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Necessary Administrative Reforms in the Immigration and Nationality Act of 1952

Cover Page Footnote

Member of the District of Columbia and New York Bars.

NECESSARY ADMINISTRATIVE REFORMS IN THE IMMIGRATION AND NATIONALITY ACT OF 1952

HARRY N. ROSENFELD*

IT is probably accurate to say of the Immigration and Nationality Act of 1952¹ that few laws enacted by the Congress are longer and more complex,² or have been subject to greater and more widespread criticism by successive Presidents of the United States,³ by both national political parties⁴ and by individual citizens and representative American organizations.⁵ This article, however, will not deal with the law's basic and highly controversial substantive policies, such as the national origins system, quotas, or the criteria for selecting prospective immigrants. Instead, it will be limited to seven specific administrative and procedural areas in which the organized legal profession has reached a general consensus as to the nature of the substantial reforms that are necessary and desirable.

For convenience, these seven proposals are grouped into three major categories: Organizational Structure; Administrative Hearings; and Judicial Review.

I. ORGANIZATIONAL STRUCTURE FOR THE ADMINISTRATION OF THE LAW

The issue here considered is the organizational structure established by statute for the allocation of governmental functions in the field of

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1. Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101 (1952) (hereinafter cited as Act of 1952).

2. The act is subdivided into 143 sections, a great number of which are further subdivided into subsections, paragraphs, subparagraphs, and clauses. For example, the very first section, § 101, which deals with "Definitions," occupies 6 and 2/3 pages of the official law print. Section 101 consists of seven subsections, one of which includes a proviso. Six of the seven subsections are divided into a total of 60 paragraphs, of which three have provisos, and three an indefinite extension of the "definition." Six of the 60 paragraphs are further divided into a total of 26 paragraphs, of which two include exceptions and three include provisos. Five of the 26 subparagraphs are further subdivided into a total of 15 clauses, of which two include exceptions. Some of the definitions relate to the entire act, some apply only to Titles I and II, and others still apply only to Title III.

Section 101 also includes 21 cross-references to other specified parts of the act, one to all other parts of the act, three to other acts and one to all other acts.

3. President Truman vetoed the bill. H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952). President Eisenhower attacked the act during his first presidential campaign (see Rosenfield, *The Prospects for Immigration Amendments*, 21 *Law & Contemp. Prob.* 401, 404-05 (1956)), and sent special messages to Congress recommending substantial amendments. H.R. Doc. No. 329, 84th Cong., 2d Sess. (1956); H.R. Doc. No. 85, 85th Cong., 1st Sess. (1957).

4. See Rosenfield, *supra* note 3, at 403-04.

5. Cf. Heckman, *Our Immigration Laws, A Continuing Affront to the Administrative Procedure Act*, 41 *Geo. L.J.* 364 (1953); President's Commission on Immigration and Naturalization, *Whom We Shall Welcome* c. 1 (1953) (hereinafter cited as *Pres. Com. Rep.*).

immigration, not the manner in which the immigration law is being administered by the Departments of State and Justice. The basic evil is not the administration of the law, but rather the administrative structure frozen into law.

Reform Number One—Consolidation of Conflicting and Overlapping Responsibilities

A. Present Situation

1. Since 1917, there has been a complete dichotomy between the issuance of visas to aliens (a function within the Department of State⁶), and the admission of visaed aliens to the United States (a function performed now by the Attorney General⁷ and prior to June 1940, by the Secretary of Labor⁸).

2. A visa issued by an American consul is no assurance that the alien to whom it was issued will be admitted into the United States by the Attorney General,⁹ acting through the Immigration and Naturalization Service.

3. The consul and the immigration officer apply the same law to the same individual.¹⁰ Thus, the result of the present situation is that even where a single issue of law or fact is involved:

(a) a consul is free to ignore a legal ruling or precedent established by the Immigration Service or the Board of Immigration Appeals (although it acts for the Attorney General of the United States¹¹), notwithstanding the case in question is on all fours with the instant one. If a consul denies a visa to an alien, even where such action flies in the face of a contrary ruling by the other departmental authorities or even by the courts, such alien and his American sponsor are without any right of appeal to anyone;¹²

(b) immigration authorities within the Department of Justice, either in original jurisdiction or on appeal to a special inquiry officer or to the

6. See Act of 1952 §§ 221-24.

7. Id. §§ 231-40. The Attorney General has delegated this power to the Commissioner of Immigration and Naturalization. 8 C.F.R. § 9.1 (1958).

8. Reorg. Pl. No. V of 1940, 54 Stat. 1238 (1940). See 5 U.S.C. § 133t (1952). For earlier history of Immigration & Naturalization Service, see Gordon, *Judicial Review of Exclusion & Deportation*, 31 Interpreter Releases 74, 75 (Mar. 1, 1954); *The Immigration and Naturalization Systems of the United States*, S. Rep. No. 1515, 81st Cong., 2d Sess. 290-91 (1950) (hereinafter cited as *Sen. Jud. Rep.*).

9. Act of 1952 § 221(h).

10. Pres. Com. Rep. at 127. See Besterman, *Commentary on the Immigration & Nationality Act* ("the long established principle of double check"). Cf. Act of 1952 § 221(h).

11. 8 C.F.R. Pt. 6 (1958). See Part II A(2) *infra*. Query, effect of Act of 1952 § 103 ("determination and ruling by the Attorney General with respect to all questions of law shall be controlling.")?

12. See Part II A(1) *infra*.

Board of Immigration Appeals may completely ignore, or reject, the findings of fact or legal rulings of a consul even when such ruling is bolstered by an Advisory Opinion from the Visa Office of the Department of State.

B. Recommendations of Presidential or Congressional Commissions

Three Presidential or Congressional Commissions have found this duplication in statutory structure and allocation of governmental functions to be undesirable, and have recommended a consolidation in a single government agency of all authority to issue visas to aliens overseas and to inspect them for admission at ports of entry in the United States.

1. The First Hoover Commission

The Commission on Organization of the Executive Branch of the Government, established by act of Congress, concluded in its 1949 report that this dual control of immigration was unwise, and recommended that the functions of the Visa Division of the Department of State be transferred to the Department of Justice.

The first Hoover Commission made two pertinent recommendations:

1. The State Department as a general rule should not be given responsibility for the operation of specific programs whether overseas or at home.
2. [T]he functions of visa control . . . should be transferred from the State Department to the Justice Department.¹³

The Hoover Commission's Task Force on Foreign Affairs, whose recommendation was subsequently adopted by the Commission, made this analysis of the situation:

Thus, the situation in connection with the issuance of visas is confusing because of the division of authority between the Departments of State and Justice. Specifically, both have joint policy, regulatory and procedural responsibilities in the issue of visas, and whereas the State Department grants the initial visa to an alien the Justice Department has the final authority to approve or disapprove the visa on the basis of its independent judgment.¹⁴

The Task Force submitted the following recommendations:

1. All visa responsibility, therefore, except with respect to diplomatic visas should be placed in the Justice Department. Visa work presently performed by the Foreign Service abroad should be continued but in accordance with policies established by the Justice Department in consultation with the State Department.
2. The logical solution to the visa problem lies in the transfer of the Visa Division functions to the Department of Justice. Diplomatic visas, however, should remain under the jurisdiction of the Secretary of State.¹⁵

13. Commission on Organization of the Executive Branch of Government, Report on Foreign Affairs, H.R. Doc. No. 79, 81st Cong., 1st Sess. 32, 34 (1949).

14. Task Force Report on Foreign Affairs, 104 (App. H 1949).

15. *Id.* at 18.

2. The Perlman Commission

The President's Commission on Immigration and Naturalization, which was established by Executive Order, recommended in its 1953 report that there be a consolidation of all immigration and naturalization functions into a single agency, and proposed the creation of a new commission for such purpose. Its report said:

The Commission agrees with the Hoover Commission that a large program of such an administrative operation as the immigration law has no place in the Department of State. . . . The Commission recommends that the primary determination overseas of an alien's application for a visa to the United States should be made by officials of the same agency which determines admissibility at the ports of entry. Presentation of such visa at a port of entry in the United States should entitle an alien to be admitted without further inquiry except as to (1) identity, (2) any medical condition developed since the visa was issued, and (3) any evidence relating to subversive activities not previously considered.¹⁶

The Commission concluded:

There is no reason why there should be two independent determinations of the same issue, except upon the basis of mistrust and fear. Every national purpose would be fully served by one thorough and trustworthy determination.

The best available information indicates that this costly, unwieldy, and unbusiness-like duplication serves no reasonable purpose. It is hardly more than historical accident which has become, to some, a principle. . . .

. . . The time has come to terminate the unnecessary and costly obstructions established by the duplication of visa and immigration examination. This could be accomplished by eliminating overlapping and duplication through unifying these functions in a single process. The result will be a more effective administration of the law, a saving of Government expenditures, and a better location of administrative responsibility.¹⁷

3. The Wright Commission

The Commission on Government Security was established by act of Congress and included, among its members, Mr. Loyd Wright, former president of the American Bar Association, Congressman Francis E. Walter, co-author of the 1952 act, one other member of the House of Representatives, and two United States Senators. In its 1957 report, this Commission recommended that:

The Immigration and Nationality Act of 1952 should be amended to (1) transfer the functions of visa control, except for diplomatic and official visas, from the Department of State to the Department of Justice and (2) authorize the Attorney General to maintain offices and personnel abroad to carry out the visa functions without the concurrence of the Secretary of State being a requisite for such action.¹⁸

The Wright Commission, after consideration of the various points of view, concluded:

16. Pres. Com. Rep. at 135.

17. *Id.* at 134-35.

18. Report of the Commission on Government Security 572 (July 1957) (hereinafter cited as Wright Report).

The Commission on Government Security has deliberated at length over the implications of the Hoover Commission recommendation. On the basis of our own analysis of all facets of this complex question, we arrive at the same conclusion.

To insure maximum security in this area, responsibility properly must be concentrated in the agency the Congress has always intended shall make final determination of admissibility or inadmissibility. To achieve that goal, there must be a realignment to insure complete control by the Immigration Service from the time the alien first makes application for a visa right down to the moment he first sets foot on the American shoreline.¹⁹

C. *Views Supporting Status Quo*

The *status quo* of dual administration has been supported by the Senate Judiciary Committee²⁰ and the Department of State.²¹ But what was once a solid phalanx of support for the *status quo* has been split in two. The McCarran-Walter Act's acceptance of dual administration seems to have been abandoned by its co-author Walter who signed the Wright Commission's report condemning this organizational pattern. And the Commissioner of Immigration now favors consolidation of these functions.²²

D. *Previous Administrative Efforts*

The proposals for consolidation have been made in the historical context of continuous administrative efforts to cope with the unsatisfactory situation growing out of over-lapping responsibilities and conflicting decisions. Even before the Immigration Act of 1924, Immigration Service officers were assigned as attachés to consulates overseas.²³ Up to World War II, these immigration officers acted only as technical advisers to the consuls.²⁴ But since 1948, under the displaced persons²⁵ and refugee relief²⁶ programs, immigration officers stationed overseas have determined admissibility of aliens, after documentation with a visa, before their

19. *Id.* at 577-78. The Commission's proposals are incorporated in S. 2416, 85th Cong., 1st Sess. (1957).

20. *Cf.* Sen. Jud. Rep. at 331, 333.

21. The views of the State Department are outlined in the Wright Report, *supra* note 18, at 574-77; and, in a special report to the Perlman Commission, Hearings before the President's Commission on Immigration & Naturalization, House Committee on the Judiciary, 82d Cong., 2d Sess. 1881 (1952) (hereinafter cited as Pres. Com. Hearings). See also Pres. Com. Rep. at 133.

22. Wright Report, *supra* note 18, at 574.

23. See Peters, U.S. Immigration Experts As Consular Officers, III Foreign Born 78 (1922).

24. Pres. Com. Rep. at 132.

25. Displaced Persons Commission, The DP Story 313 (1952).

26. Administrator of the Refugee Relief Act of 1953, First Semiannual Report, House Judiciary Committee Print, 83d Cong., 2d Sess. 7 (1954); Hearings before Subcommittee of the Senate Committee on the Judiciary, Investigation on Administration of Refugee Relief Act, 84th Cong., 1st Sess. 290 (1955).

embarkation, just as if the inspections were being conducted at ports of entry into the United States. However, this practice was known to each of the Presidential or Congressional Commissions and apparently persuaded none of them as being suitable or able to achieve any effective solution to the problems arising from dual responsibilities and administration under the immigration and nationality laws.

E. The American Bar Association

The American Bar Association has also proposed abolition of the present system of dual and over-lapping administration of our immigration laws. The Board of Governors adopted the following resolution:

RESOLVED, that it is the opinion of the American Bar Association that the immigration and nationality laws of the United States should be amended to consolidate into the Department of Justice or an independent agency of government the immigration and national responsibilities now vested by law in the Department of State and the Attorney General, and

That the Section of Administrative Law be authorized and directed to advance appropriate legislation.²⁷

The Committee on Immigration and Nationality of the American Bar Association, Section of Administrative Law, proposed the above resolution after reaching the following conclusions:

A study of the present dual administration of our law has led the American Bar Association to the following conclusions:

1. that no sound reason exists for such duplication of responsibility by two independent agencies of government;
2. that such duplication is wasteful, unnecessary and unjustifiable, and
3. that it is in our national interest to consolidate into a single government agency the immigration and naturalization responsibilities vested in the Department of State and in the Attorney General.²⁸

What agency should administer these consolidated functions? The Hoover and Wright Commissions proposed that it be the Department of Justice; the Perlman Commission, an independent commission, and the American Bar Association eschewed any formal choice. Although the logic of the proposal for an independent commission appears to be superior, the particular agency is not as important as the consolidation itself. The merger of responsibilities now split between two government agencies in the field of immigration and nationality should not be blocked

27. The above resolution was adopted by the Board of Governors in May 1958.

28. Resolution and Report, approved by Committee on Immigration and Nationality on December 13, 1957, in a form slightly different from that adopted by the Board. Consolidation in the Department of Justice is proposed by 5 pending bills: H.R. 3364, 85th Cong., 1st Sess. §§ 103, 105(b)(3), 113, 506(b) (1957); H.R. 8339, 85th Cong., 1st Sess. § 2 (1957); H.R. 9352, 85th Cong., 1st Sess. § 402 (1957); H.R. 9937, 85th Cong., 2d Sess. § 402 (1958); S. 2416, 85th Cong., 2d Sess. § 2 (1958).

by quarrel over the identity of the new repository of responsibility and authority.

