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DUTY TO RECEIVE NATIONALS?

CLEMENS HUFMANN*

A. INTRODUCTORY REMARKS

THIS paper is an inquiry into the problem of whether a State, *A*, has a right under international law to demand from another State, *B*, the admission into the latter, of persons whom *B* recognizes as its nationals and of whose presence within its territory *A* desires to be relieved. The large number of deportation orders outstanding in the United States,¹ which are unenforceable on account of the refusal of other States to admit the persons concerned, demonstrates that the question under discussion is not without considerable practical implications. This paper arrives at the conclusion that international law imposes no duty upon States to admit their nationals. In the United States the subject matter of this paper has received little attention. This is somewhat surprising as the two opposing views have been clearly put forward by agents of the United States Government and published in juxtaposition.² In *United States ex rel. Hudak v. Uhl*³ the court said: "That the sovereign may deport the alien to the country of his nativity and of which he is presumably a citizen cannot be questioned. Such power is limited only by the power of the native sovereignty to refuse to receive the alien if it so chooses."⁴ On the other hand the Under Secretary of State, Mr. Grew, in a letter on October 19, 1926, to the Assistant to the Attorney General, Mr. Donovan, expressed the opinion that Guatemala was under a duty to receive a Guatemalan citizen.⁵

As no general international treaty or judicial precedent exists on the international law of admission of nationals, it becomes necessary to examine all evidence which might tend to establish a rule of customary international law. The search for evidence of customary international law necessitates an examination of the pertinent international treaties and of the extent to which States have admitted their nationals upon the demand of the expelling State. Secondary sources of customary international law worthy of investigation are the strength and hierarchial position of the right of sojourn granted by States to their citizens, and

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1. The Immigration and Naturalization Systems of the United States, Report of the Committee on the Judiciary, S. Rep. No. 1515, 81st Cong., 2d Sess. 639 (1950) states that on April 15, 1949, there were 3,278 unenforceable orders of deportation outstanding in the United States. *Id.* at 637 mentions 3,600 as the latest figure.

2. 3 Hackworth, *Digest of International Law* 740 (1942).

3. 20 F. Supp. 928 (N.D. N.Y. 1937).

4. *Id.* at 929.

5. 3 Hackworth, *op. cit. supra* note 2, at 740.

the degree of effectiveness of the procedures available for the implementation of the right of entry and sojourn where it exists. It is necessary to limit this phase of the study to a few representative States. Only the law of the United States and Germany on the substantive and procedural aspects of a national's right of entry will receive thorough examination. A survey and criticism of the opinions of public officials and authors concerning international legal duty to admit nationals concludes the part of this paper dealing with the ascertainment of the present state of international law. A short second part of this study considers whether it is desirable to develop a rule of international law making it obligatory on States to receive back their nationals.

Before turning to the evidence which might support the rule of law under discussion, a few remarks on the right to expel foreigners and on the nature of nationality are appropriate.

B. PRESENT STATE OF THE LAW

1. *Right to Expel Foreigners*

A duty to receive back nationals presupposes that a State demanding the reception has the liberty under international law to rid itself of the presence of the alien.

The United States Supreme Court has held that "The right to exclude or to expel all aliens, or any class of aliens, [is] . . . an inherent and inalienable right of every sovereign. . . ."⁶ But three Justices dissented from this decision on the ground that the due process clause of the United States Constitution prohibited the infliction of such "punishment" on residents by administrative action.⁷ If the dissenters' conception of the legal nature of deportation were correct it might be extended to international law, so that the expulsion of a resident foreigner for other than criminal behavior could be classified as a denial of justice giving rise to a claim for reparation against the expelling State.⁸ It is also interesting to note that expulsion was occasionally regarded as a somewhat extraordinary exercise of State power akin to retaliation.⁹

6. *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893).

7. *Id.* at 741, 759, 763.

8. Scott, *The Spanish Origin of International Law*, Francisco de Vitoria and His Law of Nations (1934) De Indis, § III, proof IV: app. A at XXXVI: ". . . , it would not be lawful for the French to prevent the Spanish from travelling or even from living in France, . . ."

9. The Alien Labour Act, 1897, 60 and 61 Vict. c. 11, as amended by 61 Vict. c. 2 (1897) and 1 Edw. 7 c. 13 s. 9 (1901) (Canada): "This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act." *Attorney General for Canada v. Cain*, [1906] A.C. 542, 545 (P.C.)

But the practice of States in this field has never brought into serious dispute the right of expulsion of foreigners in a humane manner.¹⁰ The numerous treaties of commerce and friendship containing clauses like, "The nationals of each of the High Contracting Parties shall be permitted to enter, travel, and reside in the territories of the other . . . to carry on every form of commercial activity . . . to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the state of residence. . . ."¹¹ do not result in a relinquishment by States of their right to expel nationals of the other contracting party. Consequently such treaty provisions also do not deprive the State of the alleged right to demand the admission of expellees of the State of nationality. Such rights are sometimes sought to be preserved in the treaty by a proviso: "Nothing contained in this Treaty shall be construed to affect existing statutes of either of the High Contracting Parties in relation to the immigration of aliens or the right of either of the High Contracting Parties to enact such statutes."¹² A treaty lacking such provisos ". . . should not be considered as renouncing such an important attribute of sovereignty as the right of expulsion. . . ."¹³ This interpretation seems to be generally accepted,¹⁴ and only occasionally is the treaty clause phrased so as to limit the right of expulsion by enumerating the causes which shall be regarded as sufficient to justify it.¹⁵

The law of expulsion of foreigners may be briefly summarized. It is generally maintained that a State is not completely free to expel foreigners indiscriminately. Expulsion is justified if it is executed for the preservation of public law and order. The determination of whether public law and order is endangered through the presence of an alien is left to the bona fide determination of the territorial State.¹⁶ It is not

10. Ralston, *Venezuelan Arbitrations of 1903*, at 914, *Maal case*, where the broad language of the umpire ". . . may . . . , expel persons dangerous to the welfare of the country, . . ." is not called for by the facts of the case, but may be explained by the Venezuelan law which apparently provided for expulsion not of foreigners as such but of persons with less than two years residence.

11. *Treaty of Friendship, Commerce and Consular Rights between the U.S. and the Republic of Austria*, June 19, 1928, art. I, § 1, T.S. No. 118, at 243.

12. *Id.* art. I, § 7, at 244.

13. *Dep't of State Instruction of April 9, 1912, to the American Consul General at Hamburg*, cited from *American Turkish Claims Settlement Under the Agreement of Dec. 24, 1923, and Supplemental Agreements Between the United States and Turkey*, opinions prepared by F. K. Nielsen and J. Mahtos (1937), hereinafter *Nielsen Op. and Rep.*, 503, at 509, *Lazar Rokach case*.

14. *Heinrichs, Deutsche Niederlassungsverträge und Übernahmeabkommen 179 (1903)*.

15. For an example, see *Convention of Commerce and Navigation Between Latvia and Sweden*, signed at Stockholm, Dec. 22, 1924, art. 2, *League of Nations T.S.* 36, at 285.

16. Ralston, *op. cit. supra* note 10, at 265, *Paquet case*, at 914, *Maal case*; *Fleishmann*,

necessary here to stake out the exact bounds of the right of expulsion and the methods which may legally be brought to bear on the expellee. Within broad limits of discretion a State may command an alien to leave its territory and enforce the order by appropriate means.

2. *How is Nationality Maintained While Residing in a Foreign Jurisdiction?*

It is not easy to see in what way nationality can persist after the person has left the territory of his state of nationality, as the bulk of the rights and duties pertaining to that status are at least suspended during his absence. It has, therefore, been suggested that: "Nationality, as personal status, has full juridical effect only within local jurisdiction. It lacks extraterritoriality, and its effects are therefore suspended in every instance when a moral and physical person moves to a foreign soil. . . ."¹⁷

But this difficulty can be overcome if proper emphasis is given to the factor that nationality, understood as membership in a political society most nearly normal by the standards of the society concerned, has a strong subjective flavor. Persons abroad may continue to be regarded as belonging to the society which they have left, as evidenced by its nationality laws and other statutes.¹⁸ The right to re-enter the territory may be thought of as the bridge over which the reinstatement of the suspended legal status can be accomplished. If this bridge is destroyed a kind of de facto statelessness may be said to result. But it is submitted that such de facto loss of nationality cannot be completely equated with the de jure deprivation of nationality. Otherwise, the problem dealt with in this paper would be moot.

