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Ernst W. Puttkammer

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## LEGISLATION AFFECTING THE DEPORTATION OF ALIENS

E. W. PUTTKAMMER\*

**A**MONG the more important proposals for legislation which were not passed by Congress in the last session was the Kerr bill,<sup>1</sup> to meet certain objections and abuses in the laws now regulating the deportation of aliens. In a general way the shortcomings of the present laws fall into two broad classes: those which undesirably hinder the government in the process of deportation, and those which subject aliens to hardship. These shortcomings (and particularly those in the second group named) were described in detail in Report No. 5 of the National Commission on Law Observance and Enforcement.<sup>2</sup> This report disclosed a serious state of affairs (both in the law itself and in its administration) which would probably have had public attention long ago if it were not for the fact—little enough to our credit—that these abuses in the main touched only economically and politically helpless outsiders, although even American citizens might be and were affected. As a result of the disclosures certain reforms were instituted at once, but others could be effected only by means of statutory changes. The purpose of the Kerr bill is to make some, at least, of these changes, as well as some others not considered in the commission's report. The bill, it is stated, is based on a two-year survey carried on under the supervision of the Commissioner of Immigration and Naturalization. It has received the indorsement of the National Crime Commission, the International Association of Chiefs of Police, and the executive committee of the American Bar Association, as well as other bodies. At a hearing before the House Committee on Immigration and Naturalization, Col. MacCormack, the Commissioner of Immigration and Naturalization, stated that in his opinion "there is no statute of the United States which offers so many loopholes for the escape of the criminal, while at the same time imposing such barbarous treatment upon the persons of good character, as does the body of law dealing with the depor-

\* Professor of Law, University of Chicago Law School.

<sup>1</sup> H.R. 8163, which superseded the earlier H.R. 6795, both by Judge Kerr, of North Carolina. In the Senate as S2969, by Senator Coolidge of Massachusetts.

<sup>2</sup> More generally known as the Wickersham Commission. The report referred to (hereafter cited as "Report") was signed by nine of the eleven members. Two members believed that a more detailed examination was needed before conclusions should be set forth.

tation of aliens." The bill was favorably reported both by the House and Senate committees, but, as already stated, failed of passage. As it would seem likely that further efforts will be made to pass it or similar measures, an outline of the scope of the proposed changes may be of interest.

The severest criticism in the Wickersham commission report (and a large part of its space) was devoted to the unfairness of putting into practically identical hands, in the deportation proceedings, the function of prosecutor, judge and jury. Under the system found to be in effect by the commission, the alien who was suspected of being deportable (often as a result of an anonymous communication only)<sup>3</sup> was brought in, without any preliminary legal proceedings or warrant of arrest, for an examination by an immigration inspector. No counsel was permitted at this examination, and even if it were permitted, in the nature of the case counsel would rarely be present. The questioning was entirely in the hands of the inspector, who (to paraphrase the report)<sup>4</sup> might feel with some justification that unless the alien was then and there led to commit himself he would be warned and would later tell a story that would make him non-deportable, and who also would often feel it a matter of pride to make an "air-tight" case for the government. The alien himself, both from his educational and social background, was likely to be awed by the official surroundings into answering any questions whatsoever, which were put to him, whether they were proper and pertinent or not.<sup>5</sup> Members of the same office, if not actually the same man, made the investigation and conducted the examination on the case. The inspector conducting it decided whether an interpreter was needed and if so whether he himself should act in that capacity; the questioning, which might be long drawn out and persistent, might or might not be confined to matters at issue: the stenographer (or the inspector himself, if he chose to fill that rôle also) took such notes only as the inspector indicated; and the report to be sent to Washington, on the basis of which a warrant of arrest would be issued or denied, was compiled by the inspector himself from these notes. The Wickersham commission's conclusion on this legal machinery is:<sup>6</sup>

<sup>3</sup> "Anonymous communications are one of the chief sources of information relied on by immigrant authorities." Report, p. 52. This statement, as well as those in the text at this point, are a reflection of conditions as they were at the time of the Report. Since that time a number of reforms have been introduced (for an example see note 13 *infra*), some of them of considerable importance. As the Commission's major criticism, however, centers on the legal set-up and as this has not been changed, the foundation on which the Report rests also remains unchanged.

<sup>4</sup> Report, p. 61.

<sup>5</sup> *Ib.*, p. 66.

<sup>6</sup> *Ib.*, p. 143.

It is doubtful if anywhere in the entire system of Anglo-Saxon jurisprudence are government officials given similar unfettered rights of private inquiry, or is the exercise of governmental power more often characterized by violations of fairness and decency.