II. ADMINISTRATIVE HEARINGS

A. *Right to a Hearing*

"The right to be heard," wrote Justice Frankfurter, "is a principle basic to our society."²⁹ It is at the very heart of the administrative process. "The core of our constitutional system," said Chief Justice Warren, "is that individual liberty must never be taken away by shortcuts, that fair trials in independent courts must never be dispensed with."³⁰ Administrative agencies, said Chief Justice Hughes, "must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."³¹

Reform Number Two—Right of Appeal From a Denial of a Visa

Only a consul may issue a visa to an alien for admission into the United States.³² If he issues the visa, there is an automatic and mandatory review in each instance. This review of consular grants of visas, by the Attorney General through the Immigration Service,³³ is completely *de novo*³⁴ and may entail a complete re-evaluation of the evidence presented to the consul even where that evidence tended to support his action and where there was no fraud or misrepresentation and where the issue is merely a matter of difference of judgment.³⁵

However, where the consul denies, or refuses to issue, a visa, he is a law unto himself, and his action is final and cannot be reviewed by any other administrative authority.³⁶ It is current legal doctrine that this administrative absolutism prevails even where the consul has acted unreasonably³⁷ or has committed palpable error.³⁸

29. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (concurring opinion).

30. *Jay v. Boyd*, 351 U.S. 345, 370-71 (1956) (dissenting opinion).

31. *Morgan v. United States*, 304 U.S. 1, 22 (1938).

32. Act of 1952 § 104(a).

33. *Id.* §§ 231-40.

34. *Id.* § 221(h); see *Developments in the Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 661-62 (1953).

35. *In the Matter of M—*, 4 I. & N. Dec. 532 (1952) (decision by the Attorney General of the United States).

36. For a discussion of this general subject, see Rosenfield, *Consular Non-Reviewability: A Case Study in Administrative Absolutism*, 41 A.B.A.J. 1109 (1955).

37. *United States ex rel. London v. Phelps*, 22 F.2d 288 (2d Cir. 1927), cert. denied, 276 U.S. 630 (1928). See also *United States ex rel. Gruber v. Karnuth*, 29 F.2d 314 (D.C.N.Y. 1928), *aff'd*, 30 F.2d 242 (2d Cir.), cert. denied, 279 U.S. 850 (1929).

38. See *United States ex rel. Dalleo v. Corsi*, 55 F.2d 941 (D.C.N.Y. 1932) (mistake of law in State Department's instructions to consul); *United States ex rel. Swystun v.*

Not even the Secretary of State may exercise supervision over his subordinate, the consul, in this regard. The law specifically forbids the Secretary of State to exercise any administrative control over "any power, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."³⁹ (For whatever significance it may have in statutory construction, there is no specific statutory immunity for consuls against judicial review.)⁴⁰ According to the Senate Judiciary Committee, which drafted the 1952 act, there is no appeal from a consular visa denial, under the prior law, and "even if the Visa Division [of the State Department] disagrees with the decision of the consul it cannot order him to change his decision but may merely make suggestions such as where a misinterpretation of the law occurs."⁴¹

The Visa Office has sought valiantly to set up an informal, non-appellate and purely advisory "review." This is valuable as far as it goes, but there is no recognized right of review, no specified procedures, no formal review panels, no regulations—and worst of all, no directive effect on the consul whose decision is being "reviewed."⁴²

It is difficult to find any other situation in our whole legal system in which so crucial a power is lodged in the initial operating officer and then insulated from any possibility of review. Such a pattern of governmental action is not consistent with the general principles upon which power is exercised in our system of law. It encourages the arbitrary and irresponsible exercise of power. Justice Douglas once said that "absolute discretion, like corruption, marks the beginning of the end of liberty."⁴³ Justice Frankfurter expressed a basic concept of American law as follows:

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights.⁴⁴

The Chief Justice put the issue thus:

Under our system of government there should be no way to subject the life and

McCandless, 24 F.2d 211 (D.C. Pa. 1928), *aff'd*, 33 F.2d 882 (1929) (clerical error); *Ex parte Seid Soo Hong*, 23 F.2d 847 (S.D. Cal. 1928) (mistaken form; alien admitted); *Keating ex rel. Mello v. Tillinghast*, 24 F.2d 105 (D.C. Mass. 1928) (mistake of law).

39. Act of 1952 § 104(a).

40. See Note, 35 Colum. L. Rev. 502, 505 (1939).

41. Sen. Jud. Rep. at 612-13. See also *United States ex rel. Ulrich v. Kellogg*, 30 F.2d 984, 986 (D.C. Cir.), *cert. denied*, 279 U.S. 868 (1929).

42. See Pres. Com. Rep. at 149-50; Pres. Com. Hearings at 1889; Sen. Jud. Rep. at 612-13.

43. *New York v. United States*, 342 U.S. 882, 884 (1951) (dissenting opinion).

44. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (concurring opinion).

freedom of one individual to the 'unfettered' or, more accurately, the 'arbitrary,' power of another.⁴⁵

This "unfettered" freedom of a consul from review of his negative decisions is unprecedented in our law.⁴⁶ The Minority Report in the Senate Judiciary Committee signed by four Senators in 1952, when the present act was passed, said:

Every American citizen has such a right of appeal and review if he wants to bring a horse or a necklace into the United States. Should he not have the same right of appeal from unjust decision if he wishes to bring to our shores a child or an aged parent?⁴⁷

Such administrative irresponsibility is an affront to basic principles of Anglo-American jurisprudence. A British report to the Lord High Chancellor, which was presented to Parliament, states the fundamental issue succinctly:

The existence of a right of appeal is salutary and makes for right adjudication.⁴⁸

The self-corrective process of review by an independent authority serves as insurance against injustice or mistake⁴⁹ and is a safeguard against abuse of power.⁵⁰

Actual experience in reviewing over 22,000 visas through a Board of Review proves beyond dispute the feasibility of such review.⁵¹ Such practicability is further recognized by the State Department in its regulations which require advance review for all visa applications by defectors from communism.⁵²

It is all the more remarkable for our immigration law to perpetuate "unbridled power,"⁵³ when one considers the substantive questions on which consular visa denials are absolute and unreviewable. These include complicated, and not infrequently unresolved, legal problems of eligibility under our immigration law, as well as difficult determinations of foreign

45. *Jay v. Boyd*, 351 U.S. 345, 366 (1956) (dissenting opinion).

46. Professor Louis L. Jaffe, testifying as Chairman of the American Bar Association Committee on Immigration & Nationality, Section of Administrative Law, Pres. Com. Hearings at 1566, 1569.

47. Senate Committee on the Judiciary, Revision of Immigration and Nationality Laws, S. Rep. No. 1137, 82d Cong., 2d Sess., pt. 2, at 8-9 (1952) (minority views on S. 2550).

48. Report of the Committee on Administrative Tribunals and Enquiries (London, 1957), ¶ 104, p. 25.

49. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (dissenting opinion).

50. Pres. Com. Hearings at 1578.

51. Pres. Com. Report at 148-49; Pres. Com. Hearings at 1889.

52. Cf. 22 C.F.R. § 42.42(a) (28) (iii) (1958).

53. Chief Justice Stone, N.J. B. Ass'n Y.B. 49, 62 (1922).

law and a host of technical issues.⁵⁴ Yet, when last surveyed only three per cent of our visa-issuing officers had law degrees and only one per cent of them were practicing lawyers prior to their appointment to the Foreign Service.⁵⁵ This is not to urge that all government administration should be put in the hands of lawyers. However, these facts would seem to indicate the imprudence in giving consuls final and unreviewable authority over such matters.

To remedy this situation, the President's Commission on Immigration and Naturalization recommended in 1953 that aliens should have a right of administrative review from denials of visas.⁵⁶ And in 1955 the American Bar Association took the same basic position when it adopted the following resolution favoring a Board of Visa Appeals:

BE IT RESOLVED, that it is the opinion of the American Bar Association that there be established a Board of Visa Appeals with power to review the denial by a consul of a visa and that the Section on Administrative Law be authorized and directed to advance appropriate legislation to that end.⁵⁷

The conclusions of the President's Commission and the American Bar Association seem unassailable. There is no sound reason for consular absolutism.⁵⁸ It is not consonant with our tradition and legal history to subject individuals to the possibilities of executive caprice, prejudice, or mistake, without review. The public's chief protection against bureaucratic invasion of their rights is in review of governmental action. Means should be established by law to assure that in connection with the denials of visas to aliens the prevailing doctrine should be the supremacy of law, which Chief Justice Stone once defined as meaning: "That the agencies of government are no more free than the private individual to act according to their arbitrary will or whim."⁵⁹

*Reform Number Three—Statutory Status for Board of
Immigration Appeals*

An alien excluded at a port of entry is, by statute, entitled to a hearing before a special inquiry officer, and to appeal his decision to the Attorney

54. See Pres. Com. Hearings at 1874-81.

55. Id. at 1864-65.

56. Pres. Com. Rep. at 152, 170-71. Substantial and widespread support for such a position had been expressed at the commission's hearings. See Pres. Com. Hearings at 2071. At an earlier time, both Senate and House Committees on Immigration approved bills for administrative review of visa denials in relative preference cases. S. Rep. No. 504, 72d Cong., 1st Sess. (1932); H.R. Rep. No. 1193, 72d Cong., 1st Sess. (1932).

57. See 7 Ad. L. Bull. 236 (1955); 8 Ad. L. Bull. 7-8 (1955).

58. For an analysis of reasons advanced to justify the status quo, see Rosenfield, *supra* note 36, at 1181-83. H.R. 3364, 85th Cong., 1st Sess. § 107(d)(1) (1957) establishes a Board of Immigration Appeals with authority to review "all determinations denying, withdrawing or revoking a visa, or any extension thereof . . ."

59. Stone, *The Common Law in the United States*, 50 Harv. L. Rev. 4, 17 (1936).

General.⁶⁰ In deportation, the act provides that special inquiry officers shall conduct proceedings to determine deportability and that "in any case in which an alien is ordered deported . . . the decision of the Attorney General shall be final."⁶¹ Although the statute does not specifically require it, appeal to the Attorney General in deportation matters is provided by regulation.⁶²

The Attorney General has delegated his authority and duty to hear appeals to a Board of Immigration Appeals established by regulation.⁶³ (Predecessor bodies date back to 1921).⁶⁴ The BIA, as it is commonly known, is an important tribunal whose rulings crucially affect thousands of people. Yet the Board is only a creature of the Attorney General. Established by regulation, it is subject to abolition at any moment, and its jurisdiction and authority⁶⁵ subject to unrestricted alteration and change.⁶⁶

The BIA is not even mentioned in the 119 page Act of 1952, although a proposal to give it statutory status was adopted on the floor of the House, only to have the provision eliminated in conference.⁶⁷ The House Judiciary Committee's report, while failing to provide statutory status

60. Act of 1952 § 236(b),(c).

61. *Id.* § 242(b).

62. 8 C.F.R. § 6.1(b)(2) (1958).

63. *Id.* Pt. 6. The Board of Immigration Appeals (hereinafter cited as BIA) was established pursuant to power of delegation vested in the Attorney General by the Alien Registration Act of July 28, 1940, c. 439 § 37(a), 54 Stat. 675. See Att'y Gen. Ann. Rep. 234 (1941).

64. In 1921, the Secretary of Labor set up a Board of Review, with administrative and judicial functions but no power of final decision. Its membership varied over the years from 3 to 12 persons. In 1933, the Board of Review was placed under the jurisdiction of the Commissioner of Immigration, but in 1939 was placed back under the Secretary. On August 30, 1940, after the Immigration and Naturalization Service was transferred to the Department of Justice (see note 8 *supra*), the Board of Review was reconstituted as the BIA with power to decide and not merely recommend. See 66 Cong. Rec. 2532 (1925) (comments by Congressman Cable); Pres. Com. Rep. at 129; Sen. Jud. Rep. at 317.

65. When created, the BIA had authority to render final decisions in: (1) all deportation proceedings after warrant of arrest, (2) all appeals from Boards of Special Inquiry, (3) all cases involving advance application for admission under the 7th and 9th provisos of § 3 of the Immigration Act of 1917, and (4) all cases involving administrative penalties. Att'y Gen. Ann. Rep. 234 (1941); 8 C.F.R. 903 (1958). Later its jurisdiction was limited to the exercise of appellate authority only. Until May 24, 1952, this appeal was not direct from the Field Office, but first to the Commissioner, and then to BIA. On July 20, 1954, BIA's authority was expanded to cover appeal from a District Director's refusal to release alien on bail or parole. 8 C.F.R. § 6.1(b)(7) (1958).

66. But see *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) (unqualified delegation by Attorney General is binding on him).