3. *Duty to Receive Nationals*

Turning to the alleged duty to admit citizens to the national territory, no universal or sufficiently general treaty establishing or recognizing such duty can be found.

a. *Customary laws as derivable from treaties*

It becomes, therefore, necessary to look for evidence of a general practice accepted as law. Such custom may be inferred from multilateral

Fremdenrecht Ausweisung, in I Strupp Wörterbuch des Völkerrechts und der Diplomatie 334-339 (1924); Hyde, *International Law Chiefly as Interpreted and Applied by the United States* § 61, at 230 n. 3, citing Mr. Geshman, Secretary of State, to Mr. Smithe, Minister of Haiti, Nov. 5, 1894, and at 231 (2d ed. 1945); I Oppenheim, *International Law* 631, 632 (7th ed. 1948); Verdross, *Völkerrecht* 579 (2d ed. 1950); Irizarry Y Puente, *Exclusion and Expulsion of Aliens in Latin America*, 36 *Am. J. Int'l L.* 252, 263 (1942).

17. Brown, *Cardenas Doctrine*, 34 *Am. J. Int'l L.* 300 (1940).

18. German Criminal Code, § 3, Schönke, *Strafgesetzbuch Kommentar* at 52 (5th ed. 1951).

or bilateral treaties accepted by an overwhelming majority of nations.¹⁰

Numerous treaties especially between the nations of central Europe and of the American continent recognize either expressly or by necessary implication the duty to admit nationals. The treaties between Germany and Denmark of December 11, 1873,²⁰ Germany and Switzerland of November 13, 1909,²¹ and Germany and the Netherlands of December 17, 1904²² obligate each party to receive back at the request of the other its nationals, and former nationals who have not acquired another nationality. These and other similar treaties²³ were modeled on the "Gothaer Vertrag" of July 15, 1851, accepted by Luxembourg and all German States except Austria, Holstein, Lauenburg, and Liechtenstein, which regulated in detail these questions and also those related to persons stateless *ab initio*.²⁴ Switzerland had an essentially similar treaty with Sardinia as early as 1827.²⁵

Even stronger evidence of a customary international duty is supplied by those treaties which do not in terms spell out the obligation to receive expelled nationals, but show by implication that the parties proceeded on the assumption of the existence of such duty. To this category belongs the treaty between Germany and Belgium which provides that a demand for admission must not be refused on the basis that the indigent expellee has lost his nationality.²⁶ In a treaty between Germany and

19. Schwarzenberger, *Frontiers of International Law*, 6 *The Yearbook of World Affairs* 246, 257 (1952).

20. *Uebereinkommen zwischen dem Deutschen Reiche und Dänemark wegen wechselseitiger Unterstützung Hilfsbedürftiger und Uebernahme Auszuweisender*, art. 4, Dec. 11, 1873, *Zentralblatt für das Deutsche Reich*, hereinafter *Z.f.d.D.R.*, 1874, at 31, and Keller-Trautmann, *Kommentar zum Reichs- und Staatsangehörigkeitsgesetz vom 22. Juli 1913*, at 529 (1914).

21. *Niederlassungsvertrag zwischen dem Deutschen Reich und der Schweizerischen Eidgenossenschaft*, art. 7, Nov. 13, 1909, *Reichsgesetzblatt*, hereinafter *RG Bl.*, 1911, at 887, and Keller-Trautmann, *op. cit. supra* note 20, at 503.

22. *Niederlassungsvertrag zwischen dem Deutschen Reich und den Niederlanden*, art. 6 *RG Bl.* 1906, at 879, and Keller-Trautmann, *op. cit. supra* note 20 at 489.

23. *Uebnahmeabkommen zwischen dem Deutschen Reich und Italien wegen wechselseitiger Unterstützung Hilfsbedürftiger*, art. 4 and art. 5, Aug. 8, 1873 *Z.f.d.D.R.* 1873, at 475, and Keller-Trautmann, *op. cit. supra* note 20, at 533; *Bekanntmachung, betreffend das zwischen Deutschland und Oestereich-Ungarn bezüglich der Uebernahme Auszuweisender (unterm 26. Juli 1875) getroffene Abkommen* *Z.f.d.D.R.* 1873 p. 475, and Keller-Trautmann, *op. cit. supra* note 20, p. 533.

24. *Vertrag zwischen verschiedenen deutschen Staaten wegen gegenseitiger Verpflichtung zur Uebernahme der Auszuweisenden*, art. 1, Keller-Trautmann, *op. cit. supra* note 20, at 481.

25. De Claparède, *Die Völkerrechtliche Repatriationspflicht in ihrer Entwicklung dargestellt nach den sie betreffenden Verträgen der Schweiz und des Deutschen Reiches* at 31 (1911).

26. *Deklaration zwischen Deutschland und Belgien in Beziehung auf Unterstützung und*

Russia the class of persons who must be admitted is not restricted to indigent persons but again the duty to receive is expressly recognized only with respect to former nationals.²⁷ The agreement of July 29, 1933, between the United Kingdom and France also fails to mention a duty to receive back, but specifies only the ports to which expelled persons shall be deported and the allocation of expenses.²⁸

One modern multilateral treaty may be regarded as imposing a general duty on States to receive nationals. The Convention on the Status of Aliens, concluded at the Sixth International Conference of American States, at Havana, February 20, 1928²⁹ provides in article 6: "States are required to receive their nationals expelled from foreign soil who seek to enter their territory."³⁰ It must be noted that by a literal application of the article quoted a State may refuse to comply with another State's demand to receive back its national if the expellee himself does not "seek admission" but prefers to stay where he is or to enter a third State. Moreover, the treaty is still unratified by seven member States of the Organization of American States,³¹ while fourteen have ratified it. This appears insufficient to create customary law, either general or local.

The treaties between Germany and France of 1880³² and between Great Britain and Germany of 1913³³ leave the receiving State entirely free—with one narrow exception in the latter treaty—to refuse admission. The weight to be attributed to these treaties depends somewhat on whether they are to be regarded as granting to the State of nationality the privilege to refuse admission. The language employed tends to indicate that the parties did not view the agreements as impairing a general rule of obligatory admission.

It may be doubtful on which side of the issue the second modern multilateral treaty on the subject should be placed. The Special Protocol

Heimschaffung der Hilfsbedürftigen, art. 1 and art. 4, July 7, 1877, Z.f.d.D.R. at 411, and Keller-Trautmann, *op. cit. supra* note 20, at 528.

27. 3 Deutsch—Russisches Uebnahmeabkommen, art. 1 and art. 3, Feb. 10/Jan. 29, 1894, Z.f.d.D.R. at 81, and Keller-Trautmann, *op. cit. supra* note 20, at 540.

28. Agreement Between His Britannic Majesty's Government in the United Kingdom, the Government of India, and the Government of the French Republic Regarding Deportation from Certain British and French Territories, signed at Paris, July 29, 1933, League of Nations T.S. 142, at 166.

29. 46 Stat. 2753, T.S. No. 815, IV at 4723.

30. *Id.* at 2755, T.S. No. 815, IV at 4723.

31. Argentina, Bolivia, Cuba, El Salvador, Honduras, Paraguay and Venezuela, according to a letter of April 23, 1954, by Mr. Manuel Canyes, Chief, Division of Law and Treaties of the Pan American Union.

32. Abkommen zwischen Deutschland und Frankreich, betreffend das Verfahren bei der Uebnahme von hilflosen Personen, verlassenen Kindern und Geisteskranken (1880) Keller-Trautmann, *op. cit. supra* note 20, at 532.

33. *Ibid.*

Concerning Statelessness, concluded at the Hague April 12, 1930, provides in article 1:

"If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:

(i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or

(ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.

"In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request."³⁴

Until 1939 this Special Protocol had been ratified by Belgium, Brazil, Great Britain and Northern Ireland, Australia, the Union of South Africa, India, China, and Salvador.³⁵ The relatively small number of ratifiers of this treaty tends to warrant the inference that the majority of nations do not regard the obligations contained in article 1 (1) as compatible with their rights and interests. A comparison with the wording of the Basis of Discussion No. 2, "If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose national he was *remains* bound to admit him to its territory at the request of the State where he is residing"³⁶ indicates that article 1 of the Special Protocol must be given a narrow construction. The omission of the words "remains bound" makes impossible the conclusion that if a former national must be admitted under certain circumstances admission must a fortiori generally be granted to nationals. Moreover, article 2 par. 3 of the Special Protocol: "It is understood that, in so far as any point is not covered by any of the provisions of the preceding article, the existing principles and rules of international law shall remain in force"³⁷ is an express caveat against an argument that article 1 is based on the assumption of such a general duty to admit nationals.

34. League of Nations, 11 Official Journal 881 (1930) Official No.: C. 1227. M. 114, 1930 V., V Hudson, *International Legislation*, No. 252 at 388 (1929-31), 24 *Am. J. Int'l L.* 211 (Supp. 1930). This protocol did not enter into force, though it was ratified by eight States, as the required number of ten ratifications or accessions was not reached. Report on Nationality including Statelessness by Manly O. Hudson to the International Law Commission 4th session, U.N. General Assembly Documents A/CN. 4/50, at 9 (1952).