That the spirit of the bureau and its agents has for the most part been fair<sup>7</sup> is to their great credit, but is no answer to the abuses that under such a system can occur and apparently have occurred.

As was already stated, the next step in the proceedings was an application by the local office to Washington for a warrant of arrest. Supposedly this would be granted or withheld on the basis of the record of the preliminary examination, but even this slight safeguard tended to disappear in view of the fact that the great majority of applications are by telegraph (with the record following by mail) and are so regularly followed by a telegraphic warrant in return that the local officer can assume it is coming.<sup>8</sup> Following the alien's arrest (in practice he might be detained after the preliminary examination until the arrival of the warrant) there was a "warrant hearing." It might be, and often was, before the same inspector who had launched the case, and who now sat in judgment on it. The hearing was not public and while the alien might be represented by counsel, he in fact rarely was. The record of this hearing, together with all data, and with the inspector's recommendation as to whether or not a warrant of deportation should be issued, was then sent to Washington, where it was examined by a nonstatutory "board of review" appointed by the Secretary of Labor, whose recommendations in turn went to the secretary. The final step was his issuance of, or refusal to issue, a deportation warrant. While in appearance this seemed to mean considerable control over the local officials and their decisions, in fact the board of review in about ninety per cent of the cases followed local recommendations,<sup>9</sup> and the recommendations of the board of review in turn were generally followed by the secretary. Practically, therefore, the decision by the local inspector might well be final.<sup>10</sup> The possibility of any sort of judicial review was and is limited to the small number of cases where *habeas corpus* proceedings will lie.<sup>11</sup> The commission, therefore, was convinced that there was serious need for a judicial body wholly separate from the officers administering the law and prosecuting cases, to which, at the very least, appeals should go. It was suggested that perhaps it might be better to go even

<sup>7</sup> *Ib.*, p. 5.

<sup>8</sup> *Ib.*, pp. 80, 81.

<sup>9</sup> *Ib.*, p. 96.

<sup>10</sup> About ninety-five percent of the recommendations by the inspectors, it was found, were for deportation.

<sup>11</sup> Out of 13,000-odd deportation cases a year, only 300, more or less, come before the courts on *habeas corpus*. Report, p. 111.

farther and to entrust the whole conduct of warrant hearings to field representatives of this body, thereby freeing the local officials from their present dual rôle of prosecutor and judge. Most unfortunately the Kerr bill is silent on this most important matter, thereby leaving untouched what the commission regarded as the worst feature of the present law.<sup>12</sup> Undoubtedly retaining the present set-up unchanged makes it easier to deport. Is it worth the price of occasional or frequent injustice which the report shows we had been paying?<sup>13</sup>

In fact, quite in the contrary direction Section 9 of the bill actually increases very greatly the legal powers of immigration officials, by providing that "any employee" of the service may detain any alien suspected of being deportable, who may be held without warrant not to exceed twenty-four hours. This section was added at the particular instance of the Immigration Service which sees in it the removal of one of the greatest obstacles to the enforcement of the law. At present an officer may arrest an alien without warrant while he is actually illegally entering the country in the presence of the officer. But if he is not thus caught red-handed, but has already effected his entry, arrest is lawful only if under warrant. Under the present state of affairs many aliens freely admit an illegal entry when questioned by an officer, but have disappeared by the time a warrant can be secured. The service estimates that in 1934 alone some 2,600 aliens escaped deportation because they could not be thus detained. Other advantages put forward are that it would economize the time, and hence increase the effectiveness, of the field officers, by ending much of their present work of searching for such illegal entrants, and that it would deter illegal entry by making success more difficult. The proposal has been opposed, however, by certain groups,<sup>14</sup> as amounting only to legalizing the abuses of the past. They consider it as, at its best, an invitation to petty graft and exploitation, and, at its worst, a chance to repeat the alien

<sup>12</sup> Sec. 8 in fact opens the doors still farther to local authority by providing that the Secretary of Labor may designate "persons holding supervisory positions" in the Service to issue warrants of arrest, whereas (as stated above) these now issue only from Washington. In view of the ease with which such warrants apparently are secured even now this change would not seem to be one of substance. The Immigration Service feels, however, that the provision would not only speed up the issuance of warrants but, by decentralizing responsibility for their issuance, would stimulate greater care before applying for a warrant.