67. 98 Cong. Rec. 4401 (1952); Minority Report on S. 2550, *supra* note 47, at 8.

to the BIA, directed the Attorney General not to "alter in any way the structure and function of the Board."⁶⁸

Current regulations set up a five member Board of Immigration Appeals "in the office of the Attorney General," which "shall be under the supervision and direction of the Attorney General and shall be responsible solely to him."⁶⁹ They outline the Board's jurisdiction, by stating the kinds of decisions of special inquiry officers, and other Immigration Service officials, which may be appealed to the Board,⁷⁰ and provide that the Board's decisions shall be final,⁷¹ and shall be binding upon the Immigration and Naturalization Service⁷² unless reviewed by the Attorney General. Such review occurs only at the direction of the Attorney General, request of the Service, or request of the Chairman or a majority of the Board.⁷³ The regulations make no provision for the alien himself to appeal to the Attorney General.⁷⁴ In fact, the alien is not advised when the Board has been deprived of authority to decide, by virtue of the fact that the Attorney General is reviewing his case. Whether this practice is constitutional is still open to question. A district court held that notice must be given the alien of referral to the Attorney General and an opportunity afforded the alien to submit briefs (but not make oral argument).⁷⁵ However, the court of appeals in the same circuit, in a later case denied such right to an alien, basing its decision on the specific facts and leaving open the possibility of a different result on different facts.⁷⁶

This situation is indefensible in principle; it is also ultimately destructive of true BIA independence. In the normal appeal from an administrative adjudication, the litigants bear their respective burdens of

68. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 36 (1952). See also *The Board of Immigration Appeals*, 30 Interpreter Releases 266 (Sept. 9, 1953).

69. 8 C.F.R. § 6.1(a) (1958). The report of Lemuel B. Schofield, Special Assistant to the Attorney General in Charge of the Immigration and Naturalization Service, on the second year of the Immigration and Naturalization Service's operation in the Department of Justice, reported on the BIA's activities as if it were a unit of the Service. (Photostat of typed report, in Library of Congress, pp. 21-22).

70. 8 C.F.R. § 6.1(b) (1958).

71. *Id.* § 6.1(d)(2).

72. *Id.* § 6.1(g). Selected decisions are given precedent status.

73. *Id.* § 6.1(h). See p. 158 and note 89 *infra*.

74. *Matter of E—*, 6 I. & N. Dec. 388, 391 (1954). See Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 Colum. L. Rev. 309, 318 (1956). In *Matter of R—*, 5 I. & N. Dec. 29 (1952), on request, alien's counsel had an informal conference with the Attorney General and presented arguments. This was followed by a full hearing before the Attorney General with oral argument by counsel for alien and the Service. See also *Matter of C—*, 4 I. & N. Dec. 130 (1950).

75. *Bannout v. Brownell*, 129 F. Supp. 488 (D.D.C. 1955). The Government filed no appeal. Anything less, said the court, might raise a constitutional issue under *Morgan v. United States*, 304 U.S. 1 (1938).

76. *Nani v. Brownell*, 247 F.2d 103 (D.C. Cir.), cert. denied, 355 U.S. 870 (1957).

persuasion. Here, however, either the BIA's decision is not defended before the Attorney General, or the BIA must be placed in the position, almost, of a litigant arguing to sustain its position. Furthermore, what assurance can the alien have that new legal arguments, or non-record information, were not presented to the Attorney General, without any opportunity to the alien himself to contest the newly presented law or facts? For example, in one of the early cases, the Official Report prints the Board's decision, then a "Memorandum for the Acting Attorney General" apparently by a staff attorney of the Department of Justice, in the form of a reasoned opinion with an order prepared for reversal of the BIA, and then a reversal of the Board by the Acting Attorney General without opinion.⁷⁷ In another instance, there was a memorandum from the office of the Solicitor General, and a reversal by the Attorney General stating reliance upon such memorandum.⁷⁸ Often the Attorney General's action is a peremptory "disapproved"⁷⁹ or "approved,"⁸⁰ without any clue to the alien as to the "why's" and "wherefores." And sometimes the Attorney General will first approve or disapprove the Board's decision and then withdraw his action or reverse himself, in *both* instances without any reason assigned.⁸¹

Furthermore, the interval between the Board's decision and the Attorney General's action has on occasion been as long as nineteen months.⁸² During all this period the alien is presumably kept in the dark; government agencies are fighting over his body, so to speak, without giving him any opportunity to act in his own defense. Whatever one's judgments of this practice in terms of "the rudimentary requirements of fair play"⁸³ and "the historic requirements of fairness,"⁸⁴ there can be

77. Matter of E—, 1 I. & N. Dec. 44 (1941).

78. Matter of S—, 1 I. & N. Dec. 476 (1943).

79. See Matter of O—, 3 I. & N. Dec. 209 (1950).

80. Matter of The S. S. Atlantida, 2 I. & N. Dec. 570 (1944).

81. The Matter of A—, 3 I. & N. Dec. 714 (1949) (first approval and then disapproval); Matter of B—, 2 I. & N. Dec. 492 (1947) (disapproval first and then approval). In Matter of C—, 2 I. & N. Dec. 895 (1947), the initial disapproval had an opinion, but was withdrawn and reversed without opinion.

82. Matter of V—, 6 I. & N. Dec. 1 (1955). A delay exceeding 17 months occurred in Matter of B— and P—, 2 I. & N. Dec. 638 (1947). For delays exceeding 14 months, see Matter of C—, 3 I. & N. Dec. 275 (1950); Matter of O—, 3 I. & N. Dec. 209 (1950). See also Matter of C—, 6 I. & N. Dec. 20 (1955). Note, however, that the BIA has reported to Congress that "the average time" of a case before it is one month. Report of the House Committee on Government Operations, Survey and Study of Administrative Organization, Procedure and Practice in the Federal Agencies, 85th Cong., 1st Sess. pt. 6, 696 (1957) (hereinafter cited as Govt. Oper. Survey).

83. *Morgan v. United States*, 304 U.S. 1, 15 (1938).

84. *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171 (1951) (concurring opinion).

little doubt as to its disquieting effect on the alien's and the general public's belief as to the BIA's independence.

Another disturbing result of the Board's organizational status is that its decisions are released to the Immigration and Naturalization Service in advance of notification to the alien involved.⁸⁵ This practice is justified on the ground that it affords the Service "an opportunity to decide whether or not some such action should be taken, such as a motion."⁸⁶ It is extraordinary, to say the least, in adjudicatory matters, to give one litigant a secret opportunity "to decide whether or not some such action should be taken" in the absence of a similar opportunity to the other litigant.⁸⁷

To date, six volumes of BIA decisions and opinions have been published.⁸⁸ These volumes disclose that, for one or another reason, the Attorney General has formally reviewed some 148 BIA decisions⁸⁹—in at least 41 instances at the request of the Immigration Service—and has reversed the Board some 43 times. These volumes, however, do not record all of BIA's decisions. According to the Annual Reports of the Attorney General from 1942 through 1956, the Attorney General reviewed 444 BIA decisions of one kind or another during this fifteen year period, and reversed, modified or remanded in 69 instances. The number of reviews in the four-year period of 1953-1956 has dropped to an average of 8 cases per year from an average of 37 cases per year in the previous eleven year period. However, the number of reversals, modifications or remands has increased from 14½ per cent in the 1942-1952 period to 28 per cent in the 1953-1956 period.

A quasi-judicial agency dealing with issues of personal status and rights should meet the test which Chief Justice Hughes once described as "the maintenance of public confidence in the fairness and soundness of this important governmental process."⁹⁰ Where an adjudicating agency

85. 8 C.F.R. § 6.1(f) (1958) requires that the Board's decision "shall be transmitted by the Board to the Service and a copy served upon the alien or party affected. . . ."

86. Hearings before the Subcommittee on Legal and Monetary Affairs of the House Committee on Government Operations, Practices and Procedures of the Immigration and Naturalization Service in Deportation Proceedings, 84th Cong., 1st Sess. 135, 189 (1955).

87. Query, whether the system of unannounced certifications to the Attorney General requires this practice?

88. The volumes cited as "I. & N. Decisions" are published not by BIA, but by the Immigration and Naturalization Service, and include decisions of the Service as well as BIA's. See Foreword, 1 I. & N. Dec. IV (1940). The six volumes cover the period from Aug. 1940 to Jan. 1956.

89. According to BIA Chairman Finucane: "in practice, only a small part of the Board's decisions are formally reviewed by the Attorney General . . . on the average, annually not more than 12." Hearings before the Subcommittee of the House Committee on Appropriations, Department of Justice Appropriations for 1956, 84th Cong., 1st Sess. 37 (1955).

90. *Morgan v. United States*, 304 U.S. 1, 15 (1938).

deals with highly controversial issues, public confidence in its independence rests on at least two factors: (1) the integrity and ability of its members, and (2) its structural status. The BIA ranks very high on the first of these requirements, but—for reasons beyond its control—lamentably lower on the second. The BIA is highly regarded by the Bar; its members are held in high esteem for their integrity, devotion and learning. The complaint is not with the Board, nor with its actions or basic procedures,⁹¹ but rather with the administrative structure within which the Board is forced to act. The defect is not with the Board's composition but rather with its position and with congressional failure to provide it with statutory sanction. The result is that a quasi-judicial Board is at the sufferance of a political officer's whim. This very situation caused the Supreme Court to remand a case for trial on whether the Attorney General dictated the BIA's decision, or whether the BIA's decision was free and untrammelled; the final result was a finding of non-dictation.⁹²

Condemnation of the non-statutory and tenuous status of the BIA, and its predecessor Board of Review, has been continuous. In 1931, the Wickersham Commission recommended the establishment by statute of an independent Board of Alien Appeals.⁹³ In 1931, Jane Perry Clark discussed the need for statutory recognition of the then Board of Review,⁹⁴ and in 1932, Dean Van Vleck's study for the Commonwealth Fund recommended statutory status.⁹⁵ In 1940, the Secretary of Labor's Committee on Administrative Procedure stressed the need for a change in the Board of Review,⁹⁶ and as a result of its report the present BIA was established, independent of the Immigration and Naturalization Service.⁹⁷ As elsewhere indicated,⁹⁸ congressional debate in 1952, during the enact-

91. See Finucane, *Procedure Before the Board of Immigration Appeals*, 31 *Interpreter Releases* 26 (1954). As to constitutionality of any delegation to BIA, see 42 *Ill. B.J.* 657 (1954).

92. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). After the first *Accardi* case, the Attorney General issued Order 45-54, to the BIA, special inquiry officers and all others exercising hearing powers in deportation cases, saying that where the Attorney General had delegated power to hear and decide, "those charged with the duty of hearing and deciding must give each alien a fair and impartial trial, without prejudgment on the basis of assertions of any official having the function of prosecuting these cases." (April 23, 1954).

93. National Comm'n on Law Observance & Enforcement, *Report on Enforcement of the Deportation Laws of the United States* 160-62, 178 (1931).

94. Clark, *Deportation of Aliens from the United States to Europe* 381, 387 (1931).

95. Van Vleck, *The Administrative Control of Aliens* 247-48 (1932).

96. Secretary of Labor's Committee on Administrative Procedure, *The Immigration and Naturalization Service* 99 (1940). This is the so-called Dimock Committee.

97. Joint Hearings before the Subcommittees on the Judiciary on S. 716, H.R. 2379, H.R. 2816, 82d Cong., 1st Sess. 672 (1951).

98. See pp. 155-56 and notes 67-68 *supra*; Maslow, *supra* note 74, at 358-59. H.R. 3364,

ment of the present law, displayed discomfort with the present situation. Within months of the act's passage, substantial dissatisfaction with the BIA's structural status was expressed during the nation-wide hearings of the President's Commission on Immigration and Naturalization.⁹⁹ And in 1953, the President's Commission recommended statutory status for a Board of Immigration and Visa Appeals.¹⁰⁰

In 1955, the Task Force on Legal Services & Procedure, of the (Second) Hoover Commission, recommended the creation of an Administrative Court, with an Immigration Section.¹⁰¹

And in February 1958, the House of Delegates of the American Bar Association adopted the following resolution approved by its Section of Administrative Law:

WHEREAS the Board of Immigration Appeals of the Department of Justice is established by regulation only, with no statutory assurance of either its existence or jurisdiction,

BE IT RESOLVED that it is the opinion of the American Bar Association that the Board of Immigration Appeals of the Department of Justice be granted statutory status and authority and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.¹⁰²

One further aspect merits special comment. The BIA is authorized to exercise all the discretion vested by law in the Attorney General.¹⁰³ That this is a significant aspect of its functions appears from the statistics that of all the appeals sustained by the BIA, as many, and often more, are sustained in matters of discretion as are in matters of law.¹⁰⁴ However,

85th Cong., 1st Sess. § 107 (1957), would establish a BIA "which shall be an independent entity attached to the Bureau [of Immigration and Citizenship created by the bill] for administrative purposes." Its nine members are to be appointed by the President for nine year terms, subject to Senate confirmation. This Board would also have the right to review visa denials.

99. Pres. Com. Hearings at 2070.

100. Pres. Com. Rep. c. 11. The Board would also hear appeals from consular denials of visas.

101. Commission on Organization of Executive Branch of Government, Task Force Report on Legal Services and Procedure 269-80 (1955). Nine task force members voted for this recommendation, 3 against and 2 refrained from voting. This proposal was not adopted by the Hoover Commission itself.

102. 10 Ad. L. Bull. 10 (1957). If immigration and nationality responsibilities are consolidated into one agency, as recommended in Part I *supra*, it would presumably then be in order to consolidate the BIA with the Board of Visa Appeals. See note 57 *supra*. Such, in effect, was the Board of Immigration and Visa Appeals recommended by the President's Commission. Pres. Com. Rep. c. 11.