35. League of Nations Publication V, Legal, 3, at 75 (1939).

36. League of Nations, Conference for the Codification of International Law. The Hague 1930, First Committee on Nationality, Nationality Proposals 1-78, at 2, 24 *Am. J. Int'l L.* 10 (Supp. 1930). (Emphasis added.)

37. See note 34 supra.

It must therefore be concluded that the Special Protocol Concerning Statelessness tends to negative rather than support the inference of a customary duty to admit.³⁸

This review shows that the duty to receive back nationals has won only limited recognition by treaties, which in itself is insufficient to result in a rule of general customary international law.

b. International State practice

Therefore, the practice of States, apart from treaties, should be taken into account.

It appears that States endeavoring to deport aliens frequently encounter opposition on the part of the State to which the expelled is sought to be deported. On April 15, 1949, there were 3,278 unenforceable orders of deportation outstanding in the United States.³⁹ Uncertainty, however, persists as to the number of deportees whose nationality had been definitely determined. It may well be that the standard is national origin rather than nationality or citizenship as conferred or withdrawn by the municipal law of the State concerned. This doubt is caused by the statutory language which must have been the standard for determining the country of deportation named in the deportation order. The statute prescribed deportation of aliens "to the country whence they came."⁴⁰ It had been understood to refer to the State which, at the time of deportation, includes the place from which the alien came.⁴¹

But this interpretation of the statute was not universal. When interpreting the statutory language in *Delany v. Moraitis*,⁴² the court emphasized the nationality bond: "The purpose of the deportation Statute . . . is to remove from this country an alien who is here contrary to our laws, and place him under the jurisdiction of the political power to which he owes allegiance."⁴³ The case involved a Greek seaman who had come to the United States from Spain on a Greek vessel. Deportation could neither be effected to Greece which was occupied by Germany nor to Spain which refused admission. The District Court was reversed in holding that deportation to England, where the Greek government in exile was functioning, was illegal. But it does not appear from opinion that the appellant's citizenship was decisive for the reversal. Its policy was

38. Art. 2 par. 2 of the Special Protocol Concerning Statelessness, *supra* note 34, disclaims that customary international law is in any way affected by art. 1.

39. See note 1 *supra*.

40. U.S. Immigration Act § 20, 39 Stat. 890, 8 U.S.C.A. 156 (1917), (repealed 66 Stat. 279 (1952)).

41. *Moraitis v. Delany*, 46 F. Supp. 425 (D.D. Md. 1942).

42. 136 F. 2d 129 (4th Cir. 1943), reversing 46 F. Supp. 425 (D.D. Md. 1942).

43. *Id.* at 131.

rather to bring about deportation. It was not denied that ". . . the term 'country' as used in the statute must be construed, ordinarily, to refer to the territory from which the alien came."⁴⁴ It must, therefore, be assumed that this latter test and not the nationality test underlies the figures quoted. Whether the statute referred to the country from which an alien had last entered or the country in which he had his last domicile is immaterial for the present study. It is sufficient to point out that the statute did not expressly specify and was not construed to refer to the country of nationality. The language in *Frick v. Lewis*.⁴⁵ ". . . the words 'returned to the country whence he came'⁴⁶ were intended to refer to the place of nativity or citizenship"⁴⁷ is dictum and has no support in prior holdings.

In addition, the breakdown of the undeportables conspicuously lacks the class of stateless persons. In view of the possible meta-legal use of the word "nationality," the report cannot be regarded as complete proof against the practice of admitting nationals to the national territory.

Nevertheless, it appears likely that some undeportables have nationality and that the proper government upon being contacted refused admission; so that, although the practice of keeping nationals out of their home country is certainly not as extensive as a superficial reading of the report suggests, it is safe to infer that their entry is not universally permitted. Russia,⁴⁸ Great Britain⁴⁹ and other States⁵⁰ are reported to have refused admission to their nationals.

c. *Municipal State practice*

Some light is shed on the question by an examination of State constitutions. Most of the more recent ones contain some provision on the right to sojourn in the country. This right is sometimes bestowed on the "people,"⁵¹ or all the inhabitants of the republic,⁵² or on every "per-

44. *Id.* at 130.

45. 195 Fed. 693 (6th Cir. 1912).

46. The reference is to 34 Stat. 904, 905 (1907) § 20, 21 of the Immigration Act.

47. 195 Fed. at 701 (6th Cir. 1912).

48. Castrén, Die gegenseitigen Pflichten der Staaten in bezug auf den Aufenthalt und die Aufnahme ihrer Staatsangehörigen und der Staatenlosen, 11 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 325, at 366 (1942).

49. Heinrichs, *op. cit.* supra note 14, at 180.

50. As regards other states see Castrén, *op. cit.* supra note 48, at 374; Lessing, Das Recht der Staatsangehörigkeit und die Aberkennung der Staatsangehörigkeit zu Straf- und Sicherungszwecken, XII Bibliotheca Visseriana 144 (1937).

51. Const. of China of Dec. 25, 1941, art. 10, I Peaslee, Constitution of Nations 446 (1950).

52. Const. of Chile, Sept. 18, 1925, art. 10 § 15, I Peaslee, *op. cit.* supra note 51, at 415; Const. of Argentina, March 16, 1949, art. 26, I Peaslee, *op. cit.* supra note 51, at 66.

son"⁵³ in countries where citizenship is not adopted by constitutional law as the nexus to which the right to reside in the territory attaches. European constitutions usually predicate the enjoyment of this right on citizenship.⁵⁴ But irrespective of who the beneficiary of the right may be, the right is seldom absolute and unconditional but subject to the law or police regulations.⁵⁵

How secure a national's right of entry is may well depend on whether or not the courts are unconditionally open to him to establish his nationality.⁵⁶

(1) *Practice of the United States*

The United States Supreme Court has had no occasion to pass on the exact question of whether the Constitution confers the right of entering the country to citizens, or whether this right is given only by way of negative inference drawn from the absence of statutes restricting the admission of citizens. The closest judicial expression has come to asserting the constitutional character of a citizen's right to enter the country, is a decision by Mr. Justice Field: ". . . no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress."⁵⁷ The Supreme Court in later decisions carefully avoided a premature pronouncement on the subject: "The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return. . . ."⁵⁸

The first sentence of the last quotation was and still is correct as a general proposition. The present law contains no express provision under which nationals of the United States can be excluded. The provisions relating to detention and examination,⁵⁹ exclusion and deportations⁶⁰ are in terms applicable only to aliens, thus withholding from public officials the power to exclude citizens.

53. Const. of Bolivia, Nov. 23, 1945, art. 6, I Peaslee, op. cit. supra note 51, at 153; Const. of Brazil, Sept. 24, 1946, art. 142, I Peaslee, op. cit. supra note 51, at 209.

54. Swiss Const., Sept. 12, 1948, art. 44, III Peaslee, op. cit. supra note 51, at 134; Const. of Italy, Jan. 1, 1948, art. 16, II Peaslee, op. cit. supra note 51, at 281; Const. of Albania, March 15, 1946, art. 19, par. 6, I Peaslee, op. cit. supra note 51, at 41; see also Const. of Burma, Sept. 24, 1947, § 17(iv), I Peaslee, op. cit. supra note 51, at 252.

55. See footnote 54 supra.

56. Contra: Zimmerman, *Judicial Versus Administrative Determination of Controverted Claims to United States Citizenship*, 43 Geo. L.J. 19, 51 (1954).

57. *In re Look Tin Sing*, 21 Fed. 905, 910 (D. Cir. Cal. 1884).

58. *Justice Holmes in Chin Yow v. United States*, 208 U.S. 8, at 12 (1908).

59. U.S. Immigration Act §§ 232, 233, 238, 66 Stat. 196, 197, 202, 8 U.S.C.A. §§ 1222, 1223, 1228 (1952).

Where a statute could be construed so as to exclude citizens, the Supreme Court has adopted an interpretation under which citizens are admitted, declaring the contrary construction as achieving “. . . an anomalous result which, obviously, Congress did not intend.”⁶¹

The procedures available to implement the citizen's right of entry have varied, and deserve consideration, as they tend to show the degree of effectiveness of this right.

