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ALIENS - DEPORTATION - STATUTORY CONSTRUCTION

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ALIENS — DEPORTATION — STATUTORY CONSTRUCTION — The petitioner was held for deportation under a statute [1] requiring deportation of any alien who at any time after entering the United States is found to have been at the time of entry or to have become thereafter a member of any one of previously enumerated classes of aliens who may be excluded. The circuit court of appeals in denying deportation based its decision on the fact that the evidence was insufficient, since it was not proven that the Communist Party was an organization that believes in or advocates the overthrow by force or violence of the government of the United States.[2] *Held*, the statute does not require deportation of an alien who after entry has become a member of such organization, but who prior to arrest has ceased to be a member. *Kessler v. Strecker*, (U. S. 1939) 59 S. Ct. 694.

It is well settled by the decisions of the Supreme Court of the United States that an alien resident in the United States may be deported for any reason which Congress has determined will make his residence here inimical to the best interests of the government.[3] The numerous provisions for the deportation of the various classifications of aliens are generally considered civil proceedings, administrative in their nature, and in no wise criminal trials, necessitating strict construction of statutes in favor of the accused.[4] Nevertheless, the decisions of the executive officers must fall within the clear intent and meaning of the statutes.[5] To determine this, the language of congressional enactments must be construed in a manner consistent with the common and ordinary meaning usually placed upon the words and phrases contained therein.[6] In the instant case, the construction of the statute adopted by the Court seems strained and unwarranted.[7] The statute provides in clear and concise language that "Any alien who, at any time after entering the United States, is found to have been *at the time of entry*, or *to have become thereafter*, a member of any one of the classes of aliens enumerated in this section shall . . . be taken into custody and

[1] 40 Stat. L. 1012 (1918), as amended by 41 Stat. L. 1008 (1920); 8 U. S. C. (1934), § 137.

[2] Strecker v. Kessler, (C. C. A. 5th, 1938) 95 F. (2d) 976, commented on in 48 YALE L. J. 111 (1938); 52 HARV. L. REV. 157 (1938); 87 UNIV. PA. L. REV. 226 (1938).

[3] Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016 (1893), stating that the right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions in war or peace, is an inherent and inalienable right of every sovereign and independent nation. See also, Skeffington v. Katzeff, (C. C. A. 1st, 1922) 277 F. 129.

[4] United States ex rel. Boric v. Marshall, (D. C. Pa. 1933) 4 F. Supp. 965; Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016 (1893); Mahler v. Eby, 264 U. S. 32, 44 S. Ct. 283 (1924); Bugajewitz v. Adams, 228 U. S. 585, 33 S. Ct. 607 (1913); Skeffington v. Katzeff, (C. C. A. 1st, 1922) 277 F. 129.

[5] To successfully attack a deportation order in a judicial proceeding, it must be shown that essentially a fair hearing was denied, or that findings made are without substantial support in evidence, or that the law does not authorize deportation on the facts found. Nicoli v. Briggs, (C. C. A. 10th, 1936) 83 F. (2d) 375.

[6] Radin, "Realism in Statutory Interpretation and Elsewhere," 23 CAL. L. REV. 156 (1934); 20 MINN. L. REV. 56 (1935).

[7] Justices McReynolds and Butler dissenting, 59 S. Ct. at 701.

deported. . . ."[8] The statute sets forth in unambiguous terms two classes of persons subject to deportation: those found to be members of the Communist Party *at the time of entry*, and those found *to have become members thereafter*. It would be rather inconsistent to maintain that Congress intended to distinguish between the alien who at the time of entry was a member of the Communist Party, but later resigned, and the alien who after entry became a member of the organization, but at the time of suit adduced proof of his disaffiliation.[9] In either case, the potentialities Congress sought to curb are present and to treat the two differently is to defeat the very purpose and intendment Congress had in mind. To attach artificial meaning to unambiguous legislation in order to reach what is perhaps a socially desirable result is to substitute judicial legislation for statutory enactment. The same result might have been achieved in the instant case by adopting the theory of the circuit court, namely that the purpose of the Communist Party is no longer the violent overthrow of the government by force;[10] thus, avoiding a tortured and unwarranted statutory construction.

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[8] 8 U. S. C. (1934), § 137 (g) (italics added).

[9] The Court of Appeals of the Second Circuit construed the provisions of the statute determinative of the case at bar in United States ex rel. Yokinen v. Commissioner of Immigration, (C. C. A. 2d, 1932) 57 F. (2d) 707, where it said: "It is true that he was not a member of the Communist Party when arrested. He had recently been expelled because of his attitude toward negroes, but that did not remove him from the reach of the statute. We have nothing to do with shaping the policy of the law towards aliens who come here and join a proscribed society. Congress has provided that 'any alien who, at any time after entering the United States, is found to have been at the time of entry, or to have become thereafter, a member of any one of the classes of aliens enumerated in this section' shall be deported [8 U. S. C. (1934), § 137 (g)]. This alien concededly did become after entry a member of 'one of the classes . . . enumerated' and from that time became deportable. We are urged to ameliorate the supposed harshness of the statute by reading into it words that Congress saw fit to leave out and interpret it to apply not to aliens who become members, but only to those who become and continue to the time of their arrest to be members, of one of the enumerated classes. If the words used in the statute were equivocal or the intention of Congress for any reason uncertain, there might be room for such a construction as that for which the appellant now contends. Perhaps the sufficient answer is that had Congress intended membership at the time of arrest to be the criteria it would have said so. It has the power to determine what acts of an alien shall terminate his right to remain here. . . . What it did do was to make the act of becoming a member a deportable offense without regard to continuance of membership and it did that in language so plain that any attempt to read in any other meaning is no less than an attempt to circumvent the law itself."

[10] Strecker v. Kessler, (C. C. A. 5th, 1938) 95 F. (2d) 976. Deportation warrant was issued in this case solely on the finding that the petitioner was a member of the Communist Party. The court based its decision mainly on the ground that the evidence was not sufficient to support the warrant since it was not proven that the organization in question, the Communist Party, was one that believes in or advocates the overthrow of the government by force or violence. Prior decisions to the contrary notwithstanding, the court felt these were no longer the immediate aims of the Communist Party in America. See 48 YALE L. J. 111 (1938); 52 HARV. L. REV. 157 (1938); 87 UNIV. PA. L. REV. 226 (1938); but see 84 UNIV. PA. L. REV. 1020 (1936).