103. 8 C.F.R. § 6.1(d)(1) (1958); Finucane, *supra* note 91; Hearings before the Subcommittee of the House Committee on Appropriations, Department of Justice Appropriations for 1958, 85th Cong., 1st Sess. 44 (1957).

104. Att'y Gen. Ann. Rep. 320 (1956) (10% of all appeals sustained as matter of discretion, 10% as matter of law); *id.* at 311 (1955) (12% as matter of law, 15% as matter of discretion).

the Hoover Commission's Task Force would deny to its proposed Immigration Section of the Administrative Court any authority to act on matters of administrative discretion.¹⁰⁵ On the other hand, the President's Commission would not divest its recommended statutory Board of authority to decide in matters involving discretion.¹⁰⁶ And the House Judiciary Committee, while not recommending statutory status, directed the Attorney General not to alter the Board's functions "in any way."¹⁰⁷ Experience with the BIA's actions in the field of discretion in the past fifteen or so years, coupled with the importance of such discretionary authority¹⁰⁸ in the light of the rigidities of the 1952 Act, led to the conviction that the national welfare would best be served by adopting the view of the President's Commission in this respect and retaining in the statutory BIA authority over matters of discretion.

Whatever may have been the earlier justification, if any, the absence of statutory sanction and jurisdiction for the BIA is now a most regrettable and undesirable situation. The status of the Board of Immigration Appeals should no longer be left to the uncertainty of regulation. The Board's continued existence, and its jurisdiction, including authority in discretionary matters, should be assured by congressional enactment.

*Reform Number Four—Hearings on the Record, in
Exclusion Proceedings*

Every alien who, in the judgment of the examining immigration officer, "may not appear . . . to be clearly and beyond a doubt entitled to land"¹⁰⁹ is entitled to a hearing before a special inquiry officer whose determination "shall be based only on the evidence produced at the inquiry."¹¹⁰ If such decision is adverse, the excluded alien is entitled to an appeal to the Attorney General¹¹¹ who has delegated this appeal to the Board of Immigration Appeals.¹¹² The Board's decision on appeal "shall be rendered solely upon the evidence adduced before the special inquiry officer."¹¹³

However, where it appears to either the examining immigration officer

105. Task Force, *supra* note 101, at 278. The Wickersham Commission and Secretary of Labor's Committee would have restricted their proposed Boards to "quasi-judicial" functions. See notes 93, 96 *supra*.

106. Pres. Com. Rep. at 164.

107. See note 68 *supra*.

108. The Supreme Court has shown its regard for the importance of this discretionary authority in the BIA, in *Marcello v. Bonds*, 349 U.S. 302 (1955), and in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

109. Act of 1952 § 235(a).

110. *Id.* § 236(a).

111. *Id.* § 236(b).

112. 8 C.F.R. § 6.1(b)(1) (1958).

113. Act of 1952 § 236(b).

or to the special inquiry officer that the alien may be excludable under specified provisions of the law dealing with exclusions for public safety, security or subversive activity,¹¹⁴ the hearing before the special inquiry officer is deferred and the case referred to the Attorney General. In his discretion, the Attorney General may order the alien to be excluded without the hearing otherwise provided, if he is satisfied that the alien is excludable "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."¹¹⁵ In such event, there is no appeal to the Board of Immigration Appeals.¹¹⁶ The constitutionality of such exclusions without hearing has been upheld by the Supreme Court.¹¹⁷

Exclusions without hearing were instituted by presidential proclamation in 1941¹¹⁸ immediately prior to our entry into World War II. According to the General Counsel of the Immigration Service at that time, this practice was intended to provide very special powers to cover exceptional and extraordinary cases during a wartime period.¹¹⁹ However, what started out to be "a very extraordinary provision in a real shooting war" ended up with being "routine."¹²⁰

What sort of evidence becomes "confidential" under this proceeding? The Immigration Service's chief officer overseas during the displaced persons program testified before a Senate Committee that in "doubtful cases" where they have no "absolute proof" but only "weak" evidence, the "source" of which "is no longer available," the information is placed in the "confidential" category although it "would not be sufficient to exclude by the normal board of special inquiry proceedings because those proceedings must be conducted in a manner in which they could not be subject to attack in a court of the United States."¹²¹

More recently a subcommittee of the House Committee on Government Operations took testimony on the use of confidential information

114. Id. § 212(a)(27), (28), (29).

115. Id. § 235(c). The Attorney General has delegated this decision to the regional commissioners of the Service. 8 C.F.R. §§ 9.5(q), 235.8(b), (c) (1958).

116. 8 C.F.R. § 235.8(c) (1958). See Pres. Com. Hearings at 1968; H.R. Rep. No. 1365, 82d Cong., 2d Sess. 56 (1952).

117. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

118. Proc. No. 2523, Nov. 14, 1941, 55 Stat. 1696, pursuant to authority of the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252. See Pres. Com. Hearings at 1964-65. The practice was given statutory sanction by the Internal Security Act of 1950, c. 1024, 64 Stat. 987 (codified in scattered sections of 18, 22, 50 U.S.C.), from which it was carried forward into the Act of 1952.

119. Pres. Com. Hearings at 13, 16.

120. Hearings, *supra* note 97, at 139. See also Pres. Com. Rep. at 229.

121. Hearings before the Subcommittee on Amendments to the Displaced Persons Act, Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 664-65 (1949-50).

in deportation hearings. A special inquiry officer described such information as "what might be termed as hearsay evidence, which could not be gotten in the record."¹²² An investigator testified that "some of these confidential reports were merely information received off the street."¹²³ Under such circumstances, how can the alien protect himself and the United States Government against "confidential" information which turns out to be nothing more than malicious denunciations without any factual substance?¹²⁴

The statute¹²⁵ and the regulations¹²⁶ require that no information be labelled "confidential" for the purpose of denial of a hearing in exclusion proceedings unless its disclosure "would be prejudicial to the public interest, safety or security." Despite this restriction, a variety of information has been designated as "confidential" which has no necessary relation to security or to the national safety. For example, the Immigration Service's Investigator's Manual¹²⁷ refers to non-record or "confidential" information which is not classified defense information,¹²⁸ and also contains the following statement:

[I]n certain types of cases requiring reports of character investigation, a report containing unfavorable information cannot be placed in evidence if such information is based on confidential records *or if adverse witnesses are unwilling to testify*.¹²⁹

This pattern is sufficiently repetitious to raise the query whether difficulty of proof is sufficient reason for designating information as "confidential."

The philosophic issue here is, of course, security against liberty. Despite the fact that the officials who order exclusions without a hearing are motivated by their highest ideals of patriotism, Justice Brandeis' warning is still valid, that:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.¹³⁰

122. Hearings, *supra* note 86, at 67, 78.

123. *Id.* at 18, 20, 45, 55.

124. See Maslow, *supra* note 74, at 356.

125. Act of 1952, § 235(c).

126. 8 C.F.R. § 235.8(b) (1958).

127. This is a confidential document described and excerpted by the House Committee on Government Operations, Sixth Intermediate Report, Practices & Procedures of the Immigration and Naturalization Service in Deportation Proceedings, H.R. Rep. No. 1458, 84th Cong., 1st Sess. 5 (1955).

128. Hearings, *supra* note 86, at 207.

129. Report, *supra* note 127, at 6 (emphasis added); Maslow, *supra* note 74, at 354.

130. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion). The majority decision sustaining use of evidence obtained by wire tapping has been mooted by the Federal Communications Act of June 13, 1934, 48 Stat. 1064, 1104, 47 U.S.C. § 605 (1952). See *Benanti v. United States*, 355 U.S. 801 (1957); *Nardone v. United States*, 308

Justice Frankfurter warned against the reliability of "confidential" information:

We can take judicial notice of the fact that in conspicuous instances, not negligible in number, such 'confidential information' has turned out to be either baseless or false. There is no reason to believe that only these conspicuous instances illustrate the hazards inherent in taking action affecting the lives of fellow men on the basis of such information. The probabilities are to the contrary. A system of administrative law cannot justify itself on the assumption that the 'confidential information' . . . is impregnable or even likely to be true.¹³¹

Justice Douglas has also spoken of the unreliability of "faceless informers":

Dr. Peters was condemned by faceless informers, some of whom were not known even to the Board that condemned him. Some of these informers were not even under oath. None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people, like Titus Oates, who revel in being informers. They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.¹³²

Such admonitions of the untrustworthiness of "confidential information" have proved accurate in the area under discussion. Where independent evaluation and objective appraisal of "confidential information" has been made by judicial, congressional or other administrative means, the "confidential" evidence has been proved to be unworthy of reliance. For example, in one case the Government admitted in federal court that its so called "confidential" evidence was not actually evidence at all but mere suspicion. In *United States ex rel. Lee Till Seem v. Shaughnessy*,¹³³ an alien wife of an American citizen was detained for over four months without a hearing and without being advised of the basis for the detention or the nature of the charges. The Government refused to give any facts, but admitted that no security issue was involved. The court accepted from the Government an affidavit *in camera*, on the alleged ground that premature disclosure might impede the investigation. The affidavit gave no facts and frankly stated: "Of course, the difficulty lies in whether the Government will be able to develop sufficient evidence to establish the obvious [sic] fact." The court ruled for the alien, saying that there were "mere allegations of suspicion, unsupported by evidential facts . . .

U.S. 338 (1939), reversing 106 F.2d 41 (2d Cir.); *Nardone v. United States*, 302 U.S. 379 (1937), reversing 90 F.2d 630 (2d Cir.).

131. *Jay v. Boyd*, 351 U.S. 345, 373 (1956) (dissenting opinion). Harold Laski wrote to Holmes that, "if an executive decision can't in the last analysis be defended by the Government before the Courts there is probably something the matter with it." Holmes-Laski Letters 107 (Howe ed. 1953).

132. *Peters v. Hobby*, 349 U.S. 331, 350-51 (1955) (concurring opinion).

133. 104 F. Supp. 819 (S.D.N.Y. 1952).

To permit her continued detention under present circumstances and without a hearing comes close to those concepts of State power which are abhorrent to our way of life."¹³⁴

In another case, suspension of deportation had been denied administratively on the basis of confidential information relating to the alien's "good moral character." After being shown the confidential file in question, the court ruled that a question arose as to the credibility of the Service's sources of information, and consequently ordered a full hearing.¹³⁵

In the *Ellen Knauff* case, "due largely to a wave of newspaper publicity . . . , administrative and congressional hearings brought to light the tenuous nature of the evidence on which exclusion was based,"¹³⁶ despite the constitutionality of the procedure.¹³⁷ Here, a serviceman's war bride was excluded without a hearing. The court denied mandamus.¹³⁸ Her writ of habeas corpus was dismissed,¹³⁹ and the Supreme Court, by a four to three vote, affirmed dismissal.¹⁴⁰ A second writ was likewise dismissed.¹⁴¹ Within four months after the first Supreme Court decision, the House passed a private bill to clear her status¹⁴² but the Senate Judiciary Committee killed the bill. Appropriately intervening also was a stay order from a Justice of the Supreme Court to stop deportation.

After twice ordering Mrs. Knauff excluded without a hearing (once in 1948 and again in 1949), the Attorney General in March 1951 ordered a hearing before a Board of Special Inquiry, the then normal hearing body, on the ground that certain portions of the original confidential information could by this time be disclosed without being prejudicial. For the first time, after two and one-half years, she learned the charges against her, that allegedly she passed secret data to an Iron Curtain country, and was given an opportunity to defend herself. This Board ruled her excludable, and the Assistant Commissioner of Immigration affirmed the order.

On appeal, the Board of Immigration Appeals reversed the order of exclusion and ordered her admitted because "there was not adequate evidence to justify the order of exclusion." After an extensive analysis of all the evidence produced against the alien by the Attorney General's Im-

134. *Id.* at 820, 821.

135. *Ex parte Mota Singh Chohan*, 122 F. Supp. 851 (N.D. Cal. 1954).

136. *Kimball, Rights of Aliens in Exclusion Proceedings*, 3 *Utah L. Rev.* 349, 354 (1953).

137. See note 117 *supra*.

138. *Knauff v. Shaughnessy*, 88 F. Supp. 607 (S.D.N.Y. 1949), *aff'd*, 179 F.2d 628 (2d Cir. 1950).

139. *United States ex rel. Knauff v. Watkins*, 173 F.2d 599 (2d Cir. 1950).

140. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

141. *United States ex rel. Knauff v. McGrath*, 181 F.2d 839 (2d Cir. 1950), dismissed as moot, 340 U.S. 940 (1951).

142. H.R. 7614, 81st Cong., 2d Sess. (1950). See *Hearings Before the Subcommittee No. 1 of the House Committee on the Judiciary*, 81st Cong., 2d Sess. ser. 20 (1950) (exclusion of *Ellen Knauff*).

migration and Naturalization Service, the Attorney General's Board of Immigration Appeals came to the following conclusion:

Do we have in this case more than uncorroborated hearsay to establish the premise upon which the inference is drawn? . . . We do not. . . . The sum total then of all the testimony is hearsay . . . uncorroborated by direct evidence, and that, says the Supreme Court, does not constitute substantial evidence.¹⁴³

The BIA certified the case to the Attorney General for review, and General McGrath approved the BIA's order to admit the alien.

The *Knauff* case has an unusual additional point. One of her major supporters was Congressman Francis E. Walter, co-author of the Act of 1952 and Chairman of the House Committee on Un-American Activities. After being shown the official file on Mrs. Knauff, Congressman Walter said: "It looked to me like a lot of gossip and nonsense. . . . [T]here is nothing to warrant even a reasonable suspicion."¹⁴⁴

Thus, after two exclusion orders by the Attorney General, four district court decisions, four court of appeals decisions, two Supreme Court decisions and a stay from one of its Justices, congressional hearings and action, and two administrative hearings, Mrs. Knauff was admitted and the nation has survived disclosure of the "confidential" information involved.