The traditional remedy against wrongful exclusion and deportation from the United States based on a finding of lack of United States citizenship, has been a petition for habeas corpus. In *United States v. Ju Toy*⁶² the District Court on a writ of habeas corpus decided contrary to the Secretary of Commerce and seemingly on new evidence that *Ju Toy* was a native-born citizen. The Supreme Court held that the petition should not have been entertained as no abuse of discretion had been alleged in it. The Supreme Court further held that as to the claim of citizenship, the administrative determination was conclusive. This claim of citizenship deserved a judicial examination de novo as little as did claims of prior domicile or belonging to a class excepted from the exclusion acts.⁶³ The Court doubted whether the Fifth Amendment was applicable:

“The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for purposes of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial . . . the decision may be entrusted to an executive officer. . . .”⁶⁴

In *Chin Yow v. United States*⁶⁵ the Supreme Court ordered the writ of habeas corpus to issue. The District Court was held to be empowered to try de novo the question of citizenship if it could be shown in conformity with the petitioner's allegations that he had been allowed nothing but the semblance of a hearing. But the principle of finality of the administrative determination of the issue of citizenship as established in the *Ju Toy* case was left undisturbed: “. . . the denial of a hearing cannot be established by proving that the decision [made by the immigra-

60. Id. §§ 236, 237, 241, 66 Stat. 200, 201, 204, 8 U.S.C.A. §§ 1226, 1227, 1251 (1952).

61. *United States v. New York and Cuba Mail Steamship Co.*, 269 U.S. 304, at 310 (1925).

62. 193 U.S. 253 (1905). See also, *Chin Yow v. United States*, 203 U.S. 8 (1903); *Tang Tun v. Edsell*, 223 U.S. 673 (1912); *Zakonaite v. Wolf*, 226 U.S. 272 (1912).

63. 193 U.S. at 262.

64. Id. at 263.

65. 203 U.S. 8 (1908).

tion official concerning citizenship] was wrong."⁶⁶ The question of applicability of the due process clause of the Fifth Amendment left open in the *Ju Toy* decision was answered in the affirmative:⁶⁷ But this did not endow the citizens' right of entry with constitutional character.

The hearing, properly so called, which was sufficient to determine conclusively the deportee's status suffered by its nature from several severe shortcomings, in that: the prospective deportee could not subpoena witnesses, no punishment was provided for witnesses giving false testimony, counsel could be excluded during part of the hearing.⁶⁸ Consequently situations like that in *United States v. Ju Toy* could arise, in which the Court after probing the reasonableness of the immigration official's admission and consideration of evidence without discovering arbitrary acts, had to affirm the administrative finding, although ". . . the Court might feel that it would have reached a different conclusion than that reached by the administrative agency."⁶⁹

Illustrative of the degree of unreasonableness which the administrative agency sought to have approved by the United States Supreme Court is the Court's opinion in *Kwock Jan Fat v. White*:⁷⁰

" . . . this [identification by three witnesses] must be regarded as such an important part of the testimony of these most important witnesses that it may well have been . . . sufficient to determine the result in a case even much stronger against a claim of United States citizenship than was made in this record against the claim of petitioner, and a report [to the Secretary of Commerce and Labor as the reviewing authority] which suppressed or omitted it was not a fair report and a hearing based upon it was not a fair hearing. . . . It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."⁷¹

The sentiment expressed by the Court apparently motivated it to disregard the limitations imposed by the previous decisions: In *Ng Fung Ho v. White*⁷² the fairness of the administrative hearing was not scrutinized; instead the mandate to the lower court was to determine the question of citizenship apparently without regard to the administrative decision.

"The constitutional question . . . is: May a [lawfully admitted] resident of the United States who claims to be a citizen be arrested and deported on executive

66. *Id.* at 13.

67. *Id.* at 12-13.

68. *Low Wah Suey v. Backus*, 225 U.S. 460, 468-470 (1912).

69. *Mah Ying Og. v. Clark*, 81 F. Supp. 696, 697 (D.D.C. 1948). See also *Wong Chow Gin v. Cahill*, 79 F. 2d 854 (9th Cir. 1935).

70. 253 U.S. 454 (1920). A discussion and criticism of the administrative procedure is contained in the dissent by Mr. Justice Brewer in *United States v. Sing Tuck*, 194 U.S. 161, 170 (1904).

71. 253 U.S. at 464.

72. 259 U.S. 276 (1922).

order? . . . They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. . . . Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. . . . Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. . . . remanded to the District Court for trial . . . of the question of citizenship. . . ."⁷³

The method, to wit, testing the jurisdiction of the administrative, seized upon to eviscerate the finality of administrative action had been urged on constitutional grounds⁷⁴ previously, without having been adopted. If the *Ng Fung Ho* decision is given the wide scope attributed to it in a later opinion by its author, Mr. Justice Brandeis, saying, "A citizen who claims that his liberty has been infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. . . . opportunity must be accorded to any resident of the United States who claims to be a citizen. . . ."⁷⁵ it would by implication overrule the prior holdings.⁷⁶

It is not possible to square the decisions by making the *Ng Fung Ho* case turn on the substantiality of the showing of citizenship: "Only in the event an alleged alien asserts his United States citizenship in a hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial de novo of that issue in the district court."⁷⁷ For, in the *Ju Toy* case, the evidence of citizenship found sufficient by the District Court to establish petitioners' claim must have been substantial, and in the *Chin Yow* case, Mr. Justice Holmes, to make quite sure that the trial court would not enter on a consideration of the merits of the claim of United States citizenship, which was the only substantive issue, said, ". . . denial of a hearing cannot be established by proving that the decision was wrong."⁷⁸

The true distinction can only rest on the fact that the *Ng Fung Ho* decision was not an exclusion case but dealt with petitioners who had been lawfully admitted as citizens to residence in the United States. This circumstance was stressed in the opinion: "But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surrepti-

73. Id. at 282-285.

74. *United States v. Sing Tuck*, 194 U.S. 161, 170 (1904), dissent by Mr. Justice Brewer, and his dissent in *United States v. Ju Toy*, 198 U.S. 253, 264 (1905).

75. *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38, 73, 77 (1936), concurring opinion by Mr. Justice Brandeis.

76. *Chin Bak Kan v. United States*, 186 U.S. 193 (1902).

77. *Kessler v. Strecker*, 307 U.S. 22, 34-35 (1939).

78. 208 U.S. at 13.

tiously.⁷⁹ That this is the actual holding in spite of the broader meaning imputed to its ambit in the two Supreme Court opinions cited was recognized in *Avina v. Brownell*.⁸⁰

The *Ng Fung Ho* decision, therefore, has only indirect bearing on the question of the procedure by which a person claiming citizenship can obtain entrance to the country.

Notwithstanding the suggestion advanced in a subsequent decision that ". . . on habeas corpus . . . the function of the courts has always been limited to the enforcement of due process requirements,"⁸¹ it must be emphasized that the departure from the previous doctrine was accomplished by a change in statutory construction rather than on constitutional grounds. It is true that the *Ng Fung Ho* doctrine is still referred to as operative.⁸² But the underlying reasoning is unconvincing, as the statute provided that "In every case where any person is ordered deported from the United States under the provisions of this subchapter, or of any law or treaty, the decision of the Secretary of Labor shall be final."⁸³ This might be regarded as an indication that the *Ng Fung Ho* doctrine has constitutional character, as is intimated in the decision itself, because it offers the only way of overcoming the conceptual difficulty of singling out from the various statutory prerequisites for the legality of deportation, the one requirement of alienage for judicial review. But this has never been clearly enunciated by the United States Supreme Court.

It must therefore be assumed that it still is ". . . impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends. . . ." ⁸⁴

In the *Heikkila* case the Supreme Court said by way of dictum: "It is clear that prior to the Administrative Procedure Act habeas corpus was the only remedy by which deportation orders could be challenged in the courts. The courts have consistently rejected attempts to use injunctions, declaratory judgments and other type of relief for this purpose."⁸⁵ But of the cases cited in support none dealt with the declaratory judgment action. In fact, the Declaratory Judgment Act⁸⁶ was applied in a

79. 259 U.S. at 282.

80. 112 F. Supp. 15, 18 (S.D. Tex. 1953).

81. *Heikkila v. Barber*, 345 U.S. 229, 236 (1953).

82. *Ibid.*

83. U.S. Immigration Act § 19, 39 Stat. 889, 8 U.S.C.A. § 155 (1917) (repealed 66 Stat. 279 (1952)).

84. *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902), *Zimmerman*, op. cit. supra note 56, at 47.

85. 345 U.S. at 230.

86. Act of June 14, 1934, c. 512, as amended, 28 U.S.C.A. § 2201 (1949).

situation where the deportation order had not even been issued. In *Perkins v. Elg*⁸⁷ the petitioner sued to “. . . obtain (1) a declaratory judgment that she is a citizen of the United States . . . (2) an injunction against the . . . Commissioner of Immigration restraining them [him] from prosecuting proceedings for her deportation, and (3) an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she is not a citizen.”⁸⁸ All relief prayed for was granted. The Supreme Court held that the court below properly recognized the existence of an actual controversy under the Declaratory Judgment Act.⁸⁹ This decision disproves the language of the *Heikkila* case, for it is difficult to see why declaratory judgment action should be available prior to the issuance of the deportation order, while action taken under the deportation order itself would be subject only to habeas corpus review.