<sup>13</sup> Under the present practice of the Department of Labor the illegal arrest and detention of suspected aliens and illegal searches and seizures have been discontinued, so that in part the foregoing criticisms of the Commission have been met. So long, however, as the legal set-up remains the same there is always a risk of their revival under a less conscientious administration of the Department.

<sup>14</sup> The Immigrants' Protective League and the American Civil Liberties Union.

“drives” and terrorism which other parts of the Wickersham reports describe and condemn. The impartial observer cannot escape sharing somewhat in this fear. But on the other hand there is probably nothing that is more likely to lead to complete official lawlessness than the realization that abiding by the law means failure in one’s efforts. It is at least arguable that to confer greater authority than is now had may in the long run be a surer safeguard against arbitrary conduct than its denial would be. What in any case is far more important is the kind of administration in charge of the service. In the hands of a conscientious and able one the greater power does not need to be feared, and during a ruthless tyrannical one, the experience of the past shows that withholding the legal power means nothing. In any event, even if the power is withheld, it is always possible to circumvent it with the aid of local police authorities, through their holding desired parties on technical charges until the federal warrant has arrived. As the Immigration Service itself points out, the very fact that such a subterfuge is resorted to tends to show the need for such authority. One criticism, however, seems justified. There is no need to give this sweeping authority to detain arbitrarily to “any employee” of the service. The legitimate claims of the service do not require the power to be possessed by every stenographer or janitor employed by it. It should be limited, as, e.g., to inspectors.<sup>15</sup>

With regard to deportation because of criminal or immoral conduct after arrival in this country or anarchistic or communistic beliefs, all such matters as are now grounds for deportation are retained as such unchanged in the bill.<sup>16</sup> In addition certain new grounds are set up to meet demonstrated gaps in the present law. Thus deportation provisions are extended to include those violating state narcotic laws, whereas the present law extends only to violators of federal laws. The desirability of this change is obvious. Another change deals with conviction of the offense of carrying concealed weapons. As this has been held to be not a crime involving moral turpitude it cannot now constitute a ground (or part of the grounds) for deportation. The bill expressly makes conviction of this offense a ground, with a five-year limitation period, for which to deport. This change deserves unqualified approval.<sup>17</sup> It inflicts no hardship on the law-abiding alien and is a greatly needed weapon against the alien gun-

<sup>15</sup> The author is informed that the Department of Labor will agree to an amendment limiting the power to arrest without warrant to such persons as may be designated by the Commissioner of Immigration and Naturalization with the approval of the Secretary of Labor.

<sup>16</sup> Sec. 12.

<sup>17</sup> The change has the strong indorsement of the Immigrants’ Protective League.

man and racketeer.<sup>18</sup> The weakness of the opposing case is shown in the arguments used to support it.<sup>19</sup> It is said that carrying concealed weapons has been held to be no crime of moral turpitude. A sufficient answer is that no one denies that the statute would change the law. It is also opposed because of the "frequency with which aliens carry weapons," a consideration which would seem to the unbiased person merely one more reason to favor a change in law aimed at a vicious practice. Again, under the present law an alien smuggled into this country is deportable. But the alien who smuggled him in is not. Plainly the latter, who will frequently be a member of a smuggling ring, is a much greater danger than is the former. Accordingly the bill makes deportable<sup>20</sup> any alien who "knowingly and for gain encouraged, induced, assisted, or aided anyone to enter the United States in violation of law, or on more than one occasion . . ." so encouraged, etc., regardless of gain. This change would fill a serious gap in the present law. The Immigrants' Protective League, in strongly supporting it, points out another advantage in that it would provide an added penalty for those aliens who exploit other foreign born by assisting them to enter our country by means which the latter do not realize until too late are unlawful, and who thereafter are able to blackmail with comparative impunity.<sup>21</sup>

With regard to the general subject of criminal conduct after entry the law as it now is (and, as already stated, as it would continue to be) provides in substance for two situations where there shall be deportation, (1) where the alien is convicted of a crime involving moral turpitude committed within five years after entry and is sentenced to imprisonment for one year or more; (2) where the alien is convicted of two or more such crimes, regardless of how long after entry they were committed (but committed after Feb. 5, 1917) and on each one is sentenced to such imprison-

<sup>18</sup> For a careful examination of the proportions of foreign-born and native-born gunmen and racketeers, as disclosed by police statistics, see Wickersham Commission Report No. 10. According to it the problem is one dealing mainly with native-born citizens. If so, the new deportation provision, while helpful, is merely a single, and comparatively small, step in its solution.

<sup>19</sup> See the opposition brief of the American Civil Liberties Union.

<sup>20</sup> Sec. 1 (3).

<sup>21</sup> The American Civil Liberties Union opposes the provision, saying that it is "entirely too vague. If such a provision should be contained, it should be more specific." Disregarding the implication, not supported by argument, that the provision should be eliminated, it is hard to see wherein it is "too vague." No specification as to where the vagueness lies is made. Perhaps it is in the fact that the deportation under this subsection is not mandatory but only where it is "in the public interest"—a discretionary provision which will be discussed below. But as this provision is not objected to in other places where it occurs, it cannot, it would seem, constitute the "vagueness" complained of.

ment.<sup>22</sup> It will be seen that in both groups there is under the present law the requirement of a prison sentence of one year or more. As a consequence they do not include cases of conviction followed by a suspended sentence or even cases where after conviction but before sentence the prisoner jumps bail. In both these instances the alien remains non-deportable as the law now stands. The bill therefore adds a third group, by providing<sup>23</sup> for deportation where there has been a conviction of a single crime involving moral turpitude, regardless of when it was committed, and even if the conviction was not followed by a prison sentence, provided that the deportation proceedings are instituted within five years of the conviction, and provided further that such deportation is found to be in the public interest.<sup>24</sup> This provision is such a drastic addition to the present law that it was felt to be safe only if coupled with the authority in proper hands not to apply it. Even so, certain groups opposed to the bill fear that this provision may be made the means of disguised pressure, during labor disputes, on alien strikers. It is difficult to see why the legitimate claims of the government could not have been largely satisfied, and the danger of such abuse considerably reduced, by eliminating the need of a prison sentence but requiring not one but two convictions, one of which must have been within a designated period before deportation proceedings.<sup>25</sup> Such an express limitation is necessary, as without it under the terms of the act of 1924 there is no time limit on deportation<sup>26</sup> and it would be manifestly unfair to subject to perpetual danger one who many years before had been so convicted and received suspended sentences, with a record of excellent behavior ever since.

In still another respect the bill would tighten (and that very sharply) the law against the alien. Under the present law an alien cannot be deported by reason of conviction of crime (as described above) if the trial court which sentenced him shall within thirty days from the time of passing sentence "recommend" that he be not deported. Though the word used is "recommend" the so-called "recommendation" in fact constitutes an absolute veto on any deportation. While the trial judge may be in such a position as to make his conclusions regarding the wisdom of allowing

<sup>22</sup> This general statement is not accurate in respect to violators of the federal narcotic laws.

<sup>23</sup> Sec. 1 (2).

<sup>24</sup> The decision as to the "public interest" would be entrusted to a newly constituted body which will be discussed below.

<sup>25</sup> This suggestion in fact more nearly resembles the bill as it was originally introduced, as H.R. 6795.

<sup>26</sup> *Philippides v. Day*, 283 U.S. 48 (1931).

the alien to remain valuable ones, it is too much authority to leave the decision entirely in his hands, with ultimate automatic deportation or no deportation solely in his control. The limited knowledge regarding the alien, on which he probably must act, is, without more, enough to show this. Other arguments have also been advanced against this controlling authority. Thus it is said by one authority:<sup>27</sup>

Other considerations frequently influence the judge in recommending against deportation, who, in many cases, is an inferior police judge of little or no experience. He may have a personal feeling against deportation. He may be too indolent to make any inquiry at all as to the defendant's previous record. He may make the recommendation as a favor to the defendant's counsel, or as a friendly gesture because he is imposing a longer sentence than the lawyer thinks his client deserves. He even may not know that his decision is final, but may make the recommendation, believing that the immigration officials will review the question and intending that they shall disregard his recommendation if the facts warrant it.

To remedy this state of affairs the present bill provides that the "recommendation" shall in fact be merely that. According to it<sup>28</sup> the conviction shall not constitute ground for deportation if, within six months, the trial judge so recommends and this recommendation is approved by designated federal officials. It will be noticed that while the effect of the recommendation is reduced, the time within which it may be made is increased from thirty days to six months. This change was made to give more time to probation officers and social agencies to investigate each case and determine its merits.<sup>29</sup>

According to the present law<sup>30</sup>

In any deportation proceeding against any alien the burden of proof shall be on such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States.<sup>31</sup>

This provision has been severely criticized as leading to serious abuses and as contrary to the fundamental tenets of our jurisprudence in that

<sup>27</sup> J. W. Allen, former attorney general of Massachusetts, in an address at the annual meeting of the American Bar Association, July 16, 1935.

<sup>28</sup> Sec. 2.

<sup>29</sup> The effect of a pardon on deportation proceedings based on the crime to which the pardon applies remains unchanged. It constitutes a bar.

<sup>30</sup> 43 Stat. 165 (1924); 8 U.S.C.A. § 221 (1927).

<sup>31</sup> The burden of proving alienage probably rests on the government. It was so held in United States *ex rel.* Bilokumskey v. Tod, 263 U.S. 149 (1923), but this case was decided a year before the enactment of the statute just quoted. It has, however, been cited and followed since its enactment in a number of cases, of which the most recent is Broder v. Zurbrick, 38 F. (2d) 472 (1930).

it assumes guilt until innocence is proved.<sup>32</sup> Under it any ground for deportation, based on the circumstances of the entry, may be alleged, thereby forcing the alien to prove a negative—a burdensome and costly task at best, and an impossible one at worst, to impose on one who may be lawfully present in this country. Accordingly it was hoped in some quarters that this section would be repealed. All the new bill contains, however, is the provision<sup>33</sup> that “in any proceeding under Sections 3, 4, or 5 of this Act the burden of proof shall be upon the alien to establish every requisite fact.” Presumably this would leave the present law unchanged. It is true that there might be an inference that a provision expressly putting the burden on the alien in certain instances, by implication indicates that it is not to be on him in others, but the inference seems a very weak one, especially as the instances named are new ones covering matters not now dealt with. No doubt the present law is a great aid to the government—every arbitrary provision is. No doubt, also, to change it might in many cases put as impossible a burden on the government as now rests on the alien. It would seem, however, that in fairness the prosecution (that, in effect, is the rôle which the government occupies) should at least be required to establish a *prima facie* case before the alien defendant is required to disprove the charges.

In the provisions so far considered the bill either would increase the stringency of the law or would not relax it. There are, however, a number of respects in which it would relax present strictness. The most important of these is the providing for a certain amount of administrative discretion as to whether in given cases there should or should not be deportation. Under the present law there is, practically speaking, no discretion in anyone from the President down.<sup>34</sup> As the Wickersham Commission points out, the President can pardon the worst of criminals, but neither he nor anyone else can stop the machinery of deportation, once it has begun to move. “No matter how long the alien may have resided in this country before his deportation, no matter how technical may have been the nature of the violation of our laws, no matter whether he has an American family

<sup>32</sup> The terms “guilt” and “innocence” are not used in a technical sense. Legally, deportation proceedings are, of course, not criminal. *Mahler v. Eby*, 264 U.S. 32 (1924).

<sup>33</sup> Sec. 6 (a).

<sup>34</sup> As already stated, there is an indirect discretion as to convicted criminals in that pardon bars deportation based on the crime pardoned (*supra*, note 29). There is also the trial court's discretion as to “recommending” no deportation. It is ironical that the main instances of discretion should apply only to criminal aliens. The Secretary of Labor has discretion to order the deportation of aliens deportable on account of war legislation (41 Stat. 593, 594 (1920); 8 U.S.C.A. § 157 (1927))—a provision no longer of practical significance. Of greater significance, however, is the provision described in note 36, *infra*.

in this country whom he can not take with him"<sup>35</sup> and who through his deportation may become public charges, there is no power in anyone to stop the machinery.<sup>36</sup> In this matter of the enforced separation of families, with the possibility of the father being deported to one country, the mother to another, and the children remaining here as public charges, the heartless cruelty and injustice of the present law are particularly apparent. The Department of Labor at the Congressional hearings presented examples of peculiar hardship through lack of discretion, some of which are appended.<sup>37</sup> In reading them it should be remembered that an alien,

<sup>35</sup> Report, p. 123.

<sup>36</sup> According to the act of 1924, the Secretary of Labor may under certain conditions permit to remain in the United States "any alien child who, when under sixteen years of age was prior to May 26, 1924 temporarily admitted to the United States and who was within the United States on that date, and either of whose parents is a citizen of the United States" (43 Stat. 162 (1924); 8 U.S.C.A. § 214 (1927)). The limited application of the section is obvious.

<sup>37</sup> "Deportation Cases Involving Peculiar Hardship:

"(1) Honeymoon Trip to Canada Is Basis of Deportation. An alien who has been a legal resident of the United States for nine years entered Canada for a brief visit on his honeymoon. A year after this trip he contracted tuberculosis and was sent to a sanatorium. He was unable to pay the bill and, therefore, became a public charge. As this occurred within five years of his technical entry from Canada, he is deportable. He now has a part-time job and is supporting his wife, father, and mother, who live with him. There is no discretion in existing law to relieve the conceded hardship and injustice which deportation in a case of this character would cause.