But how many other equally unjustly treated aliens were not able to obtain the opportunity of self-defense? Justice Jackson described the *Knauff* case as "a near miss, saved by further administrative and congressional hearing from perpetrating an injustice."¹⁴⁵ Whatever else the case may mean, it "strikingly illustrates the injustice which can result from decisions cloaked under this regulation."¹⁴⁶

Despite its constitutional validity, the use of confidential information has been recognized by a Congressional Committee and by the Commissioner of Immigration and Naturalization to be basically improper.

A House Congressional Committee investigating deportation procedures reached a conclusion on the use of confidential information, which is relevant here in principle:

The use of confidential information as a basis for granting or denying relief is at complete variance with basic common law precepts. The subcommittee has therefore developed concern over (a) the use of confidential information in arriving at a decision

143. *In re Knauff*, 1 Pike & Fischer, Ad. L. Dec. (2d ser.) 639, 641, 644 (BIA 1951); *Knauff*, The Ellen Knauff Story app. (1952).

144. *Knauff*, The Ellen Knauff Story 181 (1952); 98 Cong. Rec. 4401 (1952).

145. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (1953) (dissenting opinion).

146. *Kimball*, supra note 136. See also *Konvitz*, Civil Rights in Immigration 46 (1953). For the mischief that can develop as a result of this practice, see *Maetzu v. Brownell*, 132 F. Supp. 751 (D.D.C. 1955) (special inquiry officer granted voluntary departure; BIA reversed on basis of confidential information).

of this kind, and (b) the authority of a nonpolicy making official to determine what should remain undisclosed because disclosure may be prejudicial to public interest, safety, or security.¹⁴⁷

And in 1956, the Commissioner announced a new policy relating to the use of confidential information in connection with applications for discretionary relief from deportation. Confidential information would be used in such matters "only when the most compelling reasons involving the national safety or security are present," and then only when: "the Commissioner has personally reviewed the case and has satisfied himself that every effort to develop evidence through Service investigation and investigation by other Governmental agencies has been exhausted."¹⁴⁸ The Commissioner is to be commended for this welcome and heartening policy change, not only for what it does but also because it betokens recognition of the problem. Nevertheless the basic issue cannot be solved by a mere shift in administrative policy.¹⁴⁹ Furthermore, under current regulations, final determination of the use of confidential information as a basis for exclusion without a hearing is not vested either in the Attorney General or the Commissioner of Immigration and Naturalization, both of whom are presidential appointees confirmed by the Senate, but in the Regional Commissioners.¹⁵⁰

Others have urged the need for a thorough-going policy change here. In 1953, the President's Commission on Immigration and Naturalization concluded that "the present situation in connection with exclusion without hearing is unsatisfactory. The protection of a right to a fair hearing is essential to a democracy." To preserve "the American concept of fair play" and also protect the nation's security, that Commission recommended that determination as to whether an alien should be excluded without a hearing, on the basis of confidential information, should be made by its proposed statutory Board of Immigration and Visa Appeals.¹⁵¹

In 1955, the American Bar Association likewise took note of this unsatisfactory situation by adopting the following resolution:

BE IT RESOLVED, that it is the opinion of the American Bar Association that an alien should not be excluded except upon record evidence taken at a hearing, provided, however, that proper provision be made in security cases for safeguarding the confidential information and the sources of confidential information relied on, and that the

147. Report, *supra* note 127, at 14.

148. Immigration & Naturalization Service, Press Release, Oct. 31, 1956; N.Y. Times, Nov. 4, 1956, § 4E, p. 12, col. 2; 33 Interpreter Release 364 (Nov. 1, 1956). The regulation itself permits the special inquiry officer to consider "non-record" information "only when the Commissioner has determined that it is in the category of national security and safety to do so." 8 C.F.R. § 242.17(c) (1958).

149. See 59 W. Va. L. Rev. 199, 201 (1957).

150. 8 C.F.R. §§ 9.5a(q), 235.8(b) (1958).

151. Pres. Com. Rep. at 228-31.

Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.¹⁵²

While protecting both the source of the confidential information and the confidential information itself, the American Bar Association's resolution would require that the alien be provided with notice of the nature of the "charges" against him. Less than this cannot be said to be just or fair. More than this, in fact, was contemplated by Congressman Walter's own version of the 1952 bill in which he would have provided that "nothing in this Act shall be construed to authorize the denial of a hearing to any alien who has arrived in the United States."¹⁵³ This provision would have returned the practice to that which prevailed for fifty-eight years prior to 1941, that no alien could be excluded without a hearing.¹⁵⁴

It is indeed a sad day when the United States Government must resort to star chamber proceedings and deny a hearing simply because it wishes to use weak and uncorroborated evidence which it knows will not be sufficient in administrative hearings and will never stand up in court. The needs of national security can be met within the purpose of the American Bar Association's resolution without enforcement techniques "which shock the common man's sense of decency and fair play."¹⁵⁵

B. Procedure

"The history of liberty," said Justice Frankfurter, "has largely been the history of observance of procedural safeguards."¹⁵⁶ Justice Jackson wrote that "procedural fairness and regularity are of the indispensable essence of liberty"; "differences in the process of administration make all the difference between a reign of terror and one of law."¹⁵⁷ It is significant that procedural safeguards constitute the major part of our Bill of Rights.¹⁵⁸

Certain ways of doing things are part of our national tradition and have become part of "the very ethos of the scheme of our society."¹⁵⁹ It is to such overriding considerations that the Administrative Procedure Act is addressed.¹⁶⁰

152. See note 57 *supra*.

153. H.R. 2379, 82d Cong., 1st Sess. § 292 (1951). However, the Senate version in S. 716 prevailed.

154. Pres. Com. Rep. at 229.

155. *Bundea v. McDowell*, 256 U.S. 465, 477 (1921) (dissenting opinion).

156. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

157. *Shaughnessy v. Mezei*, 345 U.S. 206, 224, 226 (1953) (dissenting opinion).

158. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951).

159. *Id.* at 172.

160. 60 Stat. 237-44 (1946), as amended, 5 U.S.C. §§ 1001-11 (1952) (hereinafter cited as APA).

Reform Number Five—Applicability of the Administrative Procedure Act

The integrity of the hearing process rests as much on the impartiality of the hearing officer as on any single factor. Can a litigant obtain, or just as importantly, can he be made to feel and see that he can obtain,¹⁶¹ a fair hearing under a procedure where (1) the same person may be prosecutor, judge and jury, and (2) the hearing officer is not, or may not conceive himself to be, independent of the enforcement agency whose decision is on appeal to him?

Two characteristics¹⁶² are crucial to what the Supreme Court called the "mood" of the Administrative Procedure Act.¹⁶³ First, the act sought to assure the existence of a corps of independent hearing examiners, free from supervision, rating, compensation, promotion or removal at the hands of enforcement or prosecuting officials.¹⁶⁴ The principal objective here was to protect the examiners from being "mere employees of an agency."¹⁶⁵ Second, it sought to require a separation of prosecuting and adjudicating functions¹⁶⁶ and thus avoid the almost universally condemned commingling of such functions.¹⁶⁷ The purpose here was to insulate the hearing officer from direct or indirect influence or pressure from the agency whose action was under appeal.¹⁶⁸

After the enactment of the act in 1946, the Department of Justice held the view that it did not apply to proceedings under the immigration laws.¹⁶⁹ However, in 1950 the Supreme Court ruled otherwise in *Sung v. McGrath*.¹⁷⁰ Shortly thereafter, the Congress enacted the Supplemental Appropriation Act of 1951, which provided that "proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Section 5, 7 and 8 of the Administrative Procedure Act."¹⁷¹

161. Cf. 2 Atlay, *The Victorian Chancellors* 460 (1908).

162. See Heckman, *supra* note 5.

163. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

164. APA § 11. See President's Conference on Administrative Procedure, Report of the Committee on Hearing Officers, Appointment and Status of Federal Hearing Officers (1954).

165. H.R. Rep. No. 1980, 79th Cong., 1st Sess. 46 (1946).

166. APA 5(c).

167. See Van Vleck, *supra* note 95; Secretary of Labor's Committee, *supra* note 96; Wickersham Commission Report, *supra* note 93; Clark, *supra* note 94; Chafee, *Free Speech in the United States* 198-201 (1942); Pres. Com. Rep. at 158-62; Task Force, *supra* note 101, at 182.

168. S. Rep. No. 752, 79th Cong., 1st Sess. 17 (1945); H. Report, *supra* note 165, at 30.

169. See Carusi, *The Federal Administrative Procedure Act and the Immigration and Naturalization Service*, 4 Monthly Rev. 95, 101 (1947); Note, *The Rights of Aliens in Deportation Proceedings*, 31 Ind. L.J. 218 (1956).

170. 339 U.S. 33 (1950). See Heckman, *supra* note 5, at 381-86.

171. Supplemental Appropriation Act of 1951, c. 1052, § 101, 64 Stat. 1048 (1950).

The 1952 Act repealed the appropriation act provisions¹⁷² but the state of law was not certain until 1955 when the Supreme Court ruled that the Administrative Procedure Act was not applicable to deportation hearings conducted under the Act of 1952.¹⁷³

Admitting the statutory inapplicability of the Administrative Procedure Act *in haec verba*, are its objectives achieved by the specialized hearing system provided in the immigration laws? The answer is "No," although notable administrative efforts have been made along this line. There is no question that the alien's hearing is not conducted by a hearing officer independently appointed as envisaged by section 11 of the act. Hearings in exclusions and deportation proceedings are conducted by special inquiry officers¹⁷⁴ who are such immigration officers¹⁷⁵ as are deemed by the Attorney General to be qualified to conduct such proceedings and who are "subject to such supervision and shall perform such duties . . . as the Attorney General shall prescribe."¹⁷⁶

The Commissioner of Immigration and Naturalization has made special efforts to remedy, at least in part, the evil of commingled functions. The regulations were amended in 1956 to provide that in contested deportation matters, an "examining officer" shall take over the prosecuting function from the special inquiry officer; where no contest is made on the issue of deportability, but discretionary relief is requested, this separation of prosecutory and judicial functions is only permissive and not mandatory.¹⁷⁷ Under the new regulations, special inquiry officers no longer report directly to the District Director, but are under the supervision of a Chief Special Inquiry Officer (who is "under the executive direction of the Commissioner") acting through regional special inquiry officers.¹⁷⁸ Efficiency ratings for special inquiry officers are now prepared by the regional inquiry officers.¹⁷⁹ The new separation of functions applies specifically to deportation, but the Attorney General, in seeking to effectuate the President's Special Message to the Congress on Immigration,¹⁸⁰ proposed legislation authorizing similar separation of functions

172. Act of June 27, 1952, c. 477, § 403(a) (47), 66 Stat. 280.

173. *Marcello v. Bonds*, 349 U.S. 302 (1955).

174. Act of 1952 §§ 236, 242(b).

175. By delegation from the Attorney General, the Commissioner appoints such officers. 8 C.F.R. § 9.1(b) (1958).

176. Act of 1952 § 101(b)(4). The authority has been delegated to the Commissioner.

177. *Deportability of Aliens in the United States*, 21 Fed. Reg. 97-102 (1956). See *New Regulations for Hearing Procedures*, 33 Interpreter Releases 13, 16 (Jan. 23, 1956). Prior to this amendment separation of functions in contested deportation proceedings was merely permissive. 8 C.F.R. § 242.53(f) (1953) (now revoked).

178. 8 C.F.R. § 1.18(a) (1958).

179. See Note, 42 Va. L. Rev. 803, 809 (1956).

180. H.R. Doc. No. 329, 84th Cong., 2d Sess. (1956).

in exclusion hearings.¹⁸¹ The Commissioner of Immigration and Naturalization believes that, as a result of these new regulations, "special inquiry officers are now completely insulated from control or supervision by officers with enforcement or investigative responsibilities."¹⁸²

This change in the regulations governing deportation hearings is important and desirable, and the Commissioner of Immigration is to be complimented not only for instituting the new practice, but also for his program of upgrading the special inquiry officers and his efforts to have competent and well trained lawyers in such positions. However, the very adoption of this new procedure is proof of official recognition that despite authorization by the 1952 Act, and Supreme Court clearance on constitutionality, such commingling of prosecuting and adjudicating functions is undesirable both in theory and in practice. As laudable and commendable as the new procedure is, this internal reorganization still falls far short of accomplishing the Congressional objective in enacting the Administrative Procedure Act, because the present organizational structure within which special inquiry officers must function is basically unsound.

A Congressional Committee which investigated the Immigration Service's hearing procedure came to the following conclusion:

The fact that all of the quasi-judicial proceedings are conducted by personnel who are subject to appointment by the Attorney General may raise some doubt in the minds of respondents as to the complete impartiality of the hearings conducted by the Immigration and Naturalization Service.¹⁸³

Although issued prior to the 1956 change in regulations, and specifically directed to deportation proceedings, this congressional conclusion goes to the heart of the difficulty. Special inquiry officers are still ultimately subordinate to prosecuting officials,¹⁸⁴ and are fully aware that Congress was told that one of their number who aroused the Commissioner's ire will have no future advancement.¹⁸⁵ So long as this situation prevails, even the ablest special inquiry officer is subject to real, if implicit, pressure in close and difficult cases where the Commissioner has taken a

181. Letter to Vice President and Speaker, Feb. 8, 1956, 102 Cong. Rec. 2287 (1956). See S. 1006, 84th Cong., 1st Sess. § 15 (1955), to amend § 236(a) of the Act of 1952; H.R. 4205, 85th Cong., 1st Sess. § 15 (1957). Cf. *Matter of KHC*, 5 I. & N. Dec. 312, 314 (1953).