Elg's position was identical with that of the petitioners in *Ng Fung Ho* with respect to prior lawful admission as a citizen and presence in the country. But nothing in the later decision suggests that the remedy of declaratory judgment suit was intended to be restricted to persons within this category. However, no case came up in which the exact scope of the new remedy and its availability to persons claiming citizenship and demanding admittance or resisting deportation was fully tested. Shortly after the *Elg* decision the question was clarified by statute: “If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action . . . for a judgment declaring him to be a national of the United States.”⁹⁰

This was a clear pronouncement that declaratory relief was available to United States citizens under all circumstances without regard to the absence of the peculiar prerequisites of habeas corpus proceedings, to wit, final deportation warrant against the petitioner and his being in custody. Nor was it necessary to await the outcome of the administrative proceedings. The action would lie as soon as the denial occurred. Whether as a conceptual matter, a new remedy in addition to 28 U.S.C.A. section 2201 was created, the courts did not deem necessary to examine.

The new provision liberalizing access to court for the determination

87. 307 U.S. 325 (1939).

88. *Id.* at 328.

89. *Id.* at 349.

90. Act of Oct. 14, 1940, c. 876, Title I, § 503, 54 Stat. I, 1171.

of the issue of nationality and thus strengthening the citizens' right to enter the country⁹¹ was discontinued in the Act of 1952.

The latest statute takes away the declaratory judgment remedy from a person within the United States whose citizenship is denied in connection with an exclusion proceeding,⁹² and from a person outside the United States. It can hardly be argued that this enactment affects only the former section 903 U.S.C.A. Title 28, leaving section 2201 U.S.C.A. Title 28 to fall back upon.

It is provided by the new statute that persons other than those applying for entry as aliens have to be in possession of a certificate of identity.⁹³ This certificate cannot be issued to alleged nationals of the United States born abroad and over sixteen years of age unless they have been previously physically present in the United States.⁹⁴ Persons outside this category intending to enter the United States as nationals have to obtain a United States passport for entry. Since according to 22 U.S.C.A. section 212, "No passport shall be granted . . . for any other persons than those owing allegiance . . . to the United States," no legal claim to a passport is vested in a United States citizen.⁹⁵ So the issuance of a passport may be refused according to the discretion of the Secretary of State based on public interest. The refusal to issue a passport is not subject to judicial review under the Administrative Procedure Act because the action is by law committed to discretion.⁹⁶ For the same reason, it has been held, an injunction to the Secretary of State will not lie,⁹⁷ and a mandamus action cannot be brought in the absence of a showing that the exercise of discretion was arbitrary or capricious.⁹⁸ The latter exception apparently was regarded as applicable where the Secretary of State had failed for eight months to act on an application to issue a certificate of identity.⁹⁹ The broad discretion of the Secretary of State with regard to the issuance of a passport is attenuated somewhat by the Federal Regulations which require that the tentative denial of a passport application has to be communicated to the applicant writing together with the reasons therefor. The alleged national has to be given an opportunity to be heard and may appeal.¹⁰⁰

Decisions upholding the discretionary character of the issuance of pass-

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91. *Gan Seow Tung v. Clark*, 83 F. Supp. 482 (S.D. Cal. 1949).
 92. U.S. Immigration Act § 360, 66 Stat. 273, 8 U.S.C.A. § 1503 (1952).
 93. U.S. Immigration Act § 360(c), 66 Stat. 273, 8 U.S.C.A. § 1503(c) (1952).
 94. U.S. Immigration Act § 360(c), 66 Stat. 273, 8 U.S.C.A. § 1503(b) (1952).
 95. 22 C.F.R. § 51.75.
 96. Act of June 11, 1946, c. 324, § 10, 60 Stat. 243, 5 U.S.C.A. § 1009 (1950).
 97. *Yee Gwing Mee v. Acheson*, 108 F. Supp. 502 (N.D. Cal. 1952).
 98. *Eng. v. Acheson*, 108 F. Supp. 682 (S.D. N.Y. 1952).
 99. *Look Yun Lin v. Acheson*, 95 F. Supp. 583 (N.D. Cal. 1951).
 100. 22 C.F.R. § 51.143 makes applicable §§ 51.135-51.142 (1954).

ports and certificates of identity¹⁰¹ do not conflict with the holding in *Acheson v. Nobuo Ishimaru*,¹⁰² where an appeal from an order to issue a certificate of identity to enable the plaintiff to testify in an action for judgment declaring his status as a national of the United States was held inappropriate on the grounds that the order was interlocutory,^{102a} being analagous to a subpoena duces tecum¹⁰³ and that the denial was contrary to 8 U.S.C.A. section 801(c)(e).

The net result of the Nationality Act of 1952, therefore, appears to be the resurrection of the law with respect to nationals' remedies against non-admittance as it stood prior to *Elg v. Perkins*. The extension of the *Ng Fung Ho* doctrine to a petitioner whose right of entry is denied by the administrative agency on the grounds that he is not a national is carefully guarded against.¹⁰⁴ The responsibility of passing on the question of nationality for purposes of admission is within very wide boundaries entrusted to administrative agencies. The burden of providing his status as a national is on the claimant.¹⁰⁵

This poses the problem of whether, after having found a person to be a United States national, the discretion of the administrative agency could conceivably be exercised to exclude him from entering the United States. This is impossible for the immigration authorities, as their duty of admitting a citizen recognized as such is clearly established by the absence of a provision permitting his exclusion. But a citizen's right of entry might be frustrated if the Department of State were free to deny issuance of a passport to a person whose status as a United States national is undisputed. The answer here turns on the interpretation of "discretion" as used in 22 C.F.R. section 51.75. It is submitted that the administrative discretion properly exercised in the public interest cannot lead to the denial of a passport to a national abroad who needs the document for his return to the United States. Such act would show an arbitrary disregard of the state's interest, in allowing for the entry of its nationals, as evidenced by his not being excluded under law. It cannot be asumed that it was the intention of the legislature to grant such effective power to the Secretary of State in the form of a mere endowment with administrative discretion, to keep a United States national outside the country. More explicit language would be required to achieve that result.

101. See notes 98, 99 supra.

102. 185 F. 2d 547, 548-549 (9th Cir. 1950). Cf. *Avina v. Brownell*, 112 F. Supp. 15, 19 n. 4 (S.D. Tex. 1953).

102a. Cf. 28 U.S.C.A. § 1291 (Supp. 1954).

103. Fed. R. Civ. P. 45.

104. U.S. Immigration Act § 360(a)(c), 66 Stat. 273, 8 U.S.C.A. § 1503(a)(c) (1952).

105. U.S. Immigration Act § 291, 66 Stat. 234, 8 U.S.C.A. § 1361 (1952).

The laws relating to the issuance of passports to communists offers an analogy supporting the proposition put forward here. By act of Congress¹⁰⁶ it is made illegal for persons belonging to communist organizations to apply for passports or to use or to attempt to use passports. In seeming contradiction therewith is 22 C.F.R. section 51.135 providing ". . . no passport, except one limited for direct and immediate return to the United States, shall be issued to . . . members of the Communist party . . ." This regulation can be upheld as conforming to the mandate of Congress only on an argument that a passport for direct and immediate return to the United States is not a passport in the sense in which that term is used in the statute referred to. Such bold interpretation must be adopted to give effect to the strong policy of providing for the admission of United States nationals expressed in the immigration laws. If in this way the apparent encroachment on congressional legislation can be justified, no consideration of public interest could be strong enough to permit the withholding from a citizen of a "passport" for immediate and direct entry into the United States.

To sum up, if the interpretation of United States laws here advanced be correct, they do not exclude United States nationals from entering the territory, either expressly or by implication.

The burden of establishing the facts giving rise to his status as a national is placed on the claimant. The power to determine the question of nationality is largely entrusted to administrative agencies whose action is subject to judicial review only to a limited extent. The procedure to be followed by a national desiring entry may, at times, be onerous to the degree of defeating the right to admission.

(2) *German practice*

In Germany the constitution of 1871 contained in article 3¹⁰⁷ a provision corresponding roughly to the privileges and immunities clause of the United States Constitution.¹⁰⁸ It enjoined the states from discriminating against citizens of other German states but did not confer a constitutional right of entry upon German nationals.

The German Statute of November 1, 1867 (*Freizügigkeitsgesetz*)¹⁰⁹ permitted German nationals to sojourn anywhere in the Reich's territory where they were able to secure shelter, apparently qualifying the right of entry. The same law, in section 3, provided for restrictions on freedom of locomotion based on state law and police action. The *Frei*

106. 68 Stat. 778, 50 U.S.C.A. § 785 (Supp. 1954).