"(2) Girl Who Contributes to Family's Support Deportable as Public Charge. An alien came to the United States with her father eleven years ago when she was eleven years of age. Four years after her arrival she was stricken with a mental disorder which led to her confinement in a state hospital at public expense. She is subject to deportation because she became a public charge within five years after her original—and only—entry. She has recovered, is now regularly employed and is not only not a public charge, but is contributing to the support of her family who are legal residents of the United States. The injustice in deporting this young woman and separating her from her family is apparent.

"(3) Faces Deportation after Thirty-two Years' Residence Here. A fifty-two-year-old Canadian lived in the United States for thirty-two years, established a good reputation, and reared a family of five American children. He spent Christmas with his seventy-five-year-old mother in Canada. Shortly after this trip he was admitted to the St. Lawrence State Hospital in Ogdensburg, N.Y., for a mental condition. Notwithstanding his long residence his filial visit in Canada renders him subject to deportation.

"(4) Aged Father Subject to Deportation after Nearly Fifty Years' Residence. Another case concerns an alien sixty-eight years old, who spent almost half a century in the United States. He married, established a home here, became the father of several children. In 1930 he went to Canada in search of work. Failing in this he decided to go to the home of his sons in Vermont. He was without funds and had to walk. He crossed the international boundary without being inspected and consequently is subject to deportation, despite the fact that the greater part of his life has been lived in the United States.

"(5) Nine-Year-Old Boy Must Be Deported. A nine-year-old boy was brought to this country by his mother when he was an infant. The mother, a native of Canada, secured a lawful entry for herself but not for her boy. He is, therefore, subject to deportation. The father has been ordered deported to Rumania. Should the existing mandates of law be carried out-

once deported, is forever ineligible to legal admission—here, too, there is no discretion.<sup>38</sup>

Accordingly the bill sets up an Interdepartmental Committee<sup>39</sup> to be composed of representatives of the Departments of Labor, State, and Justice (presumably designated by the heads of the departments), to which is given a limited discretion to exempt from deportation where the committee finds this to be in the public interest. This discretion exists only in the following instances:

(a) Where the alien is of good moral character and has not been convicted of a crime of moral turpitude and does not entertain communistic or anarchistic views<sup>40</sup> and where, in addition, such alien either has lived in this country continuously for not less than ten years or has living here a parent, spouse, legally recognized child, or, if a minor, a brother or sister who has been lawfully admitted for permanent residence or is a citizen.<sup>41</sup> Thus this provision restricts the discretion to those whose conduct while

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this family would be divided amongst three countries, unless the mother is in a position to accompany her husband or her child. In any event she will be separated from at least one of them.

“(6) Law Requires Banishment of Twelve-Year-Old Syrian Boy. A second example involves a twelve-year-old Syrian boy. His father died in Syria and his mother migrated to Mexico in 1926, taking her infant son with her. During the serious illness of the mother an uncle had the boy smuggled into the United States and brought him to the home of relatives. Thereafter the mother married an American citizen in Mexico and entered the country as a non-quota immigrant. She and her husband joined her son. Since coming to this country the boy has attended school where his record is excellent. Leaders in the community have protested against the cruelty of separating him from his family and sending him back to a country of which he knows nothing and where there is no one to care for him.

“(7) Two Motherless Little Girls Face Separation from Foster Parents. Still another case tells the story of two sisters, nine and ten, natives of Canada, who were brought to this country illegally by their mother when infants. A year after the mother's entry she died. The children's father, who has since been deported, brought them to Lebanon, Pa., to the home of their uncle and aunt who have cared for the motherless little girls as though they were their own children and wish to adopt them. Under present law the deportation of these two children is required.”

Two other particularly tragic cases are described in the Commission Report, pp. 131 and 132.

<sup>38</sup> 46 Stat. 41 (1929); 8 U.S.C.A. § 180 (1934). Only if the alien secures permission to depart voluntarily before the deportation warrant is issued is there a possibility of his later regular admission.

<sup>39</sup> Sec. 11.

<sup>40</sup> I.e., where (broadly speaking) the ground of deportation would be one not reflecting on the alien himself—for example, where there was error in the entry record of the alien, or where he became a public charge within five years after entry from causes existing at the time of entry, etc.

<sup>41</sup> Sec. 3 (a) (1) and (2).

here has been satisfactory and who have some claim to our sympathy either because of family connections or because of long undisturbed residence. But any alien who is the beneficiary of such discretion must as a condition on remaining here take prompt steps to obtain citizenship.<sup>42</sup>

(b) In a closely allied provision, similarly restricted to aliens of good character, and not of subversive political or economic views, and where the ground of deportation would be the lack of any record of admission or an irregular entry, an alien who has resided here continuously for not less than ten years may be allowed to remain, with the same proviso as to his having to take steps to obtain citizenship. The restriction of the benefit of this provision to those who have lived here for ten years has been criticized on the ground that even in recent years there have been many inaccuracies in entry records, particularly along the Canadian border, and that the government is sufficiently protected by the separate requirement that the alien must be of good moral character and not otherwise deportable. It is a severe hardship, it is urged, that, on account of something which may be no fault of his, for ten years the alien should be at the constant risk of deportation and in any event unable to take steps to become a citizen. The only attempted answer to this powerful argument is that with a shorter period (or no fixed period at all) too great an inducement might be held out to irregular or illegal entry in the hope of "getting by" undetected for a shorter period. The deterrence of ten years of jeopardy, it is claimed, is a necessary protection.<sup>43</sup>

(c) As was pointed out above, certain criminal conduct which under the present law cannot be set up as ground for deportation, viz., the violation of a state narcotic law, the committing at any time of a single crime of moral turpitude, the smuggling in of other aliens, and the unlawful carrying of weapons, would constitute a ground under the bill. In these new cases the much greater strictness of the law would be tempered by requiring deportation only if the committee finds it in the public interest.<sup>44</sup> It must be emphasized, because in this respect the bill has been seriously misunderstood, that no discretion whatsoever would be given in those cases of alien criminals, anarchists or communists who are now deportable, and who would remain so;<sup>45</sup> the discretion applies only to those more

<sup>42</sup> Sec. 3 (c).

<sup>43</sup> Provision is made that where aliens are allowed to remain as described in (a) and (b) their number shall be deducted from the quotas of the countries of provenance. (Sec. 6 (c)). They would therefore not increase the total of immigration.

<sup>44</sup> There is no discretion, however, where there is a violation of a state narcotic law. There the requirement of deportation is absolute.

<sup>45</sup> To establish this beyond any doubt it is expressly so provided in Sec. 12.

drastic provisions that the present law does not contain at all and that could not safely be adopted, because of their severity, without some such safety valve.

The only other instance of discretion has already been commented on, and is one operative against, not for, the alien. It is where the trial court before whom an alien has been convicted of a crime of moral turpitude recommends that, despite sentence of more than one year, he be not deported.<sup>46</sup> As already stated, this would in fact become a recommendation to the board instead of, as now, a binding order.

It is unfortunate that the proposal to grant even this small discretion to remove the barbarities of the existing law has met with considerable opposition. In part this opposition is based simply on a failure to understand what the bill would do, as, for example, when it is said that it would enable criminals to remain here. It is also argued<sup>47</sup> that the discretion would constitute a delegation of legislative power to an executive department and therefore an abandonment by Congress of its control over deportation. Space will not permit a detailed examination of these contentions. It can merely be pointed out that there is ample precedent for granting this amount of administrative discretion. Thus in this very field it is provided in the Immigration Act of Feb. 5, 1917<sup>48</sup> that stowaways "if otherwise admissible, may be admitted in the discretion of the Secretary of Labor," and that children under sixteen years of age, though not accompanied by a parent or going to join a parent, likewise "may, in the discretion of the Secretary of Labor, be admitted if in his opinion they are not likely to become a public charge and are otherwise eligible." The same discretion was conferred in regard to aliens who had violated certain war legislation.<sup>49</sup> The validity of the last named statute was attacked on precisely this ground and the statute was upheld in *Mahler v. Eby*,<sup>50</sup> the court saying:

Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political and is vested in the political departments of the government. Even if the executive may not exercise it without congressional authority, Congress cannot exercise it effectively save through the executive. It cannot, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency.

<sup>46</sup> Sec. 2.

<sup>47</sup> In the minority report of the House committee.

<sup>48</sup> 39 Stat. 875 (1917); 8 U.S.C.A. § 136 (l) and (m) (1927).

<sup>49</sup> 41 Stat. 593 (1920); 8 U.S.C.A. § 157 (1927).

<sup>50</sup> 264 U.S. 32 (1924). The passage quoted is at p. 40.

It is unfortunate that so meritorious a proposed statutory provision should be assailed partly on arguments based on a complete misapprehension of what it would accomplish, and partly on an argument expressly overthrown over a decade ago by a United State Supreme Court decision.

Section 4 of the bill introduces a reform that would be of equal benefit to the government and the alien. It is a fairly frequent occurrence that aliens enter this country as "nonimmigrants" or as students, and that while here their status so changes that they become eligible to remain permanently in a nonquota group.<sup>51</sup> In order to take advantage of this fact it is necessary, under the present law, for the alien to leave the country so as to return with a consular visa showing the new status. The Immigration Service refers to this as "a cruel and futile formality," which, while subjecting all concerned "to great trouble and expense, serves no useful purpose whatever." Under the proposed law it would be possible, on payment of all fees as now, to correct the status without leaving the country.<sup>52</sup>

A few reductions in the severity of the present law, for which a good case can be made, were not adopted. One of these is to the effect that where an alien leaves the country temporarily and then re-enters, the re-entry would not be regarded as an "entry" for possible deportation purposes, except where the ground of deportation would be of a criminal nature.<sup>53</sup> Such a provision would meet the hardship and unfairness of some of the instances cited above.<sup>54</sup> While, by the same token, it would remove the possibility of deportation in some cases where it is now possible, the loss of an unjustified power should hardly be regretted. Another relaxation which might well have been adopted would have been that no alien who had entered this country under the age of fifteen should be deportable after five years of residence, provided that during that period he had been of good moral conduct. The increased stringency of the bill, with its provision that any later crime, committed no matter how long after entry, may be ground for deportation would seem to make it all the more neces-

<sup>51</sup> For example, through naturalization of spouse, through marriage, or through a change in occupation.

<sup>52</sup> Secs. 4 and 7.

<sup>53</sup> Under the present law no distinction is made between an original entry and a second or subsequent entry into this country, no matter how brief and temporary the absence may have been. Similarly the commission of a crime of moral turpitude "prior to entry," as a ground for deportation, extends alike to a crime committed in a foreign country prior to entry, and to a crime committed in the United States prior to the re-entry. *United States ex rel. Volpe v. Smith*, 289 U.S. 422 (1933). It should be pointed out that the result reached in the case just cited would not be affected by the change discussed in the text, as that too would regard a re-entry as an entry where the ground of deportation is of a criminal nature.

<sup>54</sup> The first, third and fourth cases cited in note 37, *supra*.

sary to provide in some such manner as this for an alien whose formative period had been spent here and who, for better or for worse, was mainly a product of our civilization.

The immediate effect of the passage of the Kerr bill would be to stop the deportation of some 2,600 aliens of good character, who are now here only under stays. If it is not passed they must go, leaving behind them, probably to swell the relief rolls, more than 7,000 members of their immediate families, of whom some 5,000 are wives and children,<sup>55</sup> mostly American citizens. In its ultimate effect, however, the bill would reduce the number of resident aliens (although, as will be apparent from what has been said, it is not primarily an immigration bill). While some 1,200 aliens of good character now annually deportable would be permitted to stay here, the stricter provisions, setting up new grounds for deportation and permitting twenty-four-hour detention, would increase deportations of undesirables now permitted to stay, to a figure several times 1,200. Furthermore, Section 13, which, as an immigration rather than a deportation matter, eliminates the preferential status now accorded to agriculturists—a preference under which as many as 22,000 aliens have been admitted annually<sup>56</sup>—would alone overwhelmingly counterbalance the small number of worthy persons allowed to stay. But the main reason for the passage of the proposed bill or one similar to it has been stated in a way that needs no improvement, by Mr. Reginald Heber Smith.<sup>57</sup>

The immigrant comes to this country, often from lands of injustice and oppression, with high hopes, expecting to receive fair play and square dealing. It is essential that he be assimilated and taught respect for our institutions. Because of the strangeness of all his surroundings, his ignorance of our language and our customs, often because of his simple faith in the America of which he has heard, he becomes an easy prey. When he finds himself wronged or betrayed keen disappointment is added to the sense of injustice. Through bitter disillusionment he becomes easily subject to the influences of sedition and disorder.

For his sake, but equally much for our own, the inadequacies and injustices of the present law should at once be remedied.

<sup>55</sup> Figures from a radio address by D. W. MacCormack, Commissioner of Immigration and Naturalization, Aug. 2, 1935.

<sup>56</sup> Communication from Commissioner of Immigration and Naturalization to House Committee on Immigration and Naturalization, June 21, 1935.

<sup>57</sup> In *Justice and the Poor*, as quoted in the Commission Report, p. 29.