182. Immigration and Naturalization Service, Ann. Rep. 15 (1956). See also Hearings Before the Subcommittee of the House Committee on Appropriations, Department of Justice Appropriations for 1958, 85th Cong., 1st Sess. 171-72 (1957); Hearings Before the Subcommittee on the House Committee on Appropriations, Department of Justice Appropriations for 1957, 84th Cong., 2d Sess. 270 (1956); Hearings Before the Senate Committee on Appropriations, Department of Justice Appropriations for 1957, 84th Cong., 2d Sess. 138 (1956).

183. See Report, *supra* note 127, at 14.

184. See Note, 42 Va. L. Rev. 803, 821 (1956).

185. Hearings, *supra* note 86, at 120.

strong and determined enforcement position.¹⁸⁶ Even where such doubt is unjustified in the specific case, the institutional process is compromised. Where a special inquiry officer is appointed, supervised, and rated ultimately by enforcement officials, albeit one step removed, and where the relative degree of independence provided by the new regulations is known to be a matter of administrative sufferance, revocable at will by the supervising enforcement officials, it is straining at human nature to expect true judicial independence from the special inquiry officer whose career and future advancement is still completely in the hands of enforcement officials and who is hearing appeals on controversial issues and unsettled questions of law and policy, on which his rulings affect Service policy and practice.¹⁸⁷

The absence of any true independence for special inquiry officers is illustrated in the *Brancato* case which was investigated by a Congressional Committee.¹⁸⁸ On two separate occasions,¹⁸⁹ the Supreme Court noted that in this case the Commissioner disciplined a special inquiry officer for the manner of his conduct of a deportation hearing. The *Brancato* case is cited here not in defense of the merits of the alien's case, but only because the case shows that special inquiry officers do not really have independence from enforcement officers who ultimately supervise their activity. The regulations have been changed since, and perhaps in part because of, that case; but the ultimate control by enforcement officials still remains. To what avail is protecting the "judicial function" of the special inquiry officer¹⁹⁰ by partial separation of functions,¹⁹¹ if judicial independence is denied him?

The Congressional Committee which studied the *Brancato* case reached the following significant conclusion:

Although it undoubtedly would be costly in routine cases to subject the Service to the expense of procedures required by the Administrative Procedures Act, the Service should undertake current studies to ascertain the feasibility of applying APA rules of procedure in some areas of its responsibility. While the preservation and protection of civil rights may be more costly, it is a justified expenditure.¹⁹²

186. In the case of Nicolae Malaxa, A-6421949 (exclusion), the examining officer assigned to the case was the Deputy Assistant Commissioner, as "Assistant Examining Officer." Brief for Alien, Nov. 1957.

187. Cf. Branse, Role of the Service Representative Before the Board of Immigration Appeals, 5 I. & N. Rep. 1, 3 (July 1957).

188. Hearings, *supra* note 86, at 127.

189. *Marcello v. Bonds*, 349 U.S. 302, 318-19 (1955); *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280, 282 (1955). Finally, it was judicially held that *Brancato* was not deportable. *United States ex rel. Brancato v. Lehmann*, 239 F.2d 663 (2d Cir. 1956).

190. Task Force, *supra* note 101, at 272.

191. See *Matter of P—*, 5 I. & N. Dec. 392, 402-03 (1953) (not unfair for special inquiry officers to examine Service's file before hearing). But cf. Govt. Oper. Survey, *supra* note 82, at 750.

192. See Report, *supra* note 127, at 14. As to costs, see Pres. Com. Rep. at 165.

The important steps taken by the Commissioner, to insulate the special inquiry officers from supervision by enforcement officials, cannot achieve full separation of functions because they are within the framework of an organizational structure which subordinates the special inquiry officer to enforcement officials. As another example of this, take what happens to the special inquiry officer's decision. Both the alien¹⁹³ and the examining officer who prosecuted the case¹⁹⁴ may appeal to the Board of Immigration Appeals. But this is not all. Where the decision admits the alien, the District Director (a high-ranking enforcement official) may require the case to be referred to him "for review" so that he may appeal it to the BIA.¹⁹⁵ And to move still higher up in the enforcement hierarchy, the Regional Commissioner "may direct that any case or class of cases be certified to him."¹⁹⁶ If it be a case appealable to the Board, he may certify it to the Board for review of the special inquiry officer's decision;¹⁹⁷ if it be outside the BIA's jurisdiction, the Regional Commissioner "may enter such decision as he deems appropriate."¹⁹⁸ And the Commissioner himself or an Assistant Commissioner, may likewise appeal an inquiry officer's decision on deportation¹⁹⁹ or exclusion,²⁰⁰ by certifying the case to the BIA.²⁰¹

If the prosecuting examining officer (who represents the Immigration and Naturalization Service at the hearing) may appeal the decision, why is it necessary to authorize a complex system of appeals initiated on the very highest levels of prosecuting and enforcement officials, except for control of the special inquiry officer's actions by such officials?

There is another example of the subordination, in fact, of special inquiry officers to enforcement officials. The BIA has jurisdiction on appeal from decisions of special inquiry officers involving the exercise of discretion. In contested deportation cases, as has already been noted, a laudable effort is made to prevent commingling of functions. But in cases where deportability is not contested, and the only issue is an

193. 8 C.F.R. §§ 236.15, 242.15(b) (1958). The District Director, as well as the special inquiry officers and BIA, may extend the alien's time for filing a brief. 8 C.F.R. §§ 236.15(a), 235.16 (1958).

194. 8 C.F.R. §§ 242.9(a), 242.20 (1958). See Matter of N—, A-10750962, Interim Decision #867 (BIA, May 31, 1957).

195. 8 C.F.R. § 236.16 (1958).

196. *Id.* § 7.1(b).

197. *Id.* § 6.1(c).

198. *Id.* § 7.1(b)-(d).

199. *Id.* § 6.1(b)(1).

200. *Id.* § 6.1(b)(2).

201. *Id.* § 6.1(c). At the outset, when the BIA was established, the Commissioner had no authority to require certification of cases to the Attorney General. Att'y Gen. Ann. Rep. 235 (1941). Then, the Commissioner could obtain review if the BIA agreed. 8 C.F.R. § 90.12 (1949). Now, the Commissioner can obtain automatic review.

application for discretionary relief, separation of functions is not required and the special inquiry officer's action is directly subject to the Regional Commissioner's surveillance. Where the officer grants discretionary relief in the nature of suspension of deportation, the case is referred to the Regional Commissioner for approval. If approved, the case goes to Congress for action;²⁰² if the Regional Commissioner disapproves the favorable exercise of discretion, the enforcement officer cannot reverse the special inquiry officer's decision but may certify the case (with his reasons for disapproval) to the BIA for review.²⁰³

The significance of the surveillance of special inquiry officers by enforcement officers in non-contested deportation proceedings can be estimated statistically. Deportability is contested in only one-fifth of the deportation hearings; thus, eighty per cent of all deportation hearings are for the purpose of considering applications for discretionary relief.²⁰⁴ Is it reasonable to assume that the special inquiry officer can or will be uninfluenced by the actions and rulings of so high an enforcement officer in what amounts to a *de novo* review of eighty per cent of all his actions and decisions in deportation matters?

In one respect, the regulations show that special inquiry officers are not regarded as independent quasi-judicial officers, but rather as employees on special assignments who are subject to other non-judicial assignments and to supervision as deemed necessary. The act authorizes the Attorney General to withhold deportation where, in his opinion, an alien would be subject to physical persecution.²⁰⁵ Final determination of claims for withholding of deportation under this provision of law has been delegated to the Regional Commissioners. However, the regulations provide that before a Regional Commissioner may act on such a case, a special inquiry officer shall hold "an interrogation under oath," and then prepare for the Regional Commissioner a memorandum of findings and a recommended decision which are served on the alien and as to which the alien may file exceptions with the Regional Commissioner.²⁰⁶ This is not regarded as a judicial function based on an adversary proceeding because final decision is made by an enforcement officer, the Regional Commissioner, and a right of appeal to the Board of Immigration Appeals is expressly denied.²⁰⁷

This new system for dealing with such claims of persecution²⁰⁸ is a

202. 8 C.F.R. §§ 8.1, 8.2 (1958).

203. *Id.* § 7.1(b). Another example is the special inquiry officer's lack of control over bail, a power given to the district director. *Id.* § 242.2 (subject to appeal, *id.* 6.1(b)(7)).

204. *Att'y Gen. Ann. Rep.* 421 (1956); Task Force, *supra* note 101.

205. Act of 1952 § 243(h).

206. 8 C.F.R. § 243(b)(2) (1958).

207. See *Govt. Oper. Survey*, *supra* note 82, at 728, 736; 8 C.F.R. § 243(b)(3) (1958).

208. The practice started in 1955. See *Immigration and Naturalization Service, Ann. Rep.* 18 (1955). Prior to this new practice, it had been held that no "classical

welcome and desirable improvement over the earlier practice, and it is hoped no comment here made will adversely affect its continuance under present circumstances.²⁰⁹ However, it illustrates the fact that, despite excellent efforts to provide for separation of prosecuting and deciding functions, special inquiry officers are not really insulated from enforcement pressures and influences.

The conclusion is inescapable that the structure of the present hearing system in immigration cases, by very reason of its non-conformity with the Administrative Procedure Act, may inhibit true independence on the part of the special inquiry officers. Of course there are special inquiry officers who have demonstrated complete independence. But the unsoundness of the organizational structure within which they operate is the critical issue.

The applicability of the Administrative Procedure Act to immigration hearings has long been under discussion. The President's Commission recommended that the act be made applicable to deportation hearings but not to exclusion proceedings.²¹⁰ The American Bar Association has gone further and would make it applicable to hearings "in all alien matters":

BE IT RESOLVED, That it is the opinion of the American Bar Association that in all alien matters in which an administrative hearing is required to be had by statute or the Constitution, the hearing officer be duly appointed under Section 11 of the Administrative Procedure Act and be governed by all the relevant provisions of Sections 5, 7 and 8 of that Act.²¹¹

The American Bar Association, a constant champion of the Administrative Procedure Act,²¹² would thus restore the situation to that prevailing under the Supreme Court's decision in the *Sung* case.²¹³

To adopt the American Bar Association's position would also comply with the avowed intent of the authors of the Act of 1952 (who also sponsored the Administrative Procedure Act), and with the assurances

administrative hearing" was necessary under § 243(h). *Namkung v. Boyd*, 226 F.2d 385 (9th Cir. 1955). But see *United States ex rel. Paschalidis v. District Director*, 143 F. Supp. 310, 313 (S.D.N.Y. 1956) (Attorney General's action reviewable "where the requirements of appropriate procedural due process have not been observed.").

209. For the need of improvement in the prior system of handling § 243(h) cases, see Report of the Special Subcommittee of the House Committee on the Judiciary, H.R. Rep. No. 1570, 84th Cong., 1st Sess. app. at 69 (1955). The Immigration and Naturalization Service has undertaken an exhaustive investigation of § 243(h) cases. Wright Report, *supra* note 18, at 582.

210. Pres. Com. Rep. at 164-66.

211. See note 57 *supra*.

212. See Rhyne, *The Administrative Procedure Act: Five-Year Review Finds Protections Eroded*, 37 A.B.A.J. 641 (1951).

213. See note 170 *supra*. Specifically in relation to special inquiry officers, see Déale, *A Major Reform Proposed: The Administrative Procedure Reorganization Act*, 44 A.B.A.J. 133, 136 (1958).

which they gave to the Congress. In floor debate on the bill which became the Act of 1952, Senator McCarran stated that:

The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now.²¹⁴

Congressman Walter, in the course of House debate on the bill, said:

What do we do in this act? Instead of destroying the Administrative Procedure Act, we undo what Congress did in a deficiency appropriation bill several years ago when it legislated to overturn a decision of the Supreme Court which ruled that the Administrative Procedure Act is applicable to deportation proceedings. We undo that. So here, instead of our destroying the Administrative Procedure Act, we actually see that it is reinstated in every instance.²¹⁵

And again:

[T]he law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and . . . the decision of the Supreme Court in the *Sung* case will be the law of the land when this code is adopted.²¹⁶

Thus, whatever may be the Supreme Court's interpretation of the legislative history of the Act of 1952,²¹⁷ the Congress was assured by the bill's co-authors (who were the Committee spokesmen for the measure) that the Administrative Procedure Act was applicable and that the law would be as declared by the Supreme Court in the *Sung* case. Thus, adoption of the American Bar Association's proposals on this score will bring about the happy coincidence of what is right and ought to be done, as well as what will comply with the avowed intentions of the present law's co-sponsors. The Act of 1952 should be amended to achieve this result, to the end that deportation and exclusion hearings shall be conducted by hearing officers who are appointed under, and in accordance with, the Administrative Procedure Act.

III. JUDICIAL REVIEW

Professor Jaffe has recently written:

[T]he availability of judicial review is, in our system and under our tradition, the necessary premise of legal validity The guarantee of legality by an organization independent of the executive is one of the profoundest, most pervasive premises of our system.²¹⁸

214. 98 Cong. Rec. 5778 (1952).

215. 98 Cong. Rec. 4302 (1952), in debate on H.R. 5678, 82d Cong., 2d Sess. (1952).

216. 98 Cong. Rec. 4416 (1952). H.R. 3364, 85th Cong., 1st Sess. § 108(a) (1957), requires all but rule-making hearings to be conducted either by the statutory BIA it establishes or by hearing examiners appointed and assigned pursuant to APA § 11. See also APA § 10.