107. BG Bl. 1871, at 65.

108. U.S. Const. art. IV, § 2, cl. 1.

109. Bundesgesetzblatt 1867, at 55. § 1 was made effective for the Reich by the Law of April 22, 1871, BG Bl. 1871, at 87.

zfügigkeitsgesetz made no reference to exclusion of German nationals from the Reich. Its context indicates that its primary, if not only, purpose was to regulate the movement of persons already lawfully present in Germany. Apart from such reasoning it cannot be denied that the application of these provisions of the *Freizügigkeitsgesetz* clearly could lead to the exclusion of German nationals.

As to exclusion of nationals whose admission was demanded by other States the principle of allowing their entry has been asserted.¹¹⁰ But this principle was not general. It applied to foreign States only on the basis of reciprocity.¹¹¹

Under the Weimar Constitution, article 111 guaranteed freedom of locomotion to all citizens. This guarantee, however, applied only against administrative interference which could otherwise have been based on the general police power. It was expressly made subject to legislative restrictions.¹¹² Thus the previous law remained in force.¹¹³

New legislation, the Law for the Protection of the Republic, was indeed promulgated to permit the exclusion of persons belonging to families a member of which had ruled a German state until 1918.¹¹⁴ This law remained the only one providing clearly for the exclusion of Germans. Otherwise the laws relating to exclusion or expulsion were directed against foreigners only.¹¹⁵ Article 11 of the Bonn Constitution of May 23, 1949¹¹⁶ renews the liberty of locomotion and somewhat limits legislative encroachments. Article 117 of the Bonn Constitution continues in force the restriction on the freedom of locomotion which are based on the present housing shortage. The law providing for the exclusion of members of former ruling families is thus inferentially repealed.

As section 1 of the *Freizügigkeitsgesetz* was not enacted with a view to the post-1945 housing shortage, it can not directly limit the operation of article 11 of the Bonn Constitution. If this be so, it is difficult to see

110. Keller-Trautmann, *op. cit.* supra note 20, at 35.

111. Heinrichs, *op. cit.* supra note 14, at 11, 180.

112. Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August, 1919*, at 475 (13th ed. 1930).

113. *Id.* art. 178, at 657.

114. Law for the Protection of the Republic (*Gesetz zum Schutz der Republik*) § 23, July 21, 1922, RG Bl. 1922, at 585.

115. § 8, par. 1 Aliens' Police Decree (*Ausländerpolizeiverordnung*) Aug. 22, 1938, RG Bl. I, 1938, at 1053 (translation by the present author): "A foreigner may be rejected at the frontier of the German Empire if an order prohibiting his sojourn in the Empire has been issued." § 5 of the Aliens' Police Decree as amended by § 10, no. 3, Decree Concerning the Treatment of Aliens, Sept. 5, 1939, RG Bl. I, at 1667: "An alien may be prohibited from sojourning in the territory of the Empire if the public interest demands it."

116. Von Mangoldt, *Das Bonner Grundgesetz* 87 (1953).

how article 11 of the Bonn Constitution could be tacitly conditioned on the person's ability to find shelter.¹¹⁷ It is more in line with the liberal spirit of articles 11 and 117 of the Bonn Constitution to regard section 3 of the *Freizügigkeitsgesetz* as superseded. Consequently the exclusion of a German national can, if at all, only be accomplished under new legislation conforming to the requirements of article 11, paragraph 2 of the Bonn Constitution.¹¹⁸

By legislation the Allied High Commission for Germany closed the German frontiers to anybody except as authorized by the Military Government.¹¹⁹ No discrimination was made in the law between Germans and aliens.

Summarizing the German Law, it appears that German nationals could be excluded either on grounds of express provisions to that effect (Law for the Protection of the Republic), or by the discretion granted by military government legislation, or by an adverse but tenable interpretation of the *Freizügigkeitsgesetz*.

(3) *Conclusion concerning municipal state practice*

The examination of United States and German municipal law dealing with entry of nationals reaffirms that cases in which nationals were denied admittance either on account of procedural obstacles or by substantive law to that effect must be numerically insignificant in the States considered here. Still, the departure from what appears to be fairly general practice in itself tends to show that States feel themselves entitled to deny entrance to their nationals. Therefore, the prevailing but not uniform municipal practice of granting nationals the right to be admitted cannot support the existence of an international duty toward other States to receive back nationals.

d. Opinio juris et necessitatis

The opinion of States on their legal duties in this sphere as expressed by municipal judges, executive officials, and the laws of the States do no

117. *Id.* at 90 assumes this condition.

118. *Kommentar zum Bonner Grundgesetz bearbeitet von Dennewitz et al (1950) art 11, comment II, 1, d;* "It follows from the unconditional right to reside . . . that the exclusion of a person possessing this right at the time of his re-entry is prohibited." The prefix in "re-entry (*Wiedereinreise*)" should probably be ignored as an unintentional slip.

119. *Mil. Gov. Law No. 161 as amended with effect of Dec. 1, 1945, Military Government Gazette, Germany, U.S. Zone, Issue A, June 1, 1946, p. 53, "Except as authorized by Military Government, . . . no civilian shall cross the boundaries of the U.S. Zone." Military Government Law No. 17, Military Government Gazette, Germany, U.S. Zone of Control Issue M, April 16, 1949, p. 17 continued Law No. 167 and also did not distinguish between Germans and aliens.*

amount to an *opinio juris et necessitatis*, so that another element indispensable for the creation of customary law is absent.

No cases have arisen in which a State has pressed its claim for admission of a deportee to his State of nationality to the point of causing serious diplomatic disputes, or in which a State has taken the claim to an international tribunal for adjudication.

(1) *Opinions of State officials*

Where the question has been touched upon by municipal courts their dicta have gone both ways. In *Feldman v. Justica Publica*¹²⁰ the Supreme Court of Brazil dismissed the habeas corpus petition of a Roumanian national whose deportation to his country of origin could not be effected by reason of Roumania's refusal to permit his entry. The court disputed the legality of Roumania's conduct, saying: "The country of origin of the person expelled is not entitled . . . to prevent the exercise of that incontrovertible right [of expulsion of a foreigner for sufficient cause]. . . ." ¹²¹

The Manitoba Court of Appeal gave a similar opinion: "The right of expulsion of a foreign citizen whose presence is found to be objectionable does not seem to be conditioned on the acquiescence of the country of the foreign citizenship but apparently international comity requires that communication take place. Such communication takes the form of passport application." ¹²²

The opposite opinion was expressed in *United States ex rel. Hudak v. Uhl*:¹²³ ". . . the sovereign may deport the alien to the country of his nativity and of which he is presumably a citizen. . . . Such power is limited only by the power of the native sovereignty to refuse to receive the alien if it so chooses. The power of the native sovereignty to refuse to receive the alien is absolute in the absence of treaty otherwise providing." ¹²⁴

During the Hague conference for the codification of international law numerous delegations voiced their opinions on Basis of Discussion No. 2.¹²⁵ Under this proposal there was no occasion to refer to the exact issue of admission of nationals. The delegation of States opposed to the adoption of Basis of Discussion No. 2, that is principally France, Italy, and Roumania, stressed that the proposal would infringe on the

120. Annual Digest of Public International Law Cases, 1938-40, Case No. 144, at 393, decision of Sept. 27, 1939.

121. *Ibid.*

122. *In re Janoczka*, [1933] Man. C.A. 1 D.L.R. 123, 128 (1932).

123. 20 F. Supp. 928 (N.D. N.Y. 1937).

124. *Id.* at 929.

125. 24 Am. J. Int'l L. 10 (Supp. 1930).

State's right to free itself of obnoxious persons,¹²⁶ an argument which could, of course, apply to present nationals just as much as to former nationals of the territorial State. But the remarks of these delegations invite the inference that according to their opinion a person had to lose his status as a national before his admission could be refused. However, the point was not squarely raised, and if the prevailing opinion was as indicated here, it found no definite formulation in the discussion.

The United States Department of State, in a communication directed not to a foreign government, supported the view that a national must be permitted to re-enter after a temporary visit abroad: ". . . the United States might have sent him back to his own country, which would have been under the necessity of receiving him or showing that he could not be regarded as a citizen of Guatemala!"¹²⁷

The immigration law of the United States seems to indicate the belief of the United States government that the acceptance of a deportee can freely be withheld by his national government: ". . . deportation of such alien shall be directed to any country of which such alien is a subject nationals, or citizen if such a country is willing to accept him in its territory."¹²⁸

(2) *Opinions of authors and criticism*

The opinions expressed by authors on the subject have not developed a uniform doctrine. A majority of authors have asserted the existence of a customary rule of international law imposing the duty to receive back nationals: "The duty to receive nationals cannot be disputed."¹²⁹ Castrén is less positive in his expression.¹³⁰ Notwithstanding his somewhat hesitant language, Castrén elaborates an almost gapless system attributing to persons in every conceivable situation, as regards possessor or lack of nationality, a State which is obligated to receive them if need be. Such system surely has its attractions; once the primary proposition is established it is not without logic, the argument being that unilateral action like deprivation of nationality cannot operate to relieve a State of international burdens.

