginning, of the treaty with France of 1843, and of that with Italy of 1868. *Charlton* v. *Kelly,* 229 U. S. 447, 467. Where treaties have provided for the extradition of persons without exception, the United States has always construed its obligation as embracing its citizens. *Id.,* p. 468. In the opinion in *Charlton* v. *Kelly* we alluded to the fact that it had "come to be the practice with a preponderant number of nations to refuse to deliver its citizens" and it was observed that this exception was of modern origin. The

[1] Moore, Int. Law Dig., vol. IV, § 594; Moore on Extradition, vol. I, pp. 159–162.

[2] Great Britain, 1794, Art. XXVII, 1 Malloy, Treaties, p. 605; 1842, Art. X, *id.,* p. 655; 1889, *id.,* p. 740; 1931, 47 Stat. 2122; France, 1843, 1 Malloy, p. 526; Italy, 1868, *Id.,* p. 966. See, also, Switzerland, 1850, Art. XIII, 2 Malloy, p. 1767; Venezuela, 1860, Art. XXVII, 2 Malloy, p. 1854; Dominican Republic, 1867, Art. XXVII, 1 Malloy, p. 413; Nicaragua, 1870, 2 Malloy, p. 1287; Orange Free State, 1871, Article VIII, 2 Malloy, p. 1312; Ecuador, 1872, 1 Malloy, p. 436.

beginning of the exemption was traced to the practice between France and the Low Countries in the eighteenth century. And we found that owing "to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation." Accordingly we divided the treaties in force into two classes, "those which expressly exempt citizens and those which do not." *Id.*, pp. 466, 467.

The effect of the exception of citizens in the treaty with France of 1909—now under consideration—must be determined in the light of the principles which inhere in our constitutional system. The desirability—frequently asserted by the representatives of our Government and demonstrated by their arguments and the discussions of jurists—of providing for the extradition of nationals of the asylum state is not a substitute for constitutional authority. The surrender of its citizens by the Government of the United States must find its sanction in our law.

It cannot be doubted that the power to provide for extradition is a national power; it pertains to the national government and not to the States. *United States* v. *Rauscher*, 119 U. S. 407, 412–414. But, albeit a national power, it is not confided to the Executive in the absence of treaty or legislative provision. At the very beginning, Mr. Jefferson, as Secretary of State, advised the President: "The laws of the United States, like those of England, receive every fugitive, and no authority has been given to their Executives to deliver them up." [3] As stated by John Bassett Moore in his treatise on Extradition—summarizing the precedents—"the general opinion

[3] Quoted in Moore on Extradition, vol. I, pp. 22, 23; Moore, Int. Law Dig., vol. IV, p. 246.

has been, and practice has been in accordance with it, that in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." [4] Counsel for the petitioners do not challenge the soundness of this general opinion and practice. It rests upon the fundamental consideration that the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Second. Whatever may be the power of the Congress to provide for extradition independent of treaty, that power has not been exercised save in relation to a foreign country or territory "occupied by or under the control of the United States." Act of June 6, 1900, c. 793, 31 Stat. 656. 18 U. S. C. 652. See *Neely* v. *Henkel,* 180 U. S. 109, 122. Aside from that limited provision, the Act of Congress relating to extradition simply defines the procedure to carry out an existing extradition treaty or convention.[5]

The provision is that—"*Whenever there is a treaty or convention for extradition* between the Government of the United States and any foreign government"—a proceeding may be instituted to procure the surrender of a person charged with the commission of a crime specified in the treaty or convention. Upon the apprehension of

[4] Moore on Extradition, vol. I, p. 21.

[5] Moore on Extradition, vol. I, p. 50.

the accused, he is entitled to a hearing and, upon evidence deemed to be sufficient to sustain the charge "under the provisions of the proper treaty or convention," the charge with the evidence is to be certified to the Secretary of State to the end that a warrant may issue upon the requisition of the proper authorities of such foreign government, *"for the surrender of such person, according to the stipulations of the treaty or convention."* R. S. 5270; 18 U. S. C. 651.

It is manifest that the Act does not attempt to confer power upon the Executive to surrender any person, much less a citizen of the United States, to a foreign government where an extradition treaty or convention does not provide for such surrender. The question, then, is the narrow one whether the power to surrender the respondents in this instance is conferred by the treaty itself.

Third.—It is a familiar rule that the obligations of treaties should be liberally construed so as to give effect to the apparent intention of the parties. *Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Jordan* v. *Tashiro*, 278 U. S. 123, 127; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293, 294. But, in this instance, there is no question for construction so far as the obligations of the treaty are concerned. The treaty is explicit in the denial of any obligation to surrender citizens of the asylum state—"Neither of the contracting Parties shall be bound to deliver up its own citizens."

Does the treaty, while denying an obligation in such case, contain a grant of power to surrender a citizen of the United States in the discretion of the Executive? The Constitution declares a treaty to be the law of the land. It is consequently, as Chief Justice Marshall said in *Foster* v. *Neilson*, 2 Pet. 253, 314, "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." See, also, *Head Money Cases*, 112 U. S. 580, 598;

United States v. *Rauscher, supra,* p. 418. Examining the treaty in that aspect, it is our duty to interpret it according to its terms. These must be fairly construed, but we cannot add to or detract from them.

Obviously the treaty contains no express grant of the power now invoked. Petitioners point to Article I which states that the two governments "mutually agree to deliver up persons" who are charged with any of the specified offences. Petitioners urge that the word "persons" includes citizens of the asylum state as well as all others. But Article I is the agreement to deliver. It imposes the obligation of that agreement. Article I does not purport to grant any power to surrender save as the power is related to and derived from that obligation. The word "persons" in Article I describes those who fall within the agreement and with respect to whom the obligation is assumed. As Article V provides that there shall be no obligation on the part of either party to deliver up its own citizens, the latter are necessarily excepted from the agreement in Article I and from the "persons" there described. The fact that the exception is contained in a separate article does not alter its effect. That effect is precisely the same as though Article I had read that the two governments "mutually agree to deliver up persons except its own citizens or subjects."

May a grant to the Executive of discretionary power to surrender citizens of the United States be implied? Petitioners seek to find ground for this implication by comparing the expression in Article V "Neither of the contracting parties shall be bound," in relation to the surrender of citizens, with the phrase in Article VI that "A fugitive criminal shall not be surrendered" if the offence charged is of a political character, and the clause in Article VIII that extradition "shall not be granted" where prosecution is barred by limitation according to the laws of the asylum country. This difference in the phrasing

of denials of obligation would be at the best an extremely tenuous basis for implying a power which in order to exist must be affirmatively granted. Of far greater significance is the fact that a familiar clause—found in several of our treaties—which qualifies the exception of citizens by expressly conferring discretionary power to surrender them was omitted in the treaty with France.

The treaty with Japan of 1886 provided in Article VII [6]—

"Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so."

A similar provision is found in the extradition treaties with the Argentine Republic, of 1896, and with the Orange Free State, of 1896.[7] The treaties with Mexico, of 1899, with Guatemala, of 1903, with Nicaragua, of 1905, and with Uruguay, of 1905, expressly lodge the discretionary power with the "executive authority." Thus in the treaty with Mexico of 1899 we find the following article (Art. IV):

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but the executive authority of each shall have

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[6] 1 Malloy, 1027. Quoted in *Charlton* v. *Kelly*, 229 U. S. 447, 467.

[7] The provision of the treaty with the Argentine Republic, 1896, Art. 3, 1 Malloy, 26, is as follows:

"In no case shall the nationality of the person accused be an impediment to his extradition, under the conditions stipulated by the present treaty, but neither Government shall be bound to deliver its own citizens for extradition under this convention; but either shall have the power to deliver them up, if, in its discretion it be deemed proper to do so."

The same phraseology is used in the treaty with the Orange Free State, 1896, Art. V, 2 Malloy, 1316.

the power to deliver them up, if, in its discretion, it be deemed proper to do so." [8]

We must assume that the representatives of the United States had these clauses before them when they negotiated the treaty with France and that the omission was deliberate. And the fact that our Government had favored extradition treaties without excepting citizens puts the omission of the qualifying grant of discretionary power in a strong light.

Historical background and administrative practice furnish no warrant for reading into the treaty with France a grant which the parties failed to insert. History and practice not only do not support, but they rather negative, the claim of an implied discretionary power. The language of Article V of the treaty with France first appears in our extradition treaty with Prussia in 1852,[9] and it was repeated in a number of later treaties including the Mexican treaty of 1861.[10] It seems that the question as to the effect of the provision first arose under the last-mentioned treaty. Mr. Moore reviews the cases.[11] In 1871 the United States requested the surrender of fugitives who had escaped to Mexico. It appeared that they were Mexican citizens. The Mexican Government refused surrender, stating that its action "should be in strict conformity with the stipulations of the treaty of extradition" and

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[8] 1 Malloy, 1186. The treaties with Guatemala, 1903, Art. V, 1 Malloy, 881, and with Nicaragua, 1905, 2 Malloy, 1295, have the same provision.

The treaty with Uruguay, 1905, Art. X, 2 Malloy, 1828, provides: "The obligation to grant extradition shall not in any case extend to the citizens of the two parties, but the executive authority of each shall have power to deliver them up, if, in its discretion, it is deemed proper to do so."

[9] 2 Malloy, 1503.

[10] 1 Malloy, 1127.

[11] Moore on Extradition, vol. 1, pp. 164–167; Moore, Int. Law. Dig., vol. IV, pp. 301–303.

with "the practice observed" by the Government of the United States toward the Mexican Government "in similar cases." In 1874, one Perez, a Mexican, committed a murder in Texas and escaped to Mexico. Our Secretary of State, Mr. Fish, instructed the American Ambassador that although the surrender could not be demanded as of right and would not be asked as a favor, or even accepted with an understanding that it would be reciprocated, the circumstances might be made known to the Mexican Government with a view to ascertain whether it would voluntarily surrender the fugitive. The Mexican Government declined the surrender. In another case, arising in 1877, the question of the power of the Mexican Government to surrender its citizens to the United States came before its federal supreme court. While it appeared that the fact of Mexican citizenship was not conclusively established, the court was of the view that the individual guarantees of the Mexican Constitution would not be violated by the surrender.

The question was elaborately considered in the case of Trimble in 1884. He was an American citizen whose extradition was demanded by the Mexican Government. Our Government refused surrender. Mr. Frelinghuysen, Secretary of State, took the ground that as the treaty negatived the obligation to surrender, the President was not invested with legal authority to act. While it is true that Secretary Frelinghuysen later concluded that the question was of such importance that it should receive judicial determination, the view he entertained as to the President's lack of power was cogently stated.[12] Re-

[12] Mr. Frelinghuysen's views appear in a report to the Senate. Sen. Ex. Doc. 98, 48th Cong., 1st sess. See Moore on Extradition, vol. 1, pp. 167, 168. Discussing the constitutional powers of the President, Mr. Frelinghuysen concluded:

"Thus it appears that, by the opinions of several Attorneys-General, by the decisions of our courts, and by the rulings of the Depart-

ferring to that view, Mr. Moore adds: "To this position the government of the United States has adhered." [13]

Secretary Bayard in the case of Hudson, in 1888, followed the ruling in the Trimble case. He said: "The treaty provision referred to, which is found similarly stated in

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ment of State, the President has not, independent of treaty provision, the power of extraditing an American citizen; and the only question to be considered is whether the treaty with Mexico confers that power.

"By the treaty with Mexico proclaimed June 20, 1862, this country places itself under obligations to Mexico to surrender to justice persons accused of enumerated crimes committed within the jurisdiction of Mexico who shall be found within the territory of the United States; and further provides that that obligation shall not extend to the surrender of American citizens. The treaty confers upon the President no affirmative power to surrender an American citizen. The treaty between the United States and Mexico creates an obligation on the part of the respective governments, and does no more, and where the obligation ceases the power falls. It is true that treaties are the laws of the land, but a statute and a treaty are subject to different modes of construction. If a statute by the first section should say, The President of the United States shall surrender to any friendly power any person who has committed a crime against the laws of that power, but shall not be bound so to surrender American citizens, it might be argued, perhaps correctly, that the President had a discretion whether he would or would not surrender an American citizen. But a treaty is a contract, and must be so construed. It confers upon the President only the power to perform that contract. I understand the treaty with Mexico as reading thus: The President shall be bound to surrender any person guilty of crime, unless such person is a citizen of the United States.

"Such being the construction of the treaty, and believing that the time to prevent a violation of the law of extradition was before the citizens left the jurisdiction of the United States, I telegraphed the Governor of Texas that an American citizen could not legally be held under the treaty for extradition.

"It would be a great evil that those guilty of high crime, whether American citizens or not, should go unpunished; but even that result could not justify an usurpation of power."

[13] Moore on Extradition, vol. I, p. 167.

many of our extradition treaties, was held to negative any obligation to surrender, and thus to leave the authorities of this government without authority to act in such a case. After due consideration, the department is of opinion that the construction given to the treaty in the *Trimble Case* is correct." See *Ex parte McCabe*, 4 Fed. 363, 379. Secretary Blaine, in 1891, in refusing to ask for the surrender of Mexican citizens, took the same position, saying: "In view of this," (the Trimble case) "and several prior and subsequent cases in which a similar construction has been given to the treaty, the government is precluded from demanding the extradition of the fugitives in the present instance." *Id.*

In this situation, the question of the construction of the treaty with Mexico came before the District Court of the United States for the Western District of Texas in 1891. Mrs. McCabe, an American citizen who was held for extradition proceedings on the charge that she had committed the crime of murder in Mexico, sued out a writ of *habeas corpus*. In an elaborate opinion reviewing the precedents, Judge Maxey ruled that there was no authority to surrender and directed her discharge from custody. *Ex parte McCabe, supra.* The case was not appealed.

In the light of this concurrence of administrative and judicial views a new extradition treaty with Mexico was negotiated (1899). That treaty, as we have seen, repeated the exception with respect to citizens but, following the precedent of the treaties with Japan, the Argentine Republic and the Orange Free State,[14] added the qualifying words "but the executive authority of each shall have the power to deliver them up, if, in its discretion, it be deemed proper to do so." And the same qualification was inserted in the later treaties above mentioned.[15]

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[14] See Note 7.

[15] See Note 8.

Petitioners insist that the precedents fall short of showing a uniform course of practical construction favorable to the respondents. The argument is unavailing. What is more to the point is that administrative practice is not shown to be favorable to the petitioners. Strictly the question is not whether there had been a uniform practical construction denying the power, but whether the power had been so clearly recognized that the grant should be implied. The administrative rulings to which we have referred make the latter conclusion wholly inadmissible.

The treaty with France of 1843 made no exception of citizens. France, however, refused to recognize an obligation under that treaty to surrender her citizens.[16] In inserting the exception in the new treaty, a clause was chosen under which Secretaries of State and a federal court had held that the President had no discretionary power to surrender citizens of this country. Notwithstanding this, that excepting clause was inserted without qualification, and a familiar clause granting a discretionary power was omitted. No provision was inserted to confer such a power. It was upon that basis that the treaty was negotiated and ratified. In these circumstances we know of no rule of construction which would permit us to supply the omission.

Against these considerations, the inference sought to be drawn from the French "exposé des motifs" accompanying the treaty, and more particularly from the "exposé" accompanying the Franco-British treaty of 1908, is of slight weight.[17]

Petitioners strongly rely upon the decision in England in *In re Galwey* [1896], 1 Q. B. D. 230; compare *Reg.* v. *Wilson,* 3 Q. B. D. 42 (1877). But, as the Circuit Court

[16] Moore, Int. Law Dig., vol. IV, p. 298.

[17] Documents Parlementaires (1909), Chambre des Deputés, Annexe 2391; *Id.*, Sénat, Annexe 2338.

of Appeals points out, the Anglo-Belgian treaty there under consideration had its own history and background—quite different from that which we have here—upon which the case turned. It does not present a persuasive analogy.

Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.

However regrettable such a lack of authority may be, the remedy lies with the Congress, or with the treaty-making power wherever the parties are willing to provide for the surrender of citizens, and not with the courts.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE STONE took no part in the consideration or decision of this case.

TENNESSEE PUBLISHING CO. *v.* AMERICAN NATIONAL BANK ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 48. Argued October 22, 23, 1936.—Decided November 9, 1936.

1. Constitutional questions should not be decided, by anticipation, upon records not necessarily presenting them. P. 22.
2. Under § 77B of the Bankruptcy Act, if the plan of reorganization is neither fair nor feasible, the District Judge, upon so finding, can proceed no further with the plan and is authorized to dismiss the petition. *Id.*

81 F. (2d) 463, affirmed.

on the theory that an agreement to advocate polygamy is unlawful. The trial court certainly proceeded on this theory, if it did not go further and consider discussion of polygamy as injurious to public morals as well. Therefore, even assuming that appellants may have been guilty of conduct which the state may properly restrain, the convictions should be set aside. A general verdict was returned, and hence it is impossible to determine whether the jury convicted appellants on the ground that they conspired merely to advocate polygamy or on the ground that the conspiracy was intended to incite particular and immediate violations of the law. Since therefore the convictions may rest on a ground invalid under the Federal Constitution, I would reverse the judgment of the state court. Cf. *Thomas* v. *Collins, supra; Williams* v. *North Carolina,* 317 U. S. 287; *Stromberg* v. *California,* 283 U. S. 359.

CHICAGO & SOUTHERN AIR LINES, INC. *v.* WATERMAN STEAMSHIP CORP.

NO. 78. CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.*

Argued November 19, 1947.—Decided February 9, 1948.

Section 1006 of the Civil Aeronautics Act, authorizing judicial review of certain orders of the Civil Aeronautics Board, does not apply to orders granting or denying applications of citizens of the United States for authority to engage in overseas and foreign air transportation which are subject to approval by the President under § 801. Pp. 104–114.

(a) Orders of the Board as to certificates for overseas or foreign air transportation are not mature and therefore are not susceptible of judicial review until they are made final by presidential approval, as required by § 801. P. 114.

*Together with No. 88, *Civil Aeronautics Board* v. *Waterman Steamship Corp.*, also on certiorari to the same court.

(b) After such approval has been given, the final orders embody presidential discretion as to political matters beyond the competence of the courts to adjudicate. P. 114.

159 F. 2d 828, reversed.

The Circuit Court of Appeals denied a motion to dismiss a petition seeking review of certain orders of the Civil Aeronautics Board granting and denying certificates of public convenience and necessity authorizing certain American air carriers to engage in overseas and foreign air transportation after such orders had been approved by the President under § 801 of the Civil Aeronautics Act. 159 F. 2d 828. This Court granted certiorari. 331 U. S. 802. *Reversed*, p. 114.

R. Emmett Kerrigan argued the cause and filed a brief for petitioner in No. 78.

Robert L. Stern argued the cause for petitioner in No. 88. With him on the brief were *Solicitor General Perlman, Robert W. Ginnane, Emory T. Nunneley* and *Oliver Carter.*

Bon Geaslin argued the cause for respondent. With him on the brief were *Francis H. Inge* and *Joseph M. Paul, Jr.*

MR. JUSTICE JACKSON delivered the opinion of the Court.

The question of law which brings this controversy here is whether § 1006 of the Civil Aeronautics Act, 49 U. S. C. § 646, authorizing judicial review of described orders of the Civil Aeronautics Board, includes those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation which are subject to approval by the President under § 801 of the Act. 49 U. S. C. § 601.

By proceedings not challenged as to regularity, the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago and Southern Air Lines, a rival applicant. Routes sought by both carrier interests involved overseas air transportation, § 1 (21) (b), between Continental United States and Caribbean possessions and also foreign air transportation, § 1 (21) (c), between the United States and foreign countries. Waterman filed a petition for review under § 1006 of the Act with the Circuit Court of Appeals for the Fifth Circuit. Chicago and Southern intervened. Both the latter and the Board moved to dismiss, the grounds pertinent here being that because the order required and had approval of the President, under § 801 of the Act, it was not reviewable. The Court of Appeals disclaimed any power to question or review either the President's approval or his disapproval, but it regarded any Board order as incomplete until court review, after which "the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." 159 F. 2d 828. Accordingly, it refused to dismiss the petition and asserted jurisdiction. Its decision conflicts with one by the Court of Appeals for the Second Circuit. *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810. We granted certiorari both to the Chicago and Southern Air Lines, Inc. (No. 78) and to the Board (No. 88) to resolve the conflict.

Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is "interstate air commerce," "overseas air commerce" or "foreign air commerce," each being appropriately defined. 49 U. S. C. § 401 (20). All air carriers by similar procedures must obtain from the Board certifi-

cates of convenience and necessity by showing a public interest in establishment of the route and the applicant's ability to serve it. But when a foreign carrier asks for any permit, or a citizen carrier applies for a certificate to engage in any overseas or foreign air transportation, a copy of the application must be transmitted to the President before hearing; and any decision, either to grant or to deny, must be submitted to the President before publication and is unconditionally subject to the President's approval. Also the statute subjects to judicial review "any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act." It grants no express exemption to an order such as the one before us, which concerns a citizen carrier but which must have Presidential approval because it involves overseas and foreign air transportation. The question is whether an exemption is to be implied.

This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review. Examples are set forth by Chief Justice Hughes in *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130.

The Waterman Steamship Corporation urges that review of the problems involved in establishing foreign air routes are of no more international delicacy or strategic importance than those involved in routes for water

carriage. It says, "It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea." From this premise it reasons that we should interpret this statute to follow the pattern of judicial review adopted in relation to orders affecting foreign commerce by rail, *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, or communications by wire, *United States* v. *Western Union Telegraph Co.*, 272 F. 893, or by radio, *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 68 App. D. C. 336, 97 F. 2d 641; and it likens the subject-matter of aeronautics legislation to that of Title VI of the Merchant Marine Act of 1936, 46 U. S. C. § 1171, and the function of the Aeronautics Board in respect to overseas and foreign air transportation to that of the Maritime Commission to such commerce when water-borne.

We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While trans-

port by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern governments, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensional transit.

The "public interest" that enters into awards of routes for aerial carriers, who in effect obtain also a sponsorship by our government in foreign ventures, is not confined to adequacy of transportation service, as we have held when that term is applied to railroads. *Texas* v. *United States,* 292 U. S. 522, 531. That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge. Congressional hearings and debates extending over several sessions and departmental studies of many years show that the legislative and administrative processes have proceeded in full recognition of these facts.

In the regulation of commercial aeronautics, the statute confers on the Board many powers conventional in other carrier regulation under the Congressional commerce power. They are exercised through usual procedures and apply settled standards with only customary administrative finality. Congress evidently thought of the administrative function in terms used by this Court of another of its agencies in exercising interstate commerce power: "Such a body cannot in any proper sense be

characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States,* 295 U. S. 602, 628. Those orders which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down.

But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order. 49 U. S. C. § 601. Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.

Congress may of course delegate very large grants of its power over foreign commerce to the President. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *United States* v. *Bush & Co.,* 310 U. S. 371. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For

present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.

These considerations seem controlling on the question whether the Board's action on overseas and foreign air transportation applications by citizens are subject to revision or overthrow by the courts.

It may be conceded that a literal reading of § 1006 subjects this order to re-examination by the courts. It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below. The letter of the text might with equal consistency be construed to require any one of three things: first, judicial review of a decision by the President; second, judicial review of a Board order before it acquires finality through Presidential action, the court's decision on review being a binding limitation on the President's action; third, a judicial review before action by the President, the latter being at liberty wholly to disregard the court's judgment. We think none of these results is required by usual canons of construction.

In this case, submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval. Only at that stage was review sought,

and only then could it be pursued, for then only was the decision consummated, announced and available to the parties.

While the changes made at direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full [redacted] isions as to foreign policy is political, not judicial. Such decisions are wholly [redacted] itical departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intr[redacted] *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.

The court below thought that this disability could be overcome by regarding the Board as a regulatory agent of Congress to pass on such matters as the fitness, willingness and ability of the applicant, and that the Board's own determination of these matters is subject to review. The court, speaking of the Board's action, said: "It is not final till the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." The legal incongruity of interposing judicial review between the action by the Board and that by the President are as great as the practical disadvantages. The latter arise chiefly from the inevitable delay and obstruction in the midst of the administrative proceedings. The former arises from the fact that until the President acts there is no final administrative determination to review. The statute would hardly have forbidden publication before submission if it had contemplated interposition of the courts at this intermediate stage. Nor could it have expected the courts to stay the President's hand after submission while they deliberate on the inchoate determination. The difficulty is manifest in this case. Review could not be sought until the order was made available, and at that time it had ceased to be merely the Board's tentative decision and had become one finalized by Presidential discretion.

Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor. It may be a step which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But admin-

istrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131. The dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination even of the Board's ultimate action, and after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion.

The court below considered that after it reviewed the Board's order its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments

not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case,* 2 Dall. 409; *United States* v. *Ferreira,* 13 How. 40; *Gordon* v. *United States,* 117 U. S. 697; *In re Sanborn,* 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423; *Muskrat* v. *United States,* 219 U. S. 346; *United States* v. *Jefferson Electric Co.,* 291 U. S. 386.

We conclude that orders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate. This makes it unnecessary to examine the other questions raised. The petition of the Waterman Steamship Corp. should be dismissed.

Judgment reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE RUTLEDGE concur, dissenting.

Congress has specifically provided for judicial review of orders of the Civil Aeronautics Board of the kind involved in this case. That review can be had without intruding on the exclusive domain of the Chief Executive. And by granting it we give effect to the interests of both the Congress and the Chief Executive in this field.

The Commerce Clause of the Constitution grants Congress control over interstate and foreign commerce. Art. I, § 8. The present Act is an exercise of that power. Congress created the Board and defined its functions. It specified the standards which the Board is to apply in granting certificates for overseas and foreign

air transportation.[1] It expressly made subject to judicial review orders of the Board granting or denying certificates to citizens and withheld judicial review where the applicants are not citizens.[2] If this were all, there would be no question.

But Congress did not leave the matter entirely to the Board. Recognizing the important role the President plays in military and foreign affairs, it made him a participant in the process. Applications for certificates of the type involved here are transmitted to him before hearing, all decisions on the applications are submitted to him before their publication, and the orders are "subject to" his approval.[3] Since his decisions in these matters are of a character which involves an exercise of his discretion in foreign affairs or military matters, I do not think Congress intended them to be subject to judicial review.

But review of the President's action does not result from reading the statute in the way it is written.

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[1] See §§ 401, 408 (b), 52 Stat. 987, 1001, 49 U. S. C. §§ 481, 488.

[2] Section 1006 (a) provides in part: "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order." 52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. § 646 (a).

Section 401 (a) requires every air carrier to have a certificate before engaging in air transportation. 52 Stat. 987, 49 U. S. C. § 481 (a). There is the same requirement in case of a foreign air carrier. § 402 (a), 52 Stat. 991, 49 U. S. C. § 482 (a). An air carrier is defined as a citizen who undertakes to engage in air transportation [§ 1 (2), 52 Stat. 977, 49 U. S. C. § 401 (2)], and a foreign air carrier is defined as any person not a citizen who undertakes to engage in foreign air transportation. § 1 (19), 52 Stat. 978, 49 U. S. C. § 401 (19).

[3] § 801, 52 Stat. 1014, 49 U. S. C. § 601.

Congress made reviewable by the courts only orders "issued by the Board under this Act." [4] Those orders can be reviewed without reference to any conduct of the President, for that part of the orders which is the work of the Board is plainly identifiable.[5] The President is presumably concerned only with the impact of the order on foreign relations or military matters. To the extent that he disapproves action taken by the Board, his action controls. But where that is not done, the Board's order has an existence independent of Presidential approval, tracing to Congress' power to regulate commerce. Approval by the President under this statutory scheme has relevance for purposes of review only as indicating *when* the action of the Board is reviewable. When the Board has finished with the order, the administrative function is ended. When the order fixes rights, on clearance by the President, it becomes reviewable. But the action of the President does not broaden the review. Review is restricted to the action of the Board and the Board alone.

The statute, as I construe it, contemplates that certificates issued will rest on orders of the Board which satisfy the standards prescribed by Congress. Presidential approval cannot make valid invalid orders of the Board. His approval supplements rather than supersedes Board action. Only when the Board has acted within the limits of its authority has the basis been laid for issuance of certificates. The requirement that a valid Board order underlie each certificate thus protects the President as well as the litigants and the public interest against unlawful Board action.

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[4] § 1006 (a), *supra*, note 2.

[5] The Board had consolidated for hearing 29 applications for certificates to engage in air transportation which were filed by 15 applicants. The President's partial disapproval of the proposed disposition of these applications did not relate to the applications involved in this case. As to them, the action of the Board stands unaltered.

The importance of the problem is evidenced by the character of cases controlled by this decision. The present ruling is not limited to cases granting or denying certificates for air transportation to and from foreign countries. It also denies power to review orders governing air transportation between two points in Alaska, between two points in Hawaii, between Seattle and Juneau, between New Orleans and San Juan.[6] All of those are now beyond judicial review. And so they should be so far as conduct of the President is concerned. But Congress has commanded otherwise as to action by the Board. The Board can act in a lawless way. With that in mind, Congress sought to preserve the integrity of the administrative process by making judicial review a check on Board action. That was the aim of Congress, now defeated by a legalism which in my view does not square with reality.

In this petition for review, the respondent charged that the Board had no substantial evidence to support its findings that Chicago and Southern Air Lines was fit, willing and able to perform its obligations under the certificate; and it charged that when a change of conditions as to Chicago and Southern Air Lines' ability to perform was called to the attention of the Board, the Board refused to reopen the case. I do not know whether there is merit in those contentions. But no matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders

[6] By § 801 the approval of the President extends to orders "authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession." 52 Stat. 1014, 49 U. S. C. § 601. Section 1 (21) includes in overseas air transportation commerce between a place in the continental United States and a place in a Territory or possession of the United States, or between a place in a Territory or possession of the United States and a place in any other Territory or possession. 52 Stat. 979, 49 U. S. C. § 401 (21).

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questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.

Judicial review would assure the President, the litigants and the public that the Board had acted within the limits of its authority. It would carry out the aim of Congress to guard against administrative action which exceeds the statutory bounds. It would give effect to the interests of both Congress and the President in this field.

SEABOARD AIR LINE RAILROAD CO. *v.* DANIEL, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 390. Argued January 8, 1948.—Decided February 16, 1948.

In a railroad reorganization under § 5 of the Interstate Commerce Act, as amended by the Transportation Act of 1940, a Virginia corporation, with the approval of the Interstate Commerce Commission, succeeded to the ownership and operation of a unitary railroad system in six states, including South Carolina. In granting its approval, the Commission found that, for the corporation to comply with the laws of South Carolina forbidding the ownership and operation of railroads in the State by foreign corporations, would result in "substantial delay and needless expense" and "would not be consistent with the public interest." The corporation sued in the Supreme Court of South Carolina to enjoin the State Attorney General from enforcing these state laws against it or collecting the heavy statutory penalties for noncompliance. *Held:*

1. The State Supreme Court had jurisdiction of the suit, with power to determine whether the Commission's order exempted the corporation from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order. Pp. 122–123.

International organizations, privileges, exemptions, and immunities of officers, employees, and their families, see section 288d of Title 22, Foreign Relations and Intercourse.

Original and exclusive jurisdiction of—

District courts of all actions and proceedings against consuls or vice consuls of foreign states, see section 1351 of Title 28, Judiciary and Judicial Procedure.

Supreme Court of all actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants not inconsistent with the law of nations, see section 1251(a), (2) of Title 28.

Original but not exclusive jurisdiction of Supreme Court of all actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties, see section 1251(b) (1) of Title 28.

Library References

Aliens ⇐46. C.J.S. Aliens § 84 et seq.

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment of Commissioner

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such istructions;[1] and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He is authorized, in accordance with the civil-service laws and regulations and chapter 51 and subchapter III of chapter 53 of Title 5, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other inde-

and immunities of officers, em-
of Title 22, Foreign Relations and

against consuls or vice consuls of
Judiciary and Judicial Procedure.
against ambassadors or other public
or domestic servants not in-
section 1251(a), (2) of Title 28.
Court of all actions or proceedings
of foreign states or to which
parties, see section 1251(b) (1) of

Aliens § 84 et seq.

Attorney General and
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with the administra-
all other laws relating
aliens, except insofar as
functions, and duties
of State, the officers of
or consular officers:
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pendent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

(b) The Commissioner shall be a citizen of the United States and shall be appointed by the President, by and with the advice and consent of the Senate. He shall be charged with any and all responsibilities and authority in the administration of the Service and of this chapter which are conferred upon the Attorney General as may be delegated to him by the Attorney General or which may be prescribed by the Attorney General.

June 27, 1952, c. 477, Title I, § 103, 66 Stat. 173.

[1] So in original. Probably should read "instructions".

Historical Note

References in Text. The civil service laws referred to in subsec. (a), are classified generally to Title 5, Government Organization and Employees.

Codification. Provisions of subsec. (b) which prescribed the annual compensation of the Commissioner were omitted to conform with the provisions of the Federal Executive Salary Schedule. See section 5316(44) of Title 5, Government Organization and Employees.

Emergency Plans for Alien Control. Attorney General to develop emergency plans for control of aliens and control of entry and departure, see section 2(e) of Ex.Ord.No.11310, Oct. 11, 1966, 31 F.R. 13199, set out as a note under section 509 of Title 28, Judiciary and Judicial Procedure.

Legislative History. For legislative history and purpose of Act June 27, 1952, see 1952 U.S.Code Cong. and Adm.News, p. 1653.

Cross References

Bond or undertaking as prerequisite to issuance of visas to aliens with certain physical disabilities or likely to become public charges, see section 1201(g) of this title.

Definition of the term—
- Alien, see section 1101(a) (3) of this title.
- Attorney General, see section 1101(a) (5) of this title.
- Commissioner, see section 1101(a) (8) of this title.
- Consular officer, see section 1101(a) (9) of this title.
- Entry, see section 1101(a) (13) of this title.
- Immigration laws, see section 1101(a) (17) of this title.
- Service, see section 1101(a) (34) of this title.

Duty of Attorney General to provide Commissioner of Immigration and Naturalization with an office, see section 1552 of this title.

Library References

Aliens ⇐42-44.
Attorney General ⇐6.

C.J.S. Aliens §§ 80-83.
C.J.S. Attorney General §§ 5, 6.

Notes of Decisions

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1. Constitutionality

This chapter is not invalid as unconstitutionally delegating to immigration service power to administer this chapter. U. S. ex rel. Circella v. Sahli, C.A.Ill. 1954, 216 F.2d 33, certiorari denied 75 S.Ct. 525, 348 U.S. 964, 99 L.Ed. 752.

Administration by Attorney General of powers which Congress possesses over immigration and naturalization of aliens is not an unconstitutional delegation of power. Cermeno-Cerna v. Farrell, D.C. Cal.1968, 291 F.Supp. 521.

2. Power of Congress

Power of Congress to legislate in connection with immigration and naturalization of aliens is plenary. Cermeno-Cerna v. Farrell, D.C.Cal.1968, 291 F. Supp. 521.

Congress may exclude aliens from the United States, prescribe the conditions under which they may enter, provide for their supervision, regulate their conduct, and fix their rights while in the United States. U. S. v. Frederick, D.C.Tex.1943, 50 F.Supp. 769, affirmed 146 F.2d 488, certiorari denied 65 S.Ct. 866, 324 U.S. 861, 89 L.Ed. 1418.

3. Administration of immigration and nationality laws

Commissioner and Secretary of Labor had authority to promulgate immigration rule requiring alien coming to the United States as a temporary visitor to have a passport and visa. U. S. ex rel. Di Mieri v. Uhl, C.C.A.N.Y.1938, 96 F.2d 92.

Since Congress had intrusted administration of immigration laws to Department of Labor, the Department of Justice had no legal right or power to deal with exclusion or expulsion of aliens. Colyer v. Skeffington, D.C.Mass.1920, 265 F. 17, reversed on other grounds 277 F. 129.

The Attorney General, as person charged with administration of immigration and naturalization laws, has broad discretion in the implementing of the policies of such laws. Royalton College, Inc. v. Clark, D.C.Vt.1969, 295 F.Supp. 365.

The word "jurisdiction" in former section 342a of Title 5 giving Department of Justice "jurisdiction" over immigration of aliens in the United States is synonymous with "power to act", and means that Department of Justice alone has power to administer and enforce the immigration laws. U. S. v. White, D. C.Cal.1946, 69 F.Supp. 562.

The Secretary of Labor was authorized to recommend to the Secretary of State for his action under former section 222 of this title [now covered by subsec. (a) of this section] proposed regulation forbidding a consular officer to refuse a visa to an alien on the ground that he was likely to become a public charge where the Secretary of Labor had accepted a public charge bond in advance of the alien's arrival in this country. 1933, 37 Op.Atty.Gen. 374.

4. Delegation of power

This section setting out powers and duties of Attorney General and the regulations issued thereunder give the Board of Immigration Appeals the authority and right to exercise powers of the Attorney General with respect to any discretionary relief under this chapter. Wolf v. Boyd, C.A.Wash.1956, 238 F.2d 249, certiorari denied 77 S.Ct. 814, 353 U.S. 936, 1 L.Ed.2d 759, rehearing denied 77 S.Ct. 1282, 353 U. S. 989, 1 L.Ed.2d 1146.

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...diction" in former section ...giving Department of ...over immigration ...United States is synonymous ...to act", and means ...of Justice alone has ...and enforce the im... U. S. v. White, D. ...

...Labor was authorized ...Secretary of State ...former section 222 of ...by subsec. (a) of ...regulation forbidding ...to refuse a visa ...ground that he was ...public charge where ...had accepted a ...advance of the al... country. 1933, 37

...out powers and ...and the regula... give the Board ...authority and ...of the Attorney ...discretionary ... Wolf v. Boyd, ...certiorari de... 1 L.Ed.2d ...1282, 353 U.

Secretary was properly designated to act at continued hearing in place of one of three immigrant inspectors comprising inquiry board at original hearing on alien's right to re-enter after foreign visit. U. S. ex rel. Minuto v. Reimer, C.C.A.N.Y.1936, 83 F.2d 166.

Board of commissioners of immigration, who by Act Aug. 3, 1882, were required to examine into condition of immigrants, could not delegate to a committee power to determine whether such immigrants should be permitted to land. In re Murnane, C.C.N.Y.1889, 39 F. 99.

Under Act Aug. 3, 1882, § 2, requiring state commission, board, or officers to examine immigrants and make report, and providing that if they fell in certain classes they should be excluded, immigrants could not be detained or sent back except on adverse report made to collector by commissioners themselves, or by some person by them authorized; and where report was made by secretary of board on action of subordinate not authorized to act finally in matter, and without further authority from commissioners or either of them, and on subsequent examination by one of commissioners immigrants were found not within either of prohibited classes, they should have been discharged and allowed to land. In re Bracmadfar, C.C.N.Y.1889, 37 F. 774.

5. Department of Labor

Under former provisions of section 342a of Title 5, executive officers of Department of Labor had authority to determine whether or not Chinese seeking admission had been born in United States and was therefore citizen entitled to enter. In re Moy Quong Shing, D.C.Vt.1903, 125 F. 641.

Formerly, Department of Labor had right to prescribe conditions under which alien could depart. Ex parte Kurth, D.C.Cal.1939, 28 F.Supp. 258, appeal dismissed 106 F.2d 1003.

Labor Department was formerly vested with power to make rule regarding presence of counsel at hearing before immigration authorities or taking of testimony in absence of counsel. U. S. ex rel. Chew Deck v. Commissioner of Immigration and Naturalization, Port of New York, D.C.N.Y.1936, 17 F.Supp. 78, affirmed 86 F.2d 1020, certiorari denied 57 S.Ct. 508, 300 U.S. 666, 81 L.Ed. 874.

6. Rules and regulations—Scope under delegated power

Regulations implementing this chapter and requiring Board of Immigration Appeals to exercise such discretion and power conferred upon Attorney General by law as was appropriate and necessary for disposition of case delegated to the Board discretionary authority as broad as the authority conferred by this chapter upon the Attorney General, and denied to the Attorney General the right to sidestep the Board or to dictate its decision, and thus in individual cases the Attorney General could not deviate from his published regulations. U. S. ex rel. Accardi v. Shaughnessy, N.Y.1954, 74 S.Ct. 499, 347 U.S. 260, 98 L.Ed. 681. See, also, Shaughnessy v. U. S. ex rel. Accardi, N.Y.1955, 75 S.Ct. 746, 349 U.S. 280, 99 L.Ed. 1074.

Immigration officers acting under law have authority to deny privilege of shore leave to alien through passengers on vessel in port. The Santos Maru, C.C.A.Tex.1936, 84 F.2d 482, affirmed 57 S.Ct. 356, 300 U.S. 98, 81 L.Ed. 532.

Former Commissioner of Immigration could not make regulations beyond power delegated to him. U. S. ex rel. Cook v. Karnuth, C.C.A.N.Y.1928, 24 F.2d 649, reversed on other grounds 49 S.Ct. 274, 279 U.S. 231, 73 L.Ed. 677.

While former Immigration Commissioner could make regulations to carry out provisions specified, it was not permissible for Department to make or proclaim regulations which were beyond powers delegated by Congress to Commissioner; regulations could not transgress law. The Parthian, C.C.A.N.Y.1921, 276 F. 903.

Under Act of 1907 alien admitted to insular possession, such as Puerto Rico, Hawaii, or Philippines, could be subjected to further examination if he proceeded to mainland, as test of his right to enter continent and former Commissioner General of Immigration was empowered to adopt such rule. Healy v. Backus, Cal.1915, 221 F. 358, 137 C.C.A. 166, reversed on other grounds 37 S.Ct. 400, 243 U.S. 657, 61 L.Ed. 949.

Under an earlier Act Treasury Department could make rules and regulations to carry out statutes and facilitate exclusion and return of persons whose immigration Congress had forbidden, but no mere rule could operate to exclude person not excluded by statutes. In re Kornmehl, C.C.N.Y.1898, 87 F. 314.

Note 6

Though Attorney General has broad power to promulgate regulations within delegated authority given him by Congress, that power must be exercised in promulgating regulations that carry out statutory scheme of admission or readmission of aliens and must be exercised within limits of procedural and substantive due process. Cermeno-Cerna v. Farrell, D.C.Cal.1968, 291 F.Supp. 521.

The Immigration and Naturalization Services could not amend this chapter and enlarge its scope, either by regulation or construction. Air Transport Ass'n of America v. Brownell, D.C.D.C. 1954, 124 F.Supp. 909.

Citizen cannot be deprived of his United States citizenship by any regulation. American President Lines v. Mackey, D. C.D.C.1953, 120 F.Supp. 897.

Under Act March 3, 1903, Secretary of Treasury was vested with power to make and apply such rules relative to question of immigration as might be shown from time to time to be necessary and convenient. 1899, 22 Op.Atty.Gen. 460.

7. —— Force and effect

The rules of the Secretary of Labor concerning deportation cases did not require that a person under investigation prior to application for warrant of arrest, should be advised of his right to have counsel and to decline to answer questions, before being interrogated as to his alienage. U. S. v. Tod, N.Y.1923, 44 S.Ct. 54, 263 U.S. 149, 68 L.Ed. 221.

Regulations of the United States Attorney General providing that a person subject to deportation may apply for discretionary relief in the nature of a voluntary departure, suspension of deportation or pre-examination as to right of re-entry, have the force and effect of law. Mastrapasqua v. Shaughnessy, C.A.N.Y. 1950, 180 F.2d 999.

Regulation prescribed by former Commissioner General of Immigration had force and effect of law. Lum Sha You v. U. S., C.C.A.Hawaii 1936, 82 F.2d 83.

Regulation prescribed by former Commissioner General of Immigration, providing that if discrepancies appeared in course of examination of witnesses in hearing on alien's application for admission, further cross-examination should be pursued to fully develop truth, was not mandatory upon Immigration Board. Id.

Regulations under former section 222 of this title [now covered by subsec. (a) of this section] had force of law. Hamburg-American Line v. U. S., C.C.A.N.Y. 1933, 65 F.2d 369, affirmed 54 S.Ct. 491, 291 U.S. 420, 78 L.Ed. 887.

Regulations adopted by Commissioner under immigration laws have force and effect of law. Haff v. Tom Tang Shee, C.C.A.Cal.1933, 63 F.2d 191.

Rule promulgated by Commissioner that notice of fines under immigration laws and of the necessity of bond or deposit to clear vessel should be served on master, agent, owner, or consignee of the vessel, or other responsible person, had force of law. U. S. v. Columbus Marine Corporation, C.C.A.N.Y.1933, 62 F.2d 795.

Rules of Department, unless conflicting with immigration laws, determine aliens' status in United States. Ex parte Kojiro Sugimori, D.C.Cal.1932, 58 F.2d 782, appeal dismissed 61 F.2d 1020.

Regulations under former section 222 of this title [now covered by subsec. (a) of this section] which did not conflict with Act of Congress or treaty had the force of law and if they did so conflict they were void; in any event however they were to be considered as an executive interpretation of former chapter 6 of this title. Shizuko Kumanomido v. Nagle, C. C.A.Cal.1930, 40 F.2d 42. See, also, U. S. ex rel. Goodwin v. Karnuth, D.C.N.Y.1947, 74 F.Supp. 660.

Regulations defining procedure in deportation hearings, promulgated by the Secretary of Labor under former provision of former section 102 of this title, had force of law. Chun Shee v. Nagle, C.C.A.Cal.1926, 9 F.2d 342.

Departmental rules governing deportation proceedings, in so far as consistent with law, are themselves law and binding on government as well as on aliens. Ex parte Radivoeff, D.C.Mont.1922, 278 F. 227.

Rules established under former section 102 of this title had force of law and courts had to take judicial notice of them. Colyer v. Skeffington, D.C.Mass. 1920, 265 F. 17, reversed on other grounds 277 F. 129.

Under earlier Act proper rules and regulations adopted by Department, in pursuance of provisions of Act of Congress, had force and effect of Act itself. U. S. v. Sibray, C.C.Pa.1910, 178 F. 144,

reversed on other grounds 185 F. 401, 107 C.C.A. 483.

Rules of Department of Labor respecting exclusion of Chinese persons had force and effect of law when not inconsistent with it or Constitution or treaty with China. Ex parte Chow Chok, C.C.N.Y.1908, 161 F. 627, affirmed 163 F. 1021, 90 C.C.A. 230.

In determining whether it was unlawful for an alien immigrant to obtain a visa ahead of his turn on waiting list, that notes issued by Secretary of State upon recommendation of Secretary of Labor to effect that issuance of visas out of turn was a violation of law were not published in federal register permitted inference that notes were not intended to have general applicability and legal effect. U. S. v. Birnbaum, D.C.N.Y. 1944, 55 F.Supp. 356.

Notes issued by Secretary of State upon recommendation of Secretary of Labor that issuance of visas out of turn was a violation of law did not constitute administrative interpretation of former sections 201–226 of this title, entitled to great weight in construing it, in view of practice which disregarded language of the notes. Id.

Since such rules and regulations as former Commissioner-General of Immigration was authorized to establish under former section 102 of this title had to be consistent with law, they could only have force and effect of law when not in contravention of law. Holland-America Line v. U. S., 1918, 53 Ct.Cl. 522, reversed on other grounds 41 S.Ct. 72, 254 U.S. 148, 65 L.Ed. 193.

8. —— Validity

The immigration rule prescribing five entry requirements for alien seamen was not an enabling act, did not grant right of entry, merely set out five conditions for entry which had to at all times be complied with, obligated immigration officials to order detention in all cases of noncompliance with these provisions and did not prevent detention for other reasons not named therein. National Surety Corporation v. U. S., C.C.A.Tex.1944, 143 F.2d 831, certiorari denied 65 S.Ct. 268, 323 U.S. 782, 89 L.Ed. 625.

Rule established by former Commissioner General of Immigration that alien through passengers on vessels touching at ports of United States might land temporarily if immigration officer was satisfied that they would depart on ship, but that officer might deny such privilege, was valid exercise of Commissioner's authority. The Santos Maru, C.C.A.Tex.1936, 84 F.2d 482, affirmed 57 S.Ct. 356, 300 U.S. 98, 81 L.Ed. 532.

Right of entry granted by treaty to minor son of resident Chinese merchant was subject to departmental rule and executive order requiring presentation of duly visaed passport. Weedin v. Ung Sue Chu, C.C.A.Wash.1933, 64 F.2d 953.

Under Act of 1907, rule 35(e), providing that, after arrest of alien in deportation proceedings, he should have full opportunity to show cause why he should not be deported; that he should be apprised of his right to counsel, and that he and his counsel might inspect all evidence on which he was arrested and be given opportunity to offer evidence and submit argument and to inspect and copy record and findings, such provision contemplated hearing at which alien had to be present and be confronted with witnesses against him and have full opportunity for cross-examination. U. S. v. Sibray, C.C.Pa.1910, 178 F. 144, reversed on other grounds 185 F. 401, 107 C.C.A. 483.

Under Act of 1907, rule 24, providing that any alien who entered United States across Canadian border at any other point than those designated should be deemed to have entered country unlawfully, was valid though no penalty was prescribed for its violation. Ex parte Hamaguchi, C.C.Or.1908, 161 F. 185.

Attorney General's regulations defining criteria for approval of schools attended by foreign students having nonimmigrant alien status were reasonable. Royatton College, Inc. v. Clark, D.C.Vt.1969, 295 F. Supp. 365.

Determination that an immigrant qualifies to use special form in lieu of immigrant visa or reentry permit when returning to an unrelinquished lawful permanent residence in the United States after a temporary absence abroad not exceeding one year, is within specifically delegated power of this chapter. Cermeno-Cerna v. Farrell, D.C.Cal.1968, 291 F.Supp. 521.

Regulation making special form for reentry of alien with permanent residence into United States from temporary visit abroad invalid when presented in lieu of immigrant visa or reentry permit by aliens who return for primary purpose of accepting employment at place

Note 8

where Secretary of Labor has determined that labor dispute exists, when construed to apply only to aliens who live in foreign country, is valid as exercise of generally delegated power of Attorney General in enforcement of immigration laws. Id.

Commissioner of Immigration and Naturalization's regulation defining term "alien" as any alien as defined by immigration laws and any person applying for admission to United States on ground that he is citizen or national of the United States was void. American President Lines v. Mackey, D.C.D.C.1953, 120 F. Supp. 897.

Former Commissioner General of Immigration exceeded his powers under former section 102 of this title in formulating rule that no attorney should demand or receive compensation exceeding $25 for appearing in behalf of United States, or of alien or aliens constituting one family applying for admission, unless authorized to do so by Department or officer in charge of immigration station; hence rule was invalid as being legislation. Merkle v. Paschkes, 1922, 204 N.Y.S. 102, 123 Misc. 203.

9. —— Evidence

Under Regulations of the Immigration and Naturalization Service rules that statements to be used in evidence shall be in writing, that officer shall ask person interrogated to sign the statement that interrogation shall be under oath or affirmation after warning, and that a recorded statement may be received in evidence only if its maker in unavailable or refused to testify or testifies contrary to the statement, investigating officer must obtain statement under oath and seek to have it signed, and only such a recorded statement may be used as evidence when the maker gives contradictory evidence. Bridges v. Wixon, Cal.1945, 65 S.Ct. 1443, 326 U.S. 135, 89 L.Ed. 2103.

The Regulations of Immigration and Naturalization Service relating to evidence were designed to afford due process of law to the alien, who may insist upon an observance thereof. Id.

Assuming that file of Immigration and Naturalization Service relating to sworn application for registry of alien's father as an alien was a copy, the authentication of the same by the district director of the Immigration and Naturalization Service rendered the same admissible in deportation proceeding although the legal custody of records was in the Attorney General. Maroon v. Immigration and Naturalization Service, C.A.Mo.1966, 364 F.2d 982.

Where a deportee has applied for suspension of deportation, federal regulation, having the force and effect of law, puts a duty on inquiry officer of discussing the evidence relating to the deportee's eligibility for such relief and the reasons for granting or denying such application. Acosta v. Landon, D.C.Cal. 1954, 125 F.Supp. 434.

10. Detention facilities

Alien awaiting deportation was not illegally confined in Federal House of Detention instead of at Ellis Island under regulation of Immigration and Naturalization Service providing that an alien under deportation proceedings may be confined in a jail which has been approved by the service as a detention facility, where alien made no showing that Federal House of Detention was not approved, in view of statement by assistant United States attorney that it was so approved. U. S. ex rel. Russo v. Thompson, C.A.N.Y.1949, 172 F.2d 325.

Under former section 342a of Title 5, return to writ of habeas corpus by alleged Chinese alien, showing that defendant was officer of immigration under control of former Commissioner General in charge of port where alien attempted to enter, by designation of former Secretary of Commerce and Labor, and that he held such Chinese person as such officer, sufficiently showed authority for detention. In re Moy Quong Shing, D. C.Vt.1903, 125 F. 641.

11. Appointment of personnel

Under earlier Act, inspectors of immigration were to be appointed by Secretary of Treasury, and not by superintendent of immigration. Nishimura Ekin v. U. S., Cal.1892, 12 S.Ct. 336, 142 U. S. 651, 35 L.Ed. 1146.

Secretary of Treasury had power to appoint or designate supervising inspector or special inspector to perform such duties as he should direct and to serve at such places as would, in judgment of Secretary, best promote administration of Immigrant Inspection Service, and such appointee might properly be paid from immigrant fund. 1892, 20 Op.Atty.Gen. 259. See, also, 1891, 20 Op.Atty.Gen. 76, 259.

Secretary of Treasury was empowered by Act Aug. 3, 1882 to employ counsel for purpose of advising and defending boards of immigration and to pay for such services out of immigrant fund. 1885, 18 Op.Atty.Gen. 108.

12. Compensation

Supervising inspector or special inspector might properly be paid from immigrant fund. 1892, 20 Op.Atty.Gen. 259. See, also, 1891, 20 Op.Atty.Gen. 76, 259.

Attorney General ruled that superintendent of immigration and his clerical assistants might be paid out of "immigrant fund" created under section 1 of Act of Aug. 3, 1882. 1891, 20 Op.Atty.Gen. 69.

13. Bond

Where bond was given as a condition to admission of an alien as a nonimmigrant as well as for timely departure, fact that alien departed without expense to government so that no damages were suffered did not preclude enforcement of bond providing for liquidated damages, since such was proper to compensate for indirect damage done to national economy, expense of investigation and maintenance of an agency to enforce the immigration laws. Earle v. U. S., C.A.N.Y. 1958, 254 F.2d 384, certiorari denied 79 S. Ct. 35, 358 U.S. 822, 3 L.Ed.2d 63.

Under the broad authority granted to regulate the admission of nonimmigrants, the exaction of the bond as a condition to admission was within the powers inherent in the grant, even in absence of express statutory authority. Id.

Any question surety might have raised as to power of former Commissioner General of Immigration to determine vessel's liability to fine for master's failure to detain alien seaman on board was entirely obviated by surety's voluntary signature of master's clearance bond, providing for such determination by Commissioner General. Indemnity Ins. Co. of North America v. U. S., C.C.A.Ala.1934, 74 F.2d 22.

14. Service of process

Commissioner of Immigration and Attorney General, in absence of voluntary appearance, are subject to service of process and suit only in the District of Columbia. Di Battista v. Swing, D.C. Md.1955, 135 F.Supp. 938.

15. Review of administrative decisions

In exercising its delegated authority, the Board of Immigration Appeals can make its own independent determinations on questions of law and fact, and on whether discretionary relief should be granted. Woodby v. Immigration and Naturalization Service, 1966, 87 S.Ct. 483, 385 U.S. 276, 17 L.Ed.2d 362. See, also, Novcrola-Bolaina v. Immigration and Naturalization Service, C.A.9, 1968, 395 F.2d 131; De Lucia v. Immigration and Naturalization Service, C.A.Ill.1966, 370 F.2d 305, certiorari denied 87 S.Ct. 861, 386 U.S. 912, 17 L.Ed.2d 784.

Failure to notify alien that deportation proceedings against him had been referred to Attorney General would not constitute a denial of due process of law or prejudicial noncompliance with this chapter where only questions of law were referred to and considered by the Attorney General. Nani v. Brownell, 1957, 247 F.2d 103, 101 U.S.App.D.C. 112, certiorari denied 78 S.Ct. 119, 355 U.S. 870. 2 L.Ed.2d 75.

Attorney General had discretion to review a decision by the Board of Immigration Appeals, refusing to exclude alien, and any denial of due process on such review was corrected by judicial review. Klapholz v. Esperdy, D.C.N.Y. 1961, 201 F.Supp. 294, affirmed 302 F.2d 928, certiorari denied 83 S.Ct. 183, 371 U. S. 891, 9 L.Ed.2d 124.

Absent showing of good cause, court is reluctant to order change in official records of Immigration and Naturalization Service; when an immigrant enters this country and applies for citizenship, his sworn statements should be true statements. Petition of Konsh, D.C.N.Y.1960, 188 F.Supp. 136.

Failure to transmit to alien copy of decision of the Board of Immigration Appeals, on review of Board's decision by the Attorney General, coupled with failure to given alien notice of reference to Attorney General in order that he might submit argument, invalidated Attorney General's decision that alien was subject to deportation. Bannout v. Brownell, D.C.D.C.1955, 129 F.Supp. 488.

Under regulation providing for review by Attorney General of decisions of Board of Immigration Appeals, alien is not entitled to an oral hearing before Attorney General, but is entitled to no-