217. See *Marcello v. Bonds*, 349 U.S. 302 (1955). (The decision was 5 to 3, and two members of the majority have since retired.)

218. Jaffe, *The Right to Judicial Review* I, 71 Harv. L. Rev. 401 (1958).

This view has been recognized in Congress:

Among the primary safeguards of our American way of life is the doctrine of official responsibility, the principle that Government officials are servants and not masters, and that it is more important for the people to scrutinize the conduct of officials than it is for officials to scrutinize the lives of the people. From this it follows that some form of judicial protection shall always be open to the victims of injustice, even if the injustice is committed by persons in powerful position.²¹⁹

Reform Number Six—Judicial Review of Deportation and Exclusion Orders

The immigration law has never specifically provided for judicial review of either deportation or exclusion orders.²²⁰ Prior to the enactment of the Administrative Procedure Act in 1946, it was generally understood that such orders were reviewable only through habeas corpus proceedings.²²¹ Did the act change this situation and allow review in injunctions, declaratory judgments,²²² or petitions of review under section 10?²²³ The Supreme Court ruled in 1953, after the effective date of the Act of 1952, that the Administrative Procedure Act was inapplicable to the pre-1952 immigration law²²⁴ and that therefore only habeas corpus could be used to review a deportation order under the 1917 Act.²²⁵

Under this holding, an alien could obtain judicial review of an administrative order of deportation only after he had submitted himself to the "odium of arrest and detention"²²⁶ and made all personal and business arrangements for departure. This enormous inconvenience to the alien was not counterbalanced by any corresponding benefit to the Government.²²⁷

Everyone concerned recognized that this situation was unsatisfactory. In 1952, even before the *Heikkela* case, the Acting Solicitor General (with the concurrence of the Immigration Service) proposed legislation to permit judicial review without the limitation of habeas corpus proceedings.²²⁸ Then in January 1954, the Supreme Court, by a four-to-four

219. Minority Report, S. 2550, *supra* note 47, at 7.

220. Gordon, *supra* note 8; Pres. Com. Rep. at 168; Report, *supra* note 209, app. at 68. See Act of 1952 § 236 (exclusion), § 242(b) (deportation).

221. Pres. Com. Rep. at 168; Letter of Acting Solicitor General of the United States, Pres. Com. Hearings at 1953.

222. Declaratory Judgment Act, 48 Stat. 955 (1934), 28 U.S.C. § 2201 (1952).

223. APA § 10.

224. Immigration Act of 1917, § 19(a), 39 Stat. 889, as amended, 8 U.S.C. § 155(a) (1952). (Attorney General's decision "final".)

225. *Heikkela v. Barber*, 345 U.S. 229 (1953).

226. *Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1957). See Orlow, *Habeas Corpus in Immigration Cases*, 10 Ohio St. L.J. 314 (1949); Note, 62 Yale L.J. 1000, 1007 (1953).

227. Acting Solicitor General, Pres. Com. Hearings at 1953.

228. *Ibid.*

vote per curiam, affirmed a decision that judicial review of deportation could be had by declaratory judgment and was not limited to habeas corpus.²²⁹ This inconclusive decision left the law in a highly uncertain state²³⁰ and the only way out of the dilemma seemed to be through legislation.²³¹ In March 1954, the Department of Justice sponsored a bill which would provide a statutory form of judicial review of deportation (but not exclusion) orders.²³² This proposal was an advance over the law as it then prevailed, and was endorsed in principle by the American Bar Association.²³³

However, the uncertainty of the law which was the basis of any need for legislative clarification, has since been dispelled by two clear Supreme Court rulings. In 1955, *Shaughnessy v. Pedreiro*²³⁴ held that, under the Act of 1952, deportation orders are reviewable by way of declaratory judgment. And in December of 1956, *Brownell v. Tom We Shung*²³⁵ applied the same rule to exclusion orders under the Act of 1952.²³⁶

The present state of the law on this subject seems quite satisfactory. In 1957 Congressman Walter expressed full agreement with it.²³⁷ And in February 1958, the American Bar Association adopted the following resolution opposing any legislative changes in the present situation:

WHEREAS, recent decisions of the Supreme Court of the United States have construed Section 10 of the Administrative Procedure Act as applicable to deportation and exclusion orders under the Immigration and Nationality Laws of the United States; and WHEREAS, legislation has been introduced in the Congress to restrict judicial review of deportation and exclusion orders under said laws,

BE IT RESOLVED, that the American Bar Association favors judicial review, under Section 10 of the Administrative Procedure Act, of deportation and exclusion orders under the Immigration and Nationality laws of the United States and that the Section of Administrative Law be authorized and directed to oppose legislation designed to restrict judicial review of such orders.²³⁸

229. *Rubinstein v. Brownell*, 206 F.2d 449 (D.C. Cir. 1953), aff'd, 346 U.S. 929 (1954).

230. See Report, *supra* note 209, app. at 67; Gordon, *supra* note 9.

231. Immigration and Naturalization Service, Ann. Rep. 8 (1954) (processed).

232. Department of Justice, Press Release, Mar. 10, 1954. This was sent immediately after American Bar Association's approval of the bill in principle. See 6 Ad. L. Bull. 126 (1954). The present versions are: S. 1006, 85th Cong., 1st Sess. § 34 (1957); S. 345, 85th Cong., 1st Sess. (1957); H.R. 4205, 85th Cong., 1st Sess. § 34 (1957). The President's special messages on immigration justify this proposal as a means of preventing "abuse of legal process." H.R. Doc. No. 329, 84th Cong., 2d Sess. 6 (1956); H.R. Doc. No. 85, 85th Cong., 1st Sess. (1957).

233. 6 Ad. L. Bull. 126 (1954).

234. 349 U.S. 48 (1955).

235. See note 226 *supra*.

236. See Sutherland, *The Supreme Court: 1956 Term*, 71 Harv. L. Rev. 85, 187 (1957).

237. See Ball, *Judicial Review in Deportation and Exclusion Cases*, 34 Interpreter Releases 128, 132 (June 10, 1957) (Letter of March 15, 1957 from Walter to Ball saying: "I fully agree with the . . . Shung case.").

238. 10 Ad. L. Bull. 10 (1957). This resolution was adopted by the Section of Administra-

Thus, the situation now is completely different from that which, in 1954, was the cause for suggestions of legislative remedy. In view of the clarification of the issue by the Supreme Court, and the current satisfactory state of the law in this score, there is no need at this time for any legislation to deal with judicial review of orders of exclusion or deportation.²³⁹ Nevertheless, a subcommittee of the House Judiciary Committee approved House Report 13,311 (Walter) a bill designed to restrict and limit judicial review of deportations and exclusion orders.^{239a}

The American Bar Association testified in opposition to this bill on the grounds that (1) the bill was unnecessary and that there was no evidence of a major abuse of the judicial process needing legislative rectification, (2) the form of review, through the courts of appeals rather than the district courts, was inappropriate to immigration matters, and (3) in at least ten specified ways, the bill seriously and unwisely restricted judicial review now available under the Administrative Procedure Act.^{239b}

Reform Number Seven—Judicial Determination of Claim of Citizenship

The Nationality Act of 1940²⁴⁰ gave to all persons claiming American citizenship, whether in or outside of the country, a right to a judicial determination of their claims through an action for a declaratory judgment. If resident outside the United States,²⁴¹ a claimant could obtain from a consul a certificate of identity to be admitted into the United

tive Law at its Annual Meeting in 1957, and approved by the House of Delegates at its mid-winter meeting in February 1958.

239. This is not intended to foreclose the possibility of improvement in judicial review that may result from a general revision of the Administrative Procedure Act.

239a. H.R. 13,311, 85th Cong., 2d Sess. was introduced on July 7, 1958 to perfect H.R. 12,487, 85th Cong., 2d Sess. which was introduced on May 13, 1958.

239b. The present author represented the ABA in its testimony. Hearings Before the Subcommittee No. 1, House Judiciary Committee, "Judicial Review of Deportations and Exclusion Orders," 85th Cong., 2d Sess., ser. 19, at 46-60 (1958). Also testifying in opposition to the bill was the Hon. Emanuel Celler, Chairman of the House Judiciary Comm. Statements in opposition were filed by: Association of Immigration and Nationality Lawyers; Immigration Comm. of the Bar Ass'n of the Dist. of Columbia; American Veterans Comm.; Common Council for Am. Unity; and the Committee on Migration and Refugee Problems of the Am. Council of Voluntary Agencies for Foreign Service.

240. Section 503, 54 Stat. 1171, 8 U.S.C. § 903 (1952). See *Perkins v. Elg*, 307 U.S. 325 (1939).

241. Prior to the 1940 Act, nonresident claimants could test their rights only through habeas corpus in exclusion proceedings. See Note, *Establishing Citizenship: Remedies Available to Persons Outside the United States*, 7 Stan. L. Rev. 360 (1955); *Developments in Law—Immigration & Nationality*, Note, 66 Harv. L. Rev. 643, 743 (1953); *A Judicial Review of Administrative Denial of Citizenship Claims by a Person Not in the United States*, 55 Colum. L. Rev. 226 (1955).

States in order to bring his law suit; if denied such certificate, the overseas citizenship claimant could appeal to the Secretary of State.²⁴² Under this provision, federal courts allowed actions for declaratory judgment by nonresidents who claimed to be foreign-born children of American parents.²⁴³

The 1952 Act substantially restricted these earlier-granted rights.²⁴⁴ Claimants who are within the United States may still bring action for a declaratory judgment if a right or privilege as a national of the United States has been denied by a government agency or official on the ground of non-nationality; provided, however, that the action may not be brought if the citizenship question arose in connection with, or became an issue in, an exclusion proceeding.²⁴⁵ The rights of claimants resident outside of the United States were, however, rigorously curtailed.²⁴⁶ In the first place, if permitted to come to the United States to make their claim, they cannot have—as previously—a full scale judicial determination of their citizenship claim through declaratory judgment. They are now permitted only to apply for admission into the United States, on the same footing as any alien, and to test their claims only in exclusion proceedings²⁴⁷ from which habeas corpus (with its much more limited scope of review) is stated to be the exclusive form of judicial review.²⁴⁸

Furthermore, the Act of 1952 restricts the groups of claimants who may even obtain a certificate of identity to come to the United States for this more limited review of citizenship status. A nonresident claimant of nationality is not entitled to a certificate of identity *unless*:

(1) his claim to a right or privilege as a national of the United States has been denied by an agency or official of the U. S. Government on the ground that he is not a U. S. national;

(2) his application for such certificate is, to the satisfaction of the diplomatic or consular officer passing on it, made in good faith *and* on a substantial basis; and

(3) he has either previously been physically present in the United States, *or* is a person under 16 years of age who was born abroad of a U. S. citizen parent.²⁴⁹

According to the State Department's Regulations, the first requirement (denial of a right or privilege as a national) is not met where a

242. Act of 1952 § 360(b); 22 C.F.R. § 50.38 (1958).

243. See *Ming v. Dulles*, 225 F.2d 849 (9th Cir. 1955); Note, Establishing Citizenship: Remedies Available to Persons Outside the United States, 7 *Stan. L. Rev.* 360, 361 (1955). Cf. *Developments in Law—Immigration and Nationality*, 66 *Harv L. Rev.* 643, 673 (1953).

244. *Correia v. Dulles*, 129 F. Supp. 533, 534 (D.R.I. 1954); *Avina v. Brownell*, 112 F. Supp. 15, 17 (S.D. Tex. 1953).

245. Act of 1952 § 360(a). (The act established a five year statute of limitations.)

246. H.R. Rep. No. 1365, 82d Cong., 2d Sess. 87 (1952).

247. Act of 1952 § 360(b).

248. *Id.* § 360(c). Cf. *Brownell v. Tom We Shung*, 352 U.S. 180, 183 (1957).

249. *Id.* § 360(b).

passport is denied "on the ground that the person has not established his identity."²⁵⁰

The claimant's "good faith" "is to be determined by the diplomatic or consular officer . . . in the light of the facts and circumstances of each case."²⁵¹ The claim's substantiality must be such that it:

satisfies the diplomatic or consular officer . . . that the claim . . . is . . . sufficiently meritorious to justify a determination of the question by the Attorney General in connection with an application for admission into the United States.²⁵²

Denial of a certificate of identity overseas by a diplomatic or consular officer²⁵³ may be appealed to the Secretary of State.²⁵⁴ The law is still uncertain whether the Secretary can be compelled to issue a certificate.²⁵⁵ And it is also an unsettled question whether, despite the limitations in the Act of 1952,²⁵⁶ a nonresident alien may test his claim to citizenship through an action for a declaratory judgment.²⁵⁷

The reason advanced for the change from the 1940 Act to the 1952 was that substantial fraud was being perpetrated against the United States in passport and immigration matters in Hong Kong.²⁵⁸ The

250. 22 C.F.R. § 50.32 (1958). Applications for certificates of identity are not even accepted in such instances. Note, *Establishing Citizenship: Remedies Available to Persons Outside the United States*, 7 *Stan. L. Rev.* 360, 370 (1955). But see *Yee Mee v. Dulles*, 136 F. Supp. 199, 200 (W.D. Pa. 1955).

251. 22 C.F.R. § 50.30 (1958).

252. *Id.* § 50.31.

253. The officer must make a notation of "the factual and/or legal grounds for the denial." 22 C.F.R. § 50.37 (1958).

254. Appeal may be had by the alien, through the office which denied the certificate, 22 C.F.R. § 50.38 (1958), or directly to the Secretary (through the Passport Office) by an attorney in the United States. 22 C.F.R. § 50.39 (1958). If the Secretary sustains the denial, he must state his reasons in writing. Act of 1952 § 360(b).