126. Minutes of the First Committee, League of Nations, Acts of the Conference for the Codification of International Law, held at the Hague from March 13 to April 12, 1930, II, League of Nations Publications V Legal, 1-15, at 37-42 (1930).

127. 3 Hackworth, *op. cit. supra* note 2, at 740.

128. U.S. Immigration Act § 243(a), 66 Stat. 212, 8 U.S.C.A. § 1253(a) (1952).

129. Lessing, *op. cit. supra* note 50, at 117, 110, 139, 148, and authors cited by Lessing in n. 2, at 119; Weis, *Statelessness as a Legal-Political Problem*, World Jewish Congress (British Section) 4 (1944); Bruckhardt, *Organisation der Rechtsgemeinschaft. Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts* 33f (2d ed. 1944).

130. Castrén, *op. cit. supra* note 48, at 376.

The primary assertion, however, is not undisputed: "Foreign countries are not under any obligation to accept back their nationals . . ." ¹³¹

The argument against the duty to receive back nationals is based on the exclusive sovereignty of the territorial State to decide for itself whose entry into the dominion it will permit. This is a *petitio principii*, as the extent of sovereignty is the very question. But it obviously takes into account the relative advantage held by the State insisting on the maintenance of the status quo. ¹³²

The opposite view is sometimes based on the premise that as a State has a right to expel foreigners, there must be a corresponding duty on some other state to receive such persons. This international duty, the argument proceeds, must fall on the State to which the individual is linked by the tie of nationality. ¹³³ This argument is unacceptable, as there is no conceptual difficulty in limiting a State's right of expulsion to the situations in which another State is ready to receive the expellee, or in letting the duty to receive the expellees devolve upon a state other than that of nationality.

Another argument in support of the duty to receive back could rest on the principle of mutuality; from a State's right to extend diplomatic protection to its nationals abroad it follows that a duty to receive back must exist, for otherwise the State of sojourn might find no way of ridding itself of individuals whose presence may result in diplomatic disputes. The extreme case would be that of a State refusing to take back persons on whose behalf numerous remonstrations and claims have been diplomatically presented, while the national State at the same time reserves the right to continue its diplomatic protection over the same individuals.

The more normal case, it is safe to assume, is devoid of such seeming hardship. A State will usually not have had occasion to intercede diplomatically on behalf of the deportee and will probably be willing to forego future claims to protection after having rejected the demand for his admission. But even under the hypothetical case the hardship to the State of sojourn is serious only if its behavior has been illegal. The inconveniences arising from having to handle unmeritorious claims is a general one and can be guarded against by means other than deportation. ¹³⁴

Another shortcoming of the argument under consideration is that the

131. Oppenheimer, *The Enforcement of the Deportation Laws of the United States*, National Commission on Law Observance and Enforcement 118, c. 2, 12(d) (1931).

132. See note 150 *infra*.

133. *Feldman v. Justica Publica*, Annual Digest of Public International Law Cases, 1938-40, Case No. 144, at 393, decision of Sept. 27, 1939.

134. E.g., compulsory arbitration with compensation of costs.

right of diplomatic protection of nationals, and nationals only, may not be as clearly established as has been supposed.¹³⁵ This rule may well be regarded as an extension of the treaty and adjudication practice of the mixed arbitration commissions.¹³⁶ Such extension is unjustified as treaties frequently provide otherwise.¹³⁷ Nor does this rule enjoy universal recognition.¹³⁸ But it must be conceded that after the announcement and confirmation of the nationality of claims doctrine by the International Court of Justice a change is quite improbable.¹³⁹ Nevertheless, this rule should not serve as a doctrinal prop to a duty of admission because it is unsatisfactory in its foundation, self-contradictory and logically untenable in its application,¹⁴⁰ and regrettable in its results.¹⁴¹

An argument has been made that "personal jurisdiction" exercised over nationals is the basis of the duty to admit them: "Thus deportation would appear to be an aspect of the exercise of sovereignty over absent nationals."¹⁴² But surely the expulsion of a foreigner is not an act of the alien's national sovereign but of the State of sojourn. If in the preceding quotation the word "deportation" were replaced by "duty to receive," which is probably what the author meant to say, it would still be untenable; for sovereignty denotes the sphere of independence and freedom of action allocated the States by international law. Consequently it cannot embrace a restriction on that freedom. Somewhat more in line with international law doctrine would be an argument that personal jurisdiction carries with it as an ancillary duty the obligation to receive nationals back. This argument is akin to the alleged correlation of the right to protect and the duty to receive, and it is unconvincing in part for the same reasons.

135. Particularly the Panevezys-Saldutiskis Railway Case, P.C.I.J., Ser. A/B, No. 76, at 16 (1939); Case Concerning The Factory at Chorzow (Merits), P.C.I.J., Ser. A. No. 17/13, at 27-28 (1928).

136. Sinclair, *Nationality of Claims: British Practice*, 27 *British Y.B. Int'l L.* 125, 128 (1950), dissent by Jonkheer van Eysinga, in the Panevezys-Saldutiskis Railway Case, P.C.I.J., Ser. A/B, No. 76, at 34-35 (1939).

137. See German Hungarian Protocol of Aug. 8, 1940, 24 *Zeitschrift für Völkerrecht* 567 (1941); Sinclair, *op. cit. supra* note 136, at 142.

138. Rule VI General Instructions for His Majesty's Foreign Service, quoted by Sinclair, *op. cit. supra* note 136, at 141; Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* 466 (1915); *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347 (H.L.); *The Pellworm*, [1922] 1 A.C. 292 (P.C.).

139. Although in the Bernadotte case exceptions were admitted to the rule of nationality of claims, the rule itself was upheld [1949] I.C.J. Rep. 174, at 181.

140. Dissent by Jonkheer van Eysinga, in the Panevezys-Saldutiskis Railway Case, P.C.I.J. Ser. A/B, No. 76, at 35 (1939); Sinclair, *op. cit. supra* note 136, at 126.

141. Lauterpacht, *The Subjects of the Law of Nations*, 63 *L.Q. Rev.* 438, 457 (1947); Egelton, *The Responsibility of States in International Law* 220-224 (1928).

142. Note, *Aliens—Deportation—Deserting Seamen May Not Be Deported to Greek Government-in-exile in England*, 42 *Col. L. Rev.* 1343, 1345 (1942).

Additionally the "personal jurisdiction" is a much more doubtful proposition than the nationality of claims doctrine. Probably article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, providing that "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States. . . ."¹⁴³ is an attempt to give some kind of effect to personal jurisdiction. What exactly the recognition of foreign nationality which this treaty exacts from States is to consist of remains obscure. It may not mean more than that where a conflict of laws rule is predicated on the nationality of the party the forum should apply the law of the foreign State whose nationality is claimed, for the purpose of determining the validity of the claim of nationality.

An extreme opinion holds that all States have to recognize all laws made by the national State for the conduct of its nationals abroad.¹⁴⁴ That this is not in keeping with general practice is initially brushed aside as a factual and extra-legal considerations, but where the reconciliation between territorial and personal jurisdiction is attempted the latter is virtually eliminated.¹⁴⁵

That a State may enforce its own laws against an alien within its territory in disregard of the law prescribed by the alien's sovereign is not seriously disputed. Similarly, a State's legislation may be directed to persons abroad other than its nationals. Enforcement, of course, depends upon physical presence of the person or his property within the State. Thus section 4, paragraph 3 Nos. 1, 2, 3, 6 of the German Criminal Code seeks to subject to German law various acts of foreigners done outside the confines of Germany and irrespective of the legality of the acts in the place where they are committed. The wording as well as a comparison with section 6 of the Criminal Code indicates that section 4 is not to be restricted to acts or locations covered by international treaties, nor has such a restrictive interpretation been advanced by commentators.¹⁴⁶ Similarly, the United States has not always refrained from enforcing her law against foreigners with respect to their foreign conduct. The Supreme Court has held that a statute declaring it a misdemeanor to "make any charge" or to "take security" applies to acts done abroad in conformity with the foreign law.¹⁴⁷ This was held not to be either contrary to international law or a departure from the terri-

143. 24 Am. J. Int'l L. 192 (Supp. 1930).

144. Zitelmann, *Internationals Privatrecht* 89-90 (1897).

145. *Id.* at 98-99.

146. Schönke, *op. cit. supra* note 18, at 54-56; *Reichsstrafgesetzbuch, Leipziger Kommentar* 76-79 (Jagsch 7th ed. 1953).

147. *United States v. Nord Deutscher Lloyd*, 223 U.S. 512 (1912).

toriality of law principle. The reasoning employed to accomplish this reconciliation was in effect that "to make" and "to take" are synonymous with "having taken and retaining." The retaining occurring in the United States was deemed to preserve the territoriality principle. This argumentation could make many United States laws apply to aliens abroad who later come under the physical power of the United States. The territoriality principle is in effect abandoned as it merely obligates the judge to go through one extra step of reasoning in converting the statutory verb into participles.

Personal sovereignty is, therefore, a concept the validity of which is open to serious challenge.¹⁴⁸ It should not be made the basis of a duty to admit.

Finally a kind of contractual theory is resorted to. Its basis is that a State by international law is free to refuse entry to aliens notwithstanding the national State's demands for entry. No State could introduce its own nationals into the territory of another State without an exercise of force within the foreign jurisdiction, thus committing an act illegal in times of peace. It can be argued that as the grant of privilege is in the discretion of the territorial State, so is the determination of the extent of the privilege. A State (B), in permitting a foreign national (of A) to enter, reserves to itself the right to demand his departure. B intends to grant only a temporary revocable permit.¹⁴⁹ It must be observed that this result is accomplished by B's unilateral action which transforms what was originally a legal inability of A to get rid of a person into a legal duty previously nonexistent to receive him back. Why B's intention, even if declared, should effectuate such change without A's consent remains obscure.

This objection can be overcome if the permission to emigrate given by A to its national is to be regarded as an expression of assent to this change. This first step in the analysis of the contractual theory shows, without need for further elaboration, its inherent artificialities. A State forbidding its nationals to emigrate, so that it certainly cannot be said to have assumed the duty of receiving them back, would not thereby avoid the operation of the rule based on nationality with respect to nationals contravening this law. A State which does not prevent its nationals from leaving the country and issues passports to them certainly does not think of itself as entering into a treaty and assuming the duty to receive these persons. A contractual theory should not be superimposed on fact situations which bear no vestige of an actual consensual element.

148. Cook, *The Logical and Legal Bases of the Conflicts of Laws* 71-89 (1942).

149. Lessing, *op. cit. supra* note 50, at 122; Castrén, *op. cit. supra* note 48, at 380.

4. Conclusion Regarding the Present State of Law

The alleged duty to receive back nationals has no clear foundation in international law. The presumption of international law is in favor of the legality of State action, particularly when taken within the State territory.¹⁵⁰ In case of doubt, the exclusiveness of State control over its territory prevails.¹⁵¹ It is proper to regard the exclusion of persons from State territory as within the territorial sovereignty, limitations on which have to be affirmatively established.

C. IS IT DESIRABLE TO DEVELOP A RULE OF OBLIGATORY ADMISSION OF NATIONALS?

With a view to the progressive development of international law by judicial legislation or future treaties, the duty to admit nationals into State territory recommends itself primarily for its apparent simplicity. But the opposite rule, that no State is bound to grant admission to any person upon demand by another State, partakes of the same attraction.

The adoption of the duty to admit nationals would not dispose of the problem of undeportable persons, unless accompanied by an international restriction against the practice of depriving nationals of their status as such, or obligating a State to receive back its former nationals, and by a regulation concerning persons stateless *ab initio*. Problems of finding out what State has to admit persons who were born, domiciled, or resident in territories ceded without treaty stipulation on this subject or on the nationality question cannot be solved satisfactorily by resort to the flat rule of a duty to admit nationals. This difficulty has caused authors to suggest that here "inhabitants" become nationals of the new sovereign not by virtue of the latter's laws but via international law.¹⁵² Where the integration of the newly acquired land and its people into the life of the new sovereign is avoided through expulsion of the inhabitants or other measures, the application of a rule of automatic acquisition of nationality is unsatisfactory.

150. Case Concerning Certain German Interests in Polish Upper Silesia (Merits), P.C.I.J. Ser. A, No. 7, at 30 (1926) concerning compliance with treaties; Case of the S. "Lotus," P.C.I.J. Ser. A, No. 10/9, at 18 (1927): "... a State . . . may not exercise its power in any form in the territory of another State."

151. The S.S. "Wimbledon," P.C.I.J. Ser. A, No. 1, at 24 (1923); Case of the Free Zones of Upper Savoy and the District of Gex, P.C.I.J. Ser. A/B, No. 46, at 167 (1932); Access to, or Anchorage in, the Port of Danzig of Polish War Vessels, P.C.I.J. Ser. A/B, No. 43, at 142 (1931).

152. Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* 101-103 (1948). The Bundesverfassungsgerichtshof of the Federal Republic of Germany has taken the view that international law lacks provisions granting the new sovereign's nationality to the inhabitants of a ceded territory, *Beschluss* of May 28, 1952, *Juristenzeitung* p. 414 (1952). Also compare Castrén, *op. cit. supra* note 48, at 414.

It is suggested that simplicity of a rule in any event, although it might facilitate the work of the municipal administrative agency concerned, is not a very strong argument for its adoption. International law tends to develop away from broad generalization and to look into the interests involved in a particular problem almost to the point of becoming atomistic and evading prediction.¹⁵³

The interests of States concerned with a given deportation case are, of course, not necessarily tied up with the deportee's nationality. The interests of the States which deserve consideration are so numerous as to defy exhaustive enumeration. The duration of a person's stay in a foreign State may well relieve other States of a duty to admit.¹⁵⁴ Military service, public employment, or other activity beneficial to the State of sojourn¹⁵⁵ might prevent that State from claiming admission of the person to any other State.

On the other hand, persons who have been granted entry to a country as diplomatic or other representatives of their State of nationality or residence must surely be taken back by the sending State. The same would probably be true of persons admitted for temporary visits only. But beyond these classes the area of doubt begins where the interests have to be weighed in a case by case approach.

It may even be possible for international law to take into account the interests of the individuals concerned.¹⁵⁶ The interest in the unity of a family could be the basis of obligations on States to permit the departure from the territory of dependent family members and to allow their entry to the State in which the breadwinner resides.¹⁵⁷

The Swedish delegate of the Hague Conference formulated his objection to the Basis of Discussion No. 2¹⁵⁸ in terms of humanitarian considerations, when he said, "I will take as an example the case of a person who has lived all his life in a foreign country and who has, so to speak, given all his energy to that country. This person is quite assimilated to the population of the country, and it would be an injustice to him when

153. Fisheries Case (United Kingdom v. Norway) [1951] I.C.J. Rep. 116, at 133; Waldock, *The Anglo-Norwegian Fisheries Case*, 28 *British Y.B. Int'l L.* 114, 169 (1951).

154. Castrén, *op. cit. supra* note 48, at 403-404, rejects this on the formal grounds that international law lacks a statute of limitations; Lessing, *op. cit. supra* note 50, at 127-128, opposes this as a non-legal consideration ("unjuristische Erwägung").

155. The Supreme Penal Court of Switzerland overruled a motion for expulsion of a spy *inter alia* on the grounds that he had performed services for the State, *Roessler Case*, *Neue Züricher Zeitung*, Nov. 5, 1953, No. 2609/1.

156. U.S. Immigration Act § 243(h), 66 Stat. 212, 8 U.S.C.A. § 1253(h) (1952).

157. Lessing, *op. cit. supra* note 50, at 137. *Contra*, Castrén, *op. cit. supra* note 48, at 413.

158. 24 *Am. J. Int'l L.* 10 (Supp. 1930).

he is no longer able to work to send him back to his country of origin. . . ."¹⁵⁹

The inequity of a flat rule of admission of nationals is well stated by Clark:¹⁶⁰

"Aliens entering the United States as babies . . . and in later life becoming prostitutes, criminals, narcotic traffickers or anarchists, have become such, due in no small measure to social conditions in the United States. Countries from which such persons came many years ago feel it unjust to hold them responsible for what happens so long after the arrival in the United States of one of their citizens . . . deportation is 'passing the buck' and in itself no real solution. . . . The day may arrive when the individual will be regarded internationally and will be thought of as the product of more than the country where he happens to have his legal citizenship and nationality."¹⁶¹

In conclusion it may be submitted that general international law does not obligate States to receive back their nationals from other countries, and that the development of such an obligation is not desirable.

159. Minutes of the First Committee, *supra* note 126, at 41.

160. Clark, *Deportation of Aliens from the United States to Europe (1931)*.

161. *Id.* at 484-491.

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