255. Few pertinent cases have arisen under the Act of 1952. *Avina v. Brownell*, 112 F. Supp. 15, 19 (S.D. Tex. 1953) says, obiter, that the Secretary can be so directed. The issue was left open in *D'Argento v. Dulles*, 113 F. Supp. 933, 937 (D.D.C. 1953). See *Developments in Law—Immigration and Nationality*, 66 *Harv. L. Rev.* 643, 743 (1953). For rulings under the Nationality Act of 1940, see *Dulles v. Lung*, 212 F.2d 73 (9th Cir. 1954); *Wong Beck Ling v. Dulles*, 119 F. Supp. 513 (D.D.C. 1953); *Sing v. Dulles*, 116 F. Supp. 9 (E.D.N.Y. 1953).

256. See note 248 *supra*.

257. Holdings allowing action: *Yee Mee v. Dulles*, 136 F. Supp. 199 (W.D. Pa. 1955); *Tom Mung Ngow v. Dulles*, 122 F. Supp. 709 (D.D.C. 1954). *Contra*, *Gonzalez-Gomez v. Brownell*, 114 F. Supp. 660 (S.D. Colo. 1953); *Vasquez v. Brownell*, 113 F. Supp. 722 (W.D. Tex. 1953). The Supreme Court specifically left this issue undecided in *Brownell v. Tom We Shung*, 352 U.S. 180, 184 (1957). Cf. S. Rep. No. 1137, 82d Cong., 1st Sess. 50 (1952).

258. See *Ly Shew v. Acheson*, 110 F. Supp. 50, 54-57 (1953); Joint Hearings, *supra* note 97, at 338; Hearings Before the Subcommittee of the House Committee on Appropriations, Department of Justice Appropriations for 1957, 84th Cong., 2d Sess. 225, 231 (1956); Hearings Before the Subcommittee of the House Committee on Appropriations, Department

major issue was generally one of identity, whether the claimant was the person he alleged himself to be; largely—but not wholly²⁵⁹—the persons involved were of Chinese-American extraction. In order to prevent "spurious" claims from "clogging up both administrative and judicial dockets,"²⁶⁰ a new legislative "formula" was designed and incorporated into the Act of 1952.

How, and on what theory, this new "formula" is being administered was described by the American Consul General in Hong Kong, the area of the major difficulties which brought on the new provision. He wrote:

The attempt has been made to confine the action of 360(b) to controversial questions of law. The section is to be utilized, for example, when a provision of law is susceptible of two or more interpretations and the point of difference has not been clarified by judicial decisions, or when a case presents new questions of law on which there are no administrative or judicial guides. One should not, however, exclude the possibility of isolated cases in which issues of fact may be better resolved at hearing at a port of entry in the United States than at a Foreign Service office.²⁶¹

It is significant that, in hearings leading to the enactment of the 1952 law, the State Department made not-dissimilar suggestions for a limitation of judicial review.²⁶²

This administrative policy merits close analysis. *First*, there is the breath-taking blitheness with which it passes by one of the law's most perplexing problems, the distinction between law and fact.²⁶³ "What one judge regards as a question of fact another thinks is a question of law."²⁶⁴ Furthermore, the very decision, whether it be a question of fact or of law is itself a question of law.²⁶⁵ Furthermore, as Professor Jaffe has said, "the adequacy of the evidence adduced to support a finding of fact is a question of law."²⁶⁶ Congressional awareness of this difficulty may, in part, explain why the Administrative Procedure Act authorizes a court, in the process of judicial review of administrative decision, to review "the whole record."²⁶⁷

Second, what justification can there be to empower only one party to

of Justice Appropriations for 1958, 85th Cong., 1st Sess. 365-73 (1957); Wright Report, *supra* note 18, at 480-82.

259. See Joint Hearings, *supra* note 97, at 590-91.

260. See Report, *supra* note 209, app. at 91.

261. Letter from Everett F. Drumright, April 18, 1955. Note, *Establishing Citizenship: Remedies Available to Persons Outside the United States*, 7 Stan. L. Rev. 360, 370 (1955).

262. See, Joint Hearings, *supra* note 97, at 210. (The testimony was intended to liberalize the bills then under consideration.)

263. See Davis, *Administrative Law* 874 (1951).

264. Att'y Gen., Report of Comm'n on Administrative Procedure 90 (1941).

265. Isaacs, *The Law and the Facts*, 22 Colum. L. Rev. 1, 11-12 (1922).

266. Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020 (1956).

267. APA § 10(e).

a controversy to decide what legal or constitutional issues are still so "controversial" as to merit review? Whether an issue is "controversial," or whether a court may be persuaded to reverse even a long standing ruling, is frequently the very point at stake. Furthermore, what protection does a claimant have where there is no new principle of law involved in his case but where the "old" principles have been incorrectly applied to him? If the government can control litigation by final decisions as to when litigants may or may not have a good "legal" case, a grievous blow will be dealt to the very concept and purpose of judicial review. The fundamental unsoundness of the present situation is illustrated by the fact that a citizenship claimant who presents himself for admission at a land port of entry can obtain a full hearing and can go upon appeal to the Board of Immigration Appeals²⁶⁸ and to the courts.

Third, the grudging admission of "the possibility" that in "isolated cases" issues of facts may "be better resolved" in open, adversary hearings then in one-sided administrative investigations without hearings²⁶⁹ represents astonishing naivete as to what is at the basis of most litigation, a controversy over facts.²⁷⁰ It is a monumental disregard of the legal truism that the facts often determine the law of the case. Justice Holmes spoke of "the facts that establish the law,"²⁷¹ and Judge Frank said: "A Court's decision turns on the 'facts' of the case."²⁷² On this point, Justice Miller said:

In my experience in the conference room of the Supreme Court . . . I have been surprised to find out how readily those judges come to an agreement upon the questions of law, and how often they disagree in regards to questions of fact.²⁷³

And Chief Justice Hughes, once also Secretary of State, said in another context what is relevant here in principle:

An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.'²⁷⁴

The practice in connection with issuance of certificates of identity ignores the crucial fact that the legal rights provided by the statute depend upon the determination of facts, some of which are stated by the

268. See *In re A—*, BIA A-10046823 (Dec. 2, 1957), where inspector and special inquiry officer ruled that a naturalized citizen had lost citizenship by virtue of excessive foreign residence, and where BIA reversed on error of law.

269. Cf. Note, Establishing Citizenship, Remedies Available to Persons Outside the United States, 7 *Stan. L. Rev.* 360, 369 (1955).

270. See, Cohen, Field Theory and Judicial Logic, 59 *Yale L.J.* 238 (1950).

271. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227 (1908).

272. Frank, *If Men Were Angels* 74, 92 (1942).

273. Frank, *op. cit. supra* note 272, at 78; Frank, *Law and the Modern Mind* 106 (1931).

274. Frank, *op. cit. supra* note 272, at 77.

act itself as being decisive of eligibility to the rights.²⁷⁵ It repudiates the traditional and time-tested role of judicial and administrative tribunals as triers of the fact and seems totally oblivious of the status of the jury system in Anglo-American law. It proceeds on the singular assumption that one side of a controversy should decide the facts²⁷⁶—as extraordinary a conclusion as that one side should decide the law. It subjects an American citizen "to the risk of being deprived of his heritage by a possible error of a minor administrative official without any redress."²⁷⁷ In practice,²⁷⁸ it empowers an administrative official at a relatively low level to be the final arbiter of a claim to American citizenship. It makes the constitutional rights of citizenship "depend upon the arbitrary will" of a minor official.²⁷⁹

The Government's laudable preoccupation with preventing fraud has blinded it to other overriding values. The Supreme Court put the problem into perspective:

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.²⁸⁰

The comments of a former president of the American Bar Association, made in another connection, are relevant here:

My objection goes to the theory that the end justifies the means of accomplishment, regardless of fundamental rights or privileges.²⁸¹

The dangers attendant upon foreclosing judicial scrutiny in such manner and in placing final authority in the agency which makes the original decision of denial of a certificate of identity are illustrated through the results of a survey made by the National Council on Naturalization and Citizenship. A review of cases brought under the 1940 Act and the Declaratory Judgment Act showed that out of a total of 44 cases "in 35 instances it was held that the petitioner was an American and therefore that his rights had been improperly denied him."²⁸² The evil and mischief wrought by illegality of administrative acts²⁸³ not brought

275. The Deputy Attorney General urged that a certificate of identity be granted to all "who have more than a frivolous claim to citizenship." Joint Hearings, *supra* note 97, at 721.

276. "[f]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (concurring opinion).

277. *Tom Mung Ngow v. Dulles*, 122 F. Supp. 709 at 712 (D.D.C. 1954).

278. *Dulles, The Effect in Practice of the Report on Administrative Procedure*, 41 Colum. L. Rev. 617 (1941).

279. *Shaughnessy v. Mezei*, 345 U.S. 206, 217 (1953) (dissenting opinion).

280. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920).

281. *Loyd Wright*, quoted in *Frank*, *op. cit. supra* note 272, at 43.

282. *Butler*, *supra* note 97, at 106. See also *Pres. Com. Hearings* at 1591.

283. *Developments in Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 744 (1953).

under judicial cognizance is further revealed in testimony of the State Department. In seeking to justify a budget item for investigating frauds in Hong Kong, the Department pointed out that in fiscal year 1956, as a result of the Department's efforts in investigating such frauds, the Government won 338 (or 82 per cent) of the 412 fraud cases in the courts, and the alien won 74 (or 18 per cent), and that in the last six months of 1956, the ratio in the 396 cases in the courts was 379 (or 96 per cent) for the Government and 17 (or 4 per cent) for the alien.²⁸⁴ The sad fact still remains that 78 citizens would illegally and improperly have been denied their constitutional rights if administrative absolutism reigned without judicial review.

The Act of 1952 creates an anomalous situation. Under the *We Shung* case, an alien under an exclusion order may test his statutory rights in declaratory judgment proceedings.²⁸⁵ But a person who claims American citizenship has less extensive remedies to test his constitutional rights.²⁸⁶

The Act of 1952 deprives many American citizens, native-born as well as naturalized, of the right to obtain judicial protection against improper or erroneous rejections of their citizenship claims. Limitations on the opportunity of claimants, whether within or without the United States, to prove their rights, render the rights of citizenship hollow indeed.²⁸⁷ Thus the present law affords seriously curtailed safeguards to what the Supreme Court once said is regarded by many "as the highest hope of civilized men,"²⁸⁸ United States citizenship. The claim to American citizenship, said Dean Van Vleck:

[I]s too important to be left to the routine of administrative action for conclusive and final action without the protection of judicial review of the justice of the decision on the evidence in the record.²⁸⁹

The need for a change of the law in this field has been widely recognized. "No American citizen should be deprived of his day in Court to support his claim against unjustified challenge," said the President's Commission on Immigration and Naturalization.²⁹⁰ It recommended that "there should be opportunity for a full Court review on issues of United States citizenship, even where the citizenship claim is made by a person seeking entry to the United States."²⁹¹ That some claimants have abused

284. See Hearings Before the Subcommittee of the House Committee on Appropriations, Department of State Appropriations of 1958, 85th Cong., 1st Sess. 365-73 (1957). (The Department predicted that the ratio of victories would rise for the aliens.)

285. See note 226 *supra*.

286. See Sutherland, *The Supreme Court*, 1956 Term, 71 Harv. L. Rev. 85, 188 (1957).

287. Cf. Note, 103 U. Pa. L. Rev. 559, 561 (1955).

288. *Schneiderman v. United States*, 320 U.S. 118, 120 (1943).

289. Van Vleck, *op. cit. supra* note 95, at 248.

290. Pres. Com. Rep. at 253.

291. *Ibid.*

privileges under the Nationality Act of 1940, said the Commission, "does not warrant a blanket deprivation of protection to an American citizen who happens to be outside the United States."

The American Bar Association adopted a resolution to substantially the same effect:

BE IT RESOLVED, that it is the opinion of the American Bar Association that any person whether within or without the United States who claims to be a national shall be entitled to a judicial determination of his claim, and where a court finds that the action is instituted in good faith and has a substantial basis, he shall be entitled to a certificate of identity, to enable him to appear in person in such proceedings, and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.²⁹²

The House Subcommittee responsible for immigration matters favorably reported a bill which would deal even more harshly with claims of American citizenship, through abolishing the provisions in the Act of 1952 and substituting an even more limited form of review.^{292a} Both the President's Commission and the American Bar Association would restore the law, more or less, as it was under the Nationality Act of 1940.²⁹³ Rights so basic as citizenship deserve no less a standard of protection than full judicial review of all administrative determinations.

IV. CONCLUSION

Seven procedural or administrative areas of our present immigration and nationality laws have been analyzed and considered in the light of the following criterion:

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness. . . .²⁹⁴

The recommendations herein made for reform through remedial legislation, or otherwise, will, it is believed, meet the test of the above-stated criterion and advance and enhance our national welfare and security.

292. See note 57 *supra*. The American Bar Association's view is adopted in substance in H.R. 3364, 85th Cong., 1st Sess. § 455 (1957).

292a. H.R. 13,311, 85th Cong., 2d Sess. (1958). See notes 239a, 239b *supra*, and accompanying text.

293. This is also recommended in *Developments in Law—Immigration and Nationality*, 66 Harv. L. Rev. 643, 745 (1953). Grant of certificates of identity to all claimants out of the United States is urged in *Note, Establishing Citizenship: Remedy Available to Persons Outside the United States*, 7 Stan. L. Rev. 360, 377 (1955). But cf. *Zimmerman, Judicial Versus Administrative Determination of Controverted Claims to United States Citizenship*, 43 Geo. L.J. 19 (1954) (recommends administrative determinations).

294. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion).