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Immigration and Naturalization-Suspension of Deportation- A Look at a Benevolent Aspect of the McCarran-Walter Act

Kenneth W. Graham Jr., S.Ed.
University of Michigan Law School

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COMMENTS

IMMIGRATION AND NATURALIZATION—SUSPENSION OF DEPORTATION—A LOOK AT A BENEVOLENT ASPECT OF THE McCARRAN-WALTER ACT—The Immigration and Nationality Act of 1952 is a reputedly harsh statute—"a bacchanalia of meanness" in the words of one scholar.¹ It has been vetoed by a President, attacked on numerous occasions in the courts, and been the subject of criticism in law reviews² and the halls of Congress. Yet it remains the basic law governing aliens in this country.

This comment proposes to look, for a change, at one of the ameliorative portions of the act, the provisions which allow suspension of deportation for certain deserving aliens.³ This section of the statute is not only unusual in its solicitude for the foreign-born and their families but is also effectuated by a peculiar interaction of the legislative, executive and judicial branches of government. Before considering the substantive law governing suspension of deportation, it is appropriate to look at the procedural aspects involved in applying the raw statutory language.⁴

I. THE SUSPENSION PROCEDURES

When the question of suspension arises, the alien is normally in the charge of the Immigration and Naturalization Service, an institution which is somewhat hard to characterize. Nominally subordinate to the Attorney General, it actually maintains a certain amount of independence as a result of its willingness to cooperate with those members of congressional committees, and their staffs, who exercise substantial authority over immigration matters.⁵ It is an administrative agency in the sense that it has sometimes been held subject to provisions of the Administrative Procedure Act, but unlike most agencies it has the power to

¹ *Hearings Before the President's Commission on Immigration and Naturalization*, 82d Cong., 2d Sess. 1575 (Comm. Print 1952); REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME 212 (1953) (hereinafter cited as WHOM WE SHALL WELCOME).

² See, e.g., Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309 (1956); Note, 66 HARV. L. REV. 643 (1953).

³ Immigration and Nationality Act of 1952 (McCarran-Walter Act), § 244, 66 Stat. 214, 8 U.S.C. § 1254 (1958).

⁴ See generally Note, 12 SYRACUSE L. REV. 184 (1960); Note, 42 VA. L. REV. 803 (1956); Note, 62 YALE L.J. 1000 (1953).

⁵ *Report on the Administration of the Immigration and Nationality Act*, H.R. REP. No. 1570, 84th Cong., 1st Sess. 2 (1955) (hereinafter cited as STAFF REPORT). See also Maslow, *supra* note 2, at 343 n.261.

arrest and deport aliens without recourse to a court to enforce its orders.⁶

But regardless of how it is characterized, it is the Service which conducts a hearing at which the alien is charged with being deportable on one or more of the over 700 grounds for deportation. If he wishes to apply for suspension, the alien must do so during the hearing and pay a twenty-five dollar fee.⁷ The hearing officer then treats the suspension question as part of the deportation hearing, and evidence is taken on both issues.⁸ On the question of eligibility for suspension, however, the burden of proof is on the alien.⁹ The initial decision is made by the hearing officer on the basis of evidence presented by both sides at the hearing, but in some cases he may rely on confidential information presented by the Service which is not revealed to the alien.¹⁰

If suspension is denied, the alien may appeal to the Board of Immigration Appeals.¹¹ This is a quasi-judicial body which exists by the grace of the Attorney General and without statutory authorization.¹² Although the Attorney General may review and reverse decisions of the Board, he rarely does either.¹³ Thus despite the tenuous basis for its existence, a certain amount of de facto independence is maintained by the Board.

An appeal to the Board involves hazards which are not common to most other administrative tribunals. The prior decisions of the Board are published selectively¹⁴ and, except for rare dissenting opinions, anonymously.¹⁵ Sometimes the Board relies on prior unpublished opinions in reaching a decision,¹⁶ but apparently counsel specializing in practice before the Board are familiar

⁶ See Maslow, *supra* note 2, at 310. See generally GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.4 (1959).

⁷ 8 C.F.R. § 242.17(a) (Supp. 1962).

⁸ 8 C.F.R. § 244.1 (Supp. 1962).

⁹ 8 C.F.R. § 242.17(d) (Supp. 1962).

¹⁰ 8 C.F.R. § 242.17(a) (Supp. 1962).

¹¹ 8 C.F.R. § 242.21 (Supp. 1962).

¹² GORDON & ROSENFELD, *op. cit. supra* note 6, § 1.10b.

¹³ Of 600 published opinions covering the period 1947-1954, review was found in only thirty-five cases. Maslow, *supra* note 2, at 358 n.353.

¹⁴ The decisions selected are issued first as "interim decisions" and later further culled for publication in a series entitled ADMINISTRATIVE DECISIONS UNDER IMMIGRATION AND NATIONALITY LAWS OF THE UNITED STATES (hereinafter cited as I. & N. Dec.), now in eight volumes covering the period 1940-1960. Interim decisions not as yet bound in I. & N. Dec. will be hereinafter cited as I. D. No.

¹⁵ See, *e.g.*, Matter of J., 2 I. & N. Dec. 876 (1947).

¹⁶ The Board does cite as precedents its own unreported opinions [Matter of A., I.D. No. 1145 (1961); Matter of L., 4 I. & N. Dec. 1 (1950)] as well as unreported court cases. Matter of H., 7 I. & N. Dec. 249 (1956).

with the use of these opinions and on occasion will themselves cite unpublished opinions to the Board.¹⁷

If suspension is denied by the Board, the alien has three possible remedies. The first, reversal by the Attorney General, is quite unlikely.¹⁸ The second, a private immigration bill in Congress, is more common but subject to all the vagaries of the political process. Also, this method results in but slight impact, beyond the immediate case, on the substantive law governing suspension. The third remedy, judicial review, is of most immediate concern.

At one time the alien had a variety of procedural devices by which he could challenge an order of deportation: habeas corpus, declaratory judgment¹⁹ or review under the Administrative Procedure Act.²⁰ At the very end of the 1961 session of Congress a bill was passed, over the opposition of the A.B.A. and every other group which was represented at hearings on the measure,²¹ which restricted judicial review.²² As a result of this legislation the alien not in custody has a single remedy to be known as the petition for review. Venue for these petitions is in the courts of appeals. The reason given for removing jurisdiction from the more numerous, less expensive district courts was that multiple appeals had been used by communists and criminals to delay deportation.²³

The remedy for this abuse seems drastic in light of the extent of the misuse of review. Only one percent of the formal proceedings of the Immigration Service ever get into court in the first place.²⁴ Commissioner of Immigration Swing found only thirty-seven cases of multiple appeals, concededly not all *mala fide*, out of over 200,000 handled by the Service in recent years.²⁵ The principal vehicle of repetitious appeals—habeas corpus—was left untouched by the act.

But whether the grant of suspension is made at the initial hear-

¹⁷ See *Matter of C.*, 7 I. & N. Dec. 608 (1957).

¹⁸ See note 13 *supra*.

¹⁹ See *Rubinstein v. Brownell*, 206 F.2d 449 (D.C. Cir. 1953), *aff'd by an equally divided court*, 346 U.S. 929 (1954).

²⁰ See *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

²¹ See 11 AD. L. BULL. 297, 309 (1959); 13 AD. L. REV. 256 (1961). See also 107 CONG. REC. 12174 (1961).

²² 75 Stat. 651 (1961), 8 U.S.C. § 1105(a) (Supp. 1962). For the fascinating story of how this was accomplished, see 107 CONG. REC. 19650, 19654 (1961) (remarks of Senator Javits), casting light also on the whole process of enacting alien legislation.

²³ See H.R. REP. NO. 565, 87th Cong., 1st Sess. 28 (1961). See, e.g., *Jimenez v. Barber*, 252 F.2d 550 (9th Cir. 1958).

²⁴ See H.R. REP. NO. 565, *supra* note 23, at 29.

²⁵ *Ibid.*

ing or as a result of judicial review, the final step is always approval by Congress.²⁶ In the case of aliens deportable for minor misconduct or improprieties in entering the country, suspension is automatically approved, unless a joint resolution disapproving the suspension is passed.²⁷ In all other cases affirmative congressional action is required.²⁸ In practice Congress plays a minor role in these decisions which are made for the most part by the immigration subcommittees or their staff members.²⁹

II. ELIGIBILITY FOR SUSPENSION

In examining both its procedural and substantive aspects it is important to keep in mind that suspension of deportation is not a matter of right but lies in the discretion of the Attorney General and those to whom his authority is delegated. The alien must not only show that he meets the statutory requirements for suspension but must also demonstrate some reasons why the discretion granted should be exercised in his behalf.

The statutory prerequisites are contained in section 244(a) of the act.³⁰ This section is not merely complex; it is also a good example of poor draftsmanship,³¹ standing out even in a statute which is not otherwise noted for lucidity.³² The reader of section 244(a) is required to refer to other sections of the act as well as to portions of the repealed act of 1917. In addition he is not warned that several words are subject to restrictive definitions set out elsewhere in the act.

The statute attempts to subject deportable aliens to two sorts of requirements. The first of these is a classification scheme that breaks down all *eligible* aliens into five classes, coincident with the five paragraphs of section 244(a). The five classes do not include all *deportable* aliens;³³ if the alien cannot bring himself within

²⁶ GORDON & ROSENFELD, *op. cit. supra* note 6, § 7.9f.

²⁷ Under the original suspension statute this veto power applied to all suspensions. 54 Stat. 672 (1940).

²⁸ The 1948 amendments required affirmative action for all suspensions. 62 Stat. 1206 (1948), repealed by 66 Stat. 279 (1952) but re-enacted by Immigration and Nationality Act of 1952, § 244(b), 66 Stat. 216, 8 U.S.C. § 1254(b) (1958).

²⁹ See Maslow, *supra* note 2, at 343.

³⁰ 66 Stat. 214 (1952), 8 U.S.C. § 1254(a) (1958).

³¹ See GORDON & ROSENFELD, *op. cit. supra* note 6, § 7.9a(3) ("... a pattern for relief that is complex and sometimes almost incomprehensible"); WHOM WE SHALL WELCOME 212 ("... an involved statutory scheme ... even the technical experts have difficulty ... understanding").

³² See 98 CONG. REC. 5607 (1952) (remarks of Senator Humphrey) ("a legislative maze trap"); WHOM WE SHALL WELCOME 18 ("inferior draftsmanship").

³³ Such as: (1) aliens expelled in exclusion proceedings, (2) aliens who entered prior

one of the five classes he is ineligible for suspension even though he may be able to meet the general standards.³⁴

The general standards (*e.g.*, hardship, good moral character) are applicable to all five statutory classes, with some variance between the classes as to the period of time over which the alien must meet the standards.

A. *The Statutory Classes*

There are five statutory classes based on a combination of three factors: date of entry, date of application for suspension, and the grounds upon which the alien is deportable.

Class I. This class includes all aliens who last entered the United States before June 26, 1950, and who are deportable for reasons other than criminal or subversive activities. This group encompasses most long-time resident aliens except those least deserving of suspension. For these individuals application for suspension must have been made before December 24, 1957, and they must have been otherwise eligible for suspension on that date.³⁵ As a result suspension is no longer available for aliens who entered before June 26, 1950, unless they are criminals or subversives.³⁶

It becomes crucial then for the long-time resident alien to determine the meaning of "entry." The definition had been much litigated³⁷ prior to the Immigration and Nationality Act of 1952, which now defines entry as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession," with certain exceptions for aliens whose departure was involuntary.³⁸ The Supreme Court has described this as a codification of prior case law.³⁹

Class II. The second class consists of aliens who last entered

to 1950, who are not deportable for major post-entry misconduct and who did not apply before December 24, 1957, (3) aliens who last entered before 1950 and were excludable at that time as criminals or subversives, and (4) natives of contiguous countries or adjacent islands who are eligible for a non-quota immigrant visa. See GORDON & ROSENFELD, *op. cit. supra* note 6, § 7.9c.

³⁴ Matter of O., 7 I. & N. Dec. 457 (1957); Matter of M., 5 I. & N. Dec. 598 (1954).

³⁵ See Matter of G. L. T., 8 I. & N. Dec. 403 (1959).

³⁶ See text *infra* at page 369.

³⁷ See cases cited in *Bonetti v. Rogers*, 356 U.S. 691 (1958).

³⁸ Section 101(a)(13), 66 Stat. 167 (1952), 8 U.S.C. § 1101(a)(13) (1958).

³⁹ *Barber v. Gonzales*, 347 U.S. 637, 642 (1954) (dictum), citing: *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), where a sailor on intercoastal vessel was taken to Cuba when the ship was torpedoed; *held*, no entry when he returns to U.S.; *Di Pasquale v. Karnuth*, 158 F.2d 878 (2d Cir. 1947), where alien was asleep on Buffalo-Detroit train which passed through part of Canada; *held*, no entry. See also Annot., 57 A.L.R. 1131 (1928).

the United States after June 26, 1950, and are deportable "solely for an act committed or status existing prior to or at the time of" his last entry. The aliens in this category are mainly those who were excludable under the immigration laws at the time of their last entry but whose entry was regular in form. The alien must have had all requisite entry documents at the time of his last entry. The Board has interpreted this last requirement so that if the alien was not entitled to the documents, having procured them by fraud, he is ineligible.⁴⁰

Class III. Aliens who are deportable because of minor criminal acts after their last entry and who last entered after June 26, 1950, with all requisite documents comprise the third class of suspension eligibles.

Class IV. Aliens who were excludable at their last entry as criminals or subversives or who entered without proper inspection or documents fall into this category. An alien who enters under a false claim of citizenship is included in this group.⁴¹ These offenders are viewed as more serious immigration violators than those contained in Class II and are therefore required to show good moral character for ten years instead of five.

Class V. This final category is the only one available for aliens who last entered the United States prior to June 26, 1950. In order to bring himself within it, the alien must show that he is deportable for serious criminal acts such as dope addiction, prostitution, draft-dodging or monopolizing; or that he has committed a serious immigration violation, such as failing to register or remaining longer than the period for which originally admitted;⁴² or show that the Attorney General has found him to be an undesirable resident.⁴³

B. *The General Requirements*

Once the alien has shown that he qualifies in one of the four statutory classes to which suspension is actually presently available, he must then meet certain requirements common to all classes. The only variance as to such requisites between the classes is that those in Classes IV and V must meet the applicable standard for ten years while five years suffices for Classes II and III.

⁴⁰ Matter of L., 7 I. & N. Dec. 434 (1957); cf. Matter of H., 5 I. & N. Dec. 416 (1953) [test under § 244(a)(1)].

⁴¹ Matter of M., 5 I. & N. Dec. 642 (1954).

⁴² See Chan Wing Cheung v. Hagerty, 271 F.2d 903 (1st Cir. 1959).

⁴³ This group includes aliens deportable under the 1952 act or any of its statutory predecessors. Matter of D., 6 I. & N. Dec. 285 (1954).

1. *Continuous Physical Presence.* To be eligible for suspension, applicants must have been physically present within the United States for a period of five or ten years. At the time the act was passed it was felt that even a few minutes in Canada or Mexico would disqualify the alien.⁴⁴ Some decisions of the Board have reflected this thinking.⁴⁵

Exceptions, however, have been carved out by later decisions. The Board held that an alien serving abroad with the Army was physically present in the United States.⁴⁶ The decision was based on the Board's feeling the Congress could not have intended to penalize an inducted alien. Where the alien left the country for several months as a result of false representations made by the Immigration Service, the Court of Appeals for the Third Circuit held he was nonetheless eligible for suspension.⁴⁷

2. *Hardship.* The Act of 1940 provided that "serious economic detriment" to the deportee's family must be found before suspension could be granted.⁴⁸ The McCarran-Walter Act changed this test to one of "exceptional and extremely unusual hardship" to the alien or his family. The response to this language is typified by a remark of Professor Louis L. Jaffe—"rarely has there been a balder statement of a national purpose to be cruel."⁴⁹

The reasoning of the drafters was that under the old language the officials charged with administering the act had not been severe enough.⁵⁰ As a result, it was alleged, aliens were encouraged to enter illegally with the hope of eluding the Immigration Service until such time as they would become eligible for suspension.⁵¹ This practice was said to be especially prevalent in the case of aliens from countries with oversubscribed immigration quotas. Since suspensions are charged off against the quota of the aliens' homeland, the drafters felt that the resulting reduction in quota was unfair to those waiting on the quota list.

⁴⁴ N.Y.U. CONFERENCE ON PRACTICE AND PROCEDURE UNDER THE IMMIGRATION AND NATIONALITY ACT 71-72 (1954); *cf.* Note, 66 HARV. L. REV. 643 (1953), where the writer states at 690: "Although it is hard to believe that Congress meant to disqualify those who make weekend trips to Canada or Mexico, courts will find it difficult to interpret the statute otherwise."

⁴⁵ *E.g.*, Matter of C., 8 I. & N. Dec. 549 (1960).

⁴⁶ Matter of J. M. D., 7 I. & N. Dec. 105 (1956).

⁴⁷ McCleod v. Peterson, 283 F.2d 180 (3d Cir. 1960).

⁴⁸ See generally GORDON & ROSENFELD, *op. cit. supra* note 6, § 7.9d(6).

⁴⁹ *Hearings Before the President's Commission on Immigration and Naturalization*, 82d Cong., 2d Sess. 1576 (Comm. Print 1952), quoted in *WHOM WE SHALL WELCOME* 212.

⁵⁰ S. REP. No. 1137, 82d Cong., 2d Sess. 25 (1952). See also Matter of M., 5 I. & N. Dec. 261 (1953).

⁵¹ See S. REP. No. 1515, 81st Cong., 2d Sess. 600 (1950).

The sponsors of the bill apparently overlooked the possibility of eliminating unfairness to those on the waiting list by merely dropping the charge-off provision for suspensions. If this were unacceptable, it would still be possible to deter future abuse by making the more stringent hardship test applicable only to those aliens deportable for illegal entry. The statute as drafted applies to all suspension applicants.

As expected by the drafters, the Board adopted a stricter view once the new language became effective.⁵² An early opinion⁵³ listed the factors to be considered in reaching a decision as to hardship as:

- (a) Length of residence in the United States;
- (b) Family ties;
- (c) The possibility of obtaining a visa abroad;
- (d) The financial burden on the alien of having to go abroad to obtain a visa;
- (e) The health and age of the alien.

None of these has been considered as conclusive in subsequent decisions, and the impact of each is difficult to appraise, for the Board is likely to discuss those which support its decision and not mention the others.

It is possible, however, to discern some rough benchmarks in the decisions. The alien with several decades of residence in this country has a good chance of making out a claim of hardship.⁵⁴ The existence and nature of any family ties which the alien has within the United States are somewhat less important than other factors.⁵⁵ Moreover, if the alien has left his wife and children abroad his chances of showing hardship are slim.⁵⁶ The Board

⁵² Ironically, one of the reasons given by the drafters in 1955 for a suggested change of language to substitute the words "extreme hardship" for the current verbiage was that the Board had not been sufficiently "liberal" in its decisions to prevent hardship to many aliens. STAFF REPORT 35, 47.

⁵³ Matter of S., 5 I. & N. Dec. 409 (1953).

⁵⁴ Suspension granted: Matter of M., 7 I. & N. Dec. 147 (1956) (24 years); Matter of Z., 5 I. & N. Dec. 419 (1953) (29 years); Matter of S., 5 I. & N. Dec. 409 (1953) (28 years); Matter of H., 5 I. & N. Dec. 416 (1953) (25 years); Matter of U., 5 I. & N. Dec. 413 (1953) (16 years). Suspension denied: Kam Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960) (17 years); Asikese v. Brownell, 230 F.2d 34 (D.C. Cir. 1956) (14 years); Matter of C., 7 I. & N. Dec. 608 (1957) (8½ years); Matter of V., 7 I. & N. Dec. 348 (1956) (9 years); Matter of S., 5 I. & N. Dec. 695 (1954) (8 years).

⁵⁵ Suspension granted: Matter of P., 5 I. & N. Dec. 421 (1953) (wife and children in U.S.); Matter of H., 5 I. & N. Dec. 416 (1953) (no family); Matter of U., 5 I. & N. Dec. 413 (1953) (wife, three children and mother-in-law); Matter of S., 5 I. & N. Dec. 409 (1953) (no family); Matter of B., 2 I. & N. Dec. 627 (1946) (wife and children). *But see* Kam Ng v. Pilliod, *supra* note 54 (no family, suspension denied).

⁵⁶ Suspension denied: Matter of C., 7 I. & N. Dec. 608 (1957) (wife and children in

previously placed a great deal of emphasis on whether or not the alien's national quota was oversubscribed so as to make it difficult to obtain a visa if he were allowed to depart voluntarily.⁵⁷ This factor may be de-emphasized following recent court decisions suggesting that the Board's use of this factor was an unpermissible attempt to graft a new requirement onto the statute.⁵⁸ The financial burden criterion is difficult to evaluate, as is the age and health test.⁵⁹ However, it can be said that the alien over fifty years old is better able to show hardship.⁶⁰

3. *Good Moral Character*. Prima facie it seems quite reasonable to require that the applicant for suspension show some evidence of good moral character. But, however praiseworthy the objective, its application has proved to be difficult and results are far from uniform. Prior to the 1952 act many felt that the Board and some courts had tended to err on the side of leniency.⁶¹

The McCarran-Walter Act sought to make the standard more stringent, and to increase uniformity, in two ways. First, the statute now requires the use of the same standards in determining eligibility for suspension as in ascertaining eligibility for naturalization.⁶² The intent of the drafters appears to have been to preserve the large body of case law which had been formed by construction of the "good moral character" requirement under the naturalization laws.⁶³ But Congress did not approve of all prior decisions, and, therefore, in order to offset these holdings the statute also provides that certain specified acts will bar any showing of good moral character.⁶⁴

Hong Kong); Matter of V., 7 I. & N. Dec. 348 (1956) (same in Italy); Matter of S., 5 I. & N. Dec. 695 (1954) (wife in Greece). *But see* Matter of Z., 5 I. & N. Dec. 419 (1953) (wife and children in Syria, suspension granted).

⁵⁷ Suspension granted: Matter of Z., 5 I. & N. Dec. 419 (1953) (quota oversubscribed); Matter of H., 5 I. & N. Dec. 416 (1953) (ineligible); Matter of S., 5 I. & N. Dec. 409 (1953) (quota oversubscribed); Matter of U., 5 I. & N. Dec. 413 (1953) (eligible but other equities). Suspension denied: Matter of S., 5 I. & N. Dec. 695 (1954) (quota oversubscribed); Matter of M., 3 I. & N. Dec. 490 (1949) (eligible).

⁵⁸ *McCleod v. Peterson*, 283 F.2d 180 (3d Cir. 1960); *Acosta v. Landon*, 125 F. Supp. 434 (S.D. Cal. 1954).

⁵⁹ See *Asikese v. Brownell*, 230 F.2d 34 (D.C. Cir. 1956) (alien will lose business if deported, suspension denied); Matter of Z., 5 I. & N. Dec. 419 (1953) (same, suspension granted).

⁶⁰ See Matter of M., 7 I. & N. Dec. 147 (1956) (66, suspension granted); Matter of S., 5 I. & N. Dec. 409 (1953) (48, suspension granted); Matter of P., 5 I. & N. Dec. 421 (1953) (49, suspension denied).

⁶¹ See, e.g., Matter of C., 3 I. & N. Dec. 833 (1950).

⁶² The Board, while it used the naturalization case precedents, did not feel bound by them. See Matter of O., 2 I. & N. Dec. 840 (1947).

⁶³ See *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956).

⁶⁴ Section 101(f), 66 Stat. 172 (1952), 8 U.S.C. § 1101(f) (1958). The purpose was

(a) Habitual Drunkards. There has been little litigation on this point. It is not known whether this was intended to bar aliens who could show that their condition was due to disease rather than moral delinquency, but the decisions of the Board suggest that the cause of the drunkenness is immaterial.⁶⁵

(b) Adultery. The question of what types of sexual behavior are compatible with "good moral character" has plagued the courts for years under the naturalization statutes.⁶⁶ Results were highly divergent, with some courts reacting instinctively against finding any sort of extramarital sexual escapades to be consistent with good morals,⁶⁷ and others (notably the Court of Appeals for the Second Circuit) striving to effect some sort of compromise between the findings of Dr. Kinsey and the traditional mores.⁶⁸ This quandary was also reflected in decisions of the Board.⁶⁹

Making "adultery" a bar has not clarified matters, for nowhere in the statute is the term defined. Perhaps Congress intended to reach all forms of sexual misbehavior, but there are no clues in the legislative history.⁷⁰ Some cases have used a lay or Biblical meaning and held that only married aliens fall under the bar.⁷¹ Other courts, taking note of the expressed congressional desire for uniformity, have applied the common-law definition.⁷²

The Board of Immigration Appeals has been less concerned with uniformity, taking the position that the correct definition of adultery is to be found in the law of the state where the alleged act took place.⁷³ It became necessary to be more specific as to the applicable law since many states have one definition in their criminal code and an entirely different concept in their divorce law. The Board, reasoning that deportation was a civil proceeding, held that the civil definition applied.⁷⁴

Only one point seems clearly resolved: "technical adultery"

to obtain some uniformity in decisions. S. REP. No. 1137, 82d Cong., 2d Sess. 6 (1952). See also Note, 66 HARV. L. REV. 643, 712 (1953).

⁶⁵ E.g., Matter of H., 6 I. & N. Dec. 614 (1955).

⁶⁶ See LOWENSTEIN, THE ALIEN AND THE IMMIGRATION LAW 263-64 (1958).

⁶⁷ See, e.g., Petition of Dobric, 189 F. Supp. 638 (D. Minn. 1960); Calo v. United States, 400 Ill. 329, 79 N.E.2d 619 (1948).

⁶⁸ See Matter of W. Y. S., 6 I. & N. Dec. 801 (1955).

⁶⁹ E.g., Matter of O., 2 I. & N. Dec. 840 (1947).

⁷⁰ See note 22 *supra*.

⁷¹ See Evans v. Murff, 135 F. Supp. 907 (D. Md. 1955); Matter of N., 7 I. & N. Dec. 96 (1956).

⁷² See, e.g., United States *ex rel.* Zacharias v. Shaughnessy, 221 F.2d 578 (2d Cir. 1955).

⁷³ See Matter of R. L., 7 I. & N. Dec. 175 (1956).

⁷⁴ See Matter of P., 7 I. & N. Dec. 376 (1956); Matter of M., 7 I. & N. Dec. 156 (1956).

is no bar.⁷⁵ This term originally applied to the situation where a man and woman cohabit under color of a marriage that is legally imperfect. It has, however, also been applied to cases where the parties, thinking both are single, carry on an affair which turns out to be adulterous because one or both are still married. At first the Board held that this extension was permissible only where the alien was single, reasoning that everyone was bound to know his own marital status,⁷⁶ but this position has now been abandoned.⁷⁷

(c) Criminal Acts. Aliens who are convicted of or who admit the commission of crimes involving moral turpitude or violations of the narcotics laws during the specified period cannot be found to be of good moral character. Those aliens convicted of polygamy, prostitution or smuggling other aliens into the country are also barred. A later amendment to the act made certain exceptions for those convicted of "petty crimes."⁷⁸ Furthermore, a pardon or expungement under state statute removes the bar.⁷⁹

It makes no difference that the statute which the alien is convicted of violating is not generally enforced or that the alien admits violating a statute that is not enforced at all.⁸⁰ He still may be found not to be of good moral character. There may be one exception: in cases involving sexual misconduct which does not fall within its definition of "adultery," the Board has in no case gone on to consider whether the alien is in violation of local criminal law and hence barred under this section. It is not clear whether this is oversight or an application of the doctrine of desuetude.

(d) Gambling Income. An alien whose income is derived principally from illegal gambling activities cannot be found to be of good moral character. In a recent interpretation the Board held that "derived principally" referred to the period during which the

⁷⁵ See *In re Schlau*, 136 F.2d 480 (2d Cir. 1943); *In re Mayall*, 154 F. Supp. 556 (E.D. Pa. 1957); *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956).

⁷⁶ See *Matter of N.*, 7 I. & N. Dec. 96 (1956).

⁷⁷ See *Matter of U.*, 7 I. & N. Dec. 380 (1956); *Matter of M. A.*, 7 I. & N. Dec. 365 (1956).

⁷⁸ 66 Stat. 182 (1952), 8 U.S.C. § 1182(a) (1958), as amended, 8 U.S.C. § 1182(a)(9) (Supp. III, 1962). See *Matter of M.*, 7 I. & N. Dec. 147 (1956) (possession of slugs).

⁷⁹ See *Matter of H.*, 7 I. & N. Dec. 249 (1956); *Matter of H.*, 6 I. & N. Dec. 619 (1955).

⁸⁰ *Petition of Orphanidis*, 178 F. Supp. 872 (N.D.W. Va. 1959) (liquor laws); *United States v. Gerstein*, 284 Ill. 174, 119 N.E. 922 (1918) (Sunday closing law); *Matter of S. K. C.*, 8 I. & N. Dec. 185 (1958) (gambling laws). *But see In re Hopp*, 179 Fed. 561 (E.D. Wis. 1910) [same offense held immoral in Chicago (*United States v. Gerstein, supra*), here held moral in Milwaukee]. See also Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 61 (1961), finding an implicit recognition of the concept of desuetude in the opinion in *Poe v. Ullman*, 367 U.S. 497 (1961).

alien was employed in gambling, and not the entire period for which good character must be shown.⁸¹ Thus an alien who worked for six months as a dealer in a fan-tan house could not average out these earnings over the five-year period. It was enough that his entire income for the six-month period was earned in a gambling establishment.

The Board went on to state that income was derived from gambling within the meaning of the statute if it accrued: (1) from the alien's financial interest in a gambling establishment, (2) through the alien's own gambling activities, or (3) from employment in a gaming establishment in a job which has some proximate relationship to gambling activities.

(e) Conviction of Two or More Gambling Offenses. There has been little litigation under this provision, and it is therefore not known whether it was intended merely as a supplement to the preceding section, so as to make it easier to bar the professional gambler, or whether offenses involving penny ante poker and bingo will also be proscribed.

(f) False Testimony. False testimony given for the purpose of obtaining benefits⁸² under the act will also disqualify an alien, whether or not the deception succeeds.⁸³ At one time the Board went so far as to hold that use of an identification card that did not belong to an alien constituted false testimony.⁸⁴ Now, however, the Board agrees with the courts⁸⁵ that only sworn,⁸⁶ oral statements⁸⁷ are encompassed.

Where the alien retracts, during the course of the testimony, false statements he has just made, the Board holds that there is no bar.⁸⁸ One court, however, relying on the section of the statute relating to one who "is or was" a person who gave false testimony, has reached a different result.⁸⁹

(g) Confinement in a Penal Institution. If the alien has served

⁸¹ Matter of S. K. C., *supra* note 80.

⁸² Benefits include suspension of deportation, *Bufalino v. Holland*, 277 F.2d 270 (3d Cir. 1960); citizenship, *Orlando v. Robinson*, 262 F.2d 850 (7th Cir. 1959); a duplicate certificate, Matter of G. L. T., 8 I. & N. Dec. 403 (1959); visa for a wife, Matter of W. J. W., 7 I. & N. Dec. 706 (1958); and an extension of stay, Matter of Z., 5 I. & N. Dec. 514 (1953).

⁸³ See Matter of L. D. E., 8 I. & N. Dec. 399 (1959); Matter of Z., 5 I. & N. Dec. 514 (1953).

⁸⁴ Matter of O., 7 I. & N. Dec. 486 (1957).

⁸⁵ See *Sharaiha v. Hoy*, 169 F. Supp. 598 (S.D. Cal. 1959).

⁸⁶ See Matter of G., 6 I. & N. Dec. 208 (1954).

⁸⁷ See Matter of L. D. E., 8 I. & N. Dec. 399 (1959).

⁸⁸ See Matter of M., I.D. No. 1113 (1960).

⁸⁹ *Orlando v. Robinson*, 262 F.2d 850 (7th Cir. 1959).

over 180 days as a convict during the period in which he must show good moral character he is barred, regardless of when the crime took place.⁹⁰ This adopts the reasoning of some early naturalization cases that one who is not a free agent does not show his true character,⁹¹ although this thinking had been rejected in other cases.⁹²

The few decisions under this provision have held that a pardon will remove the disabling effect of imprisonment.⁹³ The Board has, on the other hand, decided that the confinement need not be in a prison in this country and that the fact that the prisoner was a citizen at the time makes no difference, where he is subsequently denaturalized.⁹⁴

(h) Murder. A conviction of murder, in any degree, now serves to bar an alien from showing good moral character for naturalization or suspension cases.⁹⁵ The older naturalization cases had split over the effect of a killing on the character requirement,⁹⁶ some courts were willing to consider all the circumstances,⁹⁷ but others looked at no more than the name of the crime.⁹⁸ The 1952 act resolved this divergence.

One question not completely answered is whether, as the words seem to imply, a murder conviction is a perpetual bar, even if pardoned. If the pardon occurs during the period for which good moral character is required, it will not erase the bar.⁹⁹ However, one court has reserved the question of the effect of a pardon antedating that period.¹⁰⁰

(i) In General. If the alien is not barred by any of the preceding provisions, he must then proceed to show good moral character as enunciated in literally hundreds of cases decided under the naturalization laws.¹⁰¹ Faced with the almost impossible task of

⁹⁰ As to what constitutes conviction, see *Arrellano-Flores v. Hoy*, 262 F.2d 667 (9th Cir. 1958).

⁹¹ *E.g.*, *Petition of Ferro*, 141 F. Supp. 404 (M.D. Pa. 1956).

⁹² See *Daddona v. United States*, 170 F.2d 964 (2d Cir. 1948); *Petition of Sperduti*, 81 F. Supp. 833 (M.D. Pa. 1949) (parole).

⁹³ See *Matter of H.*, 7 I. & N. Dec. 249 (1956).

⁹⁴ See *Matter of B.*, 7 I. & N. Dec. 405 (1957). See also *Matter of C.*, I.D. No. 1185 (1962).

⁹⁵ See *Petition of De Angelis*, 139 F. Supp. 779 (E.D.N.Y. 1956).

⁹⁶ Compare *In re Bespatow*, 100 F. Supp. 44 (W.D. Pa. 1951), with *In re Caroni* 13 F.2d 954 (N.D. Cal. 1926).

⁹⁷ See, *e.g.*, *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947); *In re Bespatow*, 100 F. Supp. 44 (W.D. Pa. 1951); cases cited in note 82 *supra*.

⁹⁸ *E.g.*, *In re Ross*, 188 Fed. 685 (C.C.M.D. Pa. 1911).

⁹⁹ See *In re Siacco's Petition*, 184 F. Supp. 803 (D. Md. 1960).

¹⁰⁰ *Taylor v. United States*, 231 F.2d 856 (5th Cir. 1956).

¹⁰¹ See Annot., 22 A.L.R.2d 244 (1952).

finding a common ethic for a pluralistic society it is natural to find courts expressing opinions in terms ranging from religious fundamentalism¹⁰² to sociological pragmatism.¹⁰³

Although seldom phrased in these terms, the root of the dilemma seems to lie in the uncertainty as to whether Congress meant for the alien to be judged by what people actually do when faced with a moral decision. This appears most clearly in cases of sexual misconduct, an area in which there is a substantial body of data on both the verbalized norm and actual performance. While the inclusion of "adultery" as a specific bar might be indicative of congressional intent to impose a moral standard irrespective of community behavior, the law is still unsettled.

There are only two consistent notions expressed in the cases, and these are only slightly less abstract than the statute itself. The opinions almost uniformly state that in judging moral character the court looks not at its own moral code but at that of the community at large.¹⁰⁴ Perhaps some of the inconsistencies in judicial opinions are attributable to variations in local views of morality from one judicial circuit or district to another.¹⁰⁵ Further it is held that when applying this standard, perfection is not required—an occasional slip is consistent with good moral character.

The judicial determination of good moral character is, at best, a highly subjective guess. No court has followed the suggestion of the late Judge Frank that objective evidence of the national moral standard be produced.¹⁰⁶ As Judge Learned Hand pointed out, this merely shifts the issue to one of who should be polled and how the opinion of the prostitute should be weighted vis-à-vis that of the clergyman.¹⁰⁷ Nor are affidavits as to the character of the alien helpful; a participant in the infamous Appalachen underworld

¹⁰² See cases cited in note 67 *supra*.

¹⁰³ See *United States ex rel. Exarchou v. Murff*, 265 F.2d 504 (2d Cir. 1959); *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947); *Petition of Kielblock*, 163 F. Supp. 687 (S.D. Cal. 1958).

¹⁰⁴ See *Posusta v. United States*, 285 F.2d 533 (2d Cir. 1961); *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949); *Petition of Rudder*, 159 F.2d 695 (2d Cir. 1947). In addition, the Board will make allowances for the mores of the community in which the affair took place. See *Matter of W.*, 5 I. & N. Dec. 586 (1953). It has been suggested that the correct test is the mores of the country generally. Note, 66 HARV. L. REV. 643, 711 (1953). But this is difficult for the alien who can judge the national ethic only from what he observes in his own community.

¹⁰⁵ One court has held that it is sufficient if the alien's conduct measures up to either of the two standards mentioned in note 104 *supra*. *In re Mayall*, 154 F. Supp. 556 (E.D. Pa. 1957). This has the advantage of protecting the alien regardless of how he responds to quirks in local law.

¹⁰⁶ *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947) (dissenting opinion).

¹⁰⁷ *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949).

conclave was able to produce thirteen witnesses and 161 affidavits testifying to his good moral character.¹⁰⁸

Though overshadowed by the difficulties relating to the standard, a determination of the facts raises problems too. The alien bears the burden of proof, which may be quite heavy in view of the use of hearsay evidence by the Service.¹⁰⁹ In some cases confidential information not revealed to the alien is used, although this practice is now restricted somewhat by regulations of the Attorney General.¹¹⁰

A related question is how far into the past the Service can reach in seeking incidents to show character. In the naturalization cases the bulk of the courts were willing to look beyond the statutory period to past behavior as casting light on character during the relevant period.¹¹¹ The strength of these precedents in suspension cases may be weakened by the fact that in 1952 Congress specifically authorized such inquiry in naturalization proceedings but did not do so as to suspension.¹¹² Perhaps this implies a recognition that a person can reform, or that there ought to be some statute of limitations on moral error.¹¹³

III. THE EXERCISE OF DISCRETION

Only after successfully meeting the statutory prerequisites may the alien appeal to the discretion of the Attorney General, exercised through his delegates, ultimately the Board of Immigration Appeals. This discretion is limited, not only by the statute but also by the impending congressional review.

Within this somewhat narrow area of decision, the power given is essentially arbitrary. Nothing requires the Attorney General to give reasons for his decisions,¹¹⁴ though in fact they are generally given.

The value of these decisions as precedents is not clear. In one case the uniform exercise of discretion was described as desirable.¹¹⁵ The opinion proceeded to build on that foundation to the

¹⁰⁸ See *Bufalino v. Holland*, 277 F.2d 270 (3d Cir. 1960).

¹⁰⁹ See *United States ex rel. Exarchou v. Murff*, 265 F.2d 504, 506 (2d Cir. 1959); *Matter of C. T. H.*, 8 I. & N. Dec. 105 (1958).

¹¹⁰ 8 C.F.R. § 242.17(a) (Supp. 1962). See *Jay v. Boyd*, 351 U.S. 345 (1956).

¹¹¹ See *Ralich v. United States*, 185 F.2d 784 (8th Cir. 1950); *In re Schlau*, 136 F.2d 480 (2d Cir. 1943); *In re Siacco's Petition*, 184 F. Supp. 803 (D. Md. 1960); *Petition of Ferro*, 141 F. Supp. 404 (M.D. Pa. 1956). Cf. *Marcantonio v. United States*, 185 F.2d 934 (4th Cir. 1950).

¹¹² Section 316(e), 66 Stat. 243 (1952), 8 U.S.C. § 1427(e) (1958).

¹¹³ See *LOWENSTEIN*, *op. cit. supra* note 66, at 259.

¹¹⁴ Cf. *Jay v. Boyd*, 351 U.S. 345 (1956).

¹¹⁵ *Matter of C.*, 7 I. & N. Dec. 608 (1957).

conclusion that relief should be denied, although the facts were conceded to be similar to an earlier case in which suspension had been granted. On another occasion the Board stated that it would refuse to grant relief in situations where it had been denied before as a matter of discretion.¹¹⁶ If the theory behind the grant of discretion is that no two cases are alike and that decisions may best be made on subtle balancing of the equities, it would seem that the Board ought not to feel bound by past judgments.

Some courts have followed this view, at least to the point of holding that the Board may not take a single factor and make it determinative of all cases in which it appears.¹¹⁷ Such practice has been condemned as a refusal to exercise discretion and as an attempt to engraft further qualifications on the statute.¹¹⁸ Other courts¹¹⁹ have felt, arguably erroneously, that decisions of the Supreme Court permit this method of exercising discretion.¹²⁰

IV. JUDICIAL REVIEW

Judicial review of suspension cases is confined to narrow grounds. Courts have said that there is no review of discretion¹²¹ or that the court will intervene only where there is an abuse¹²² or failure to exercise discretion.¹²³ While this view is unobjectionable some courts have unfortunately applied the standard to the entire suspension case, not limiting it to the discretionary aspects.¹²⁴ These courts have failed to note that where the Attorney General denies that he has the authority to exercise discretion, *i.e.*, that the alien fails to meet statutory prerequisites, this is a legal question, as reviewable as any other.¹²⁵

The dual review function was recognized by the Supreme Court in a recent case.¹²⁶ The Court pointed out that the appellate

¹¹⁶ Matter of L., 4 I. & N. Dec. 1 (1950).

¹¹⁷ See *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950).

¹¹⁸ See *McCleod v. Peterson*, 283 F.2d 180 (3d Cir. 1960); *Acosta v. Landon*, 125 F. Supp. 434 (S.D. Cal. 1954).

¹¹⁹ See *Clair v. Barber*, 258 F.2d 558 (9th Cir. 1958); *LoDuca v. Neelly*, 213 F.2d 161 (7th Cir. 1954); *United States ex rel. Ciannamea v. Neelly*, 202 F.2d 289 (7th Cir. 1953).

¹²⁰ These courts have failed to distinguish between giving strong weight to a policy factor and making that factor conclusive. In *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957), it was the former practice which was approved. The latter practice is more closely akin to the prejudgment condemned in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *clarified*, 349 U.S. 280 (1955).

¹²¹ See *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489 (2d Cir. 1950).

¹²² See, *e.g.*, *United States ex rel. Adel v. Shaughnessy*, 183 F.2d 371 (2d Cir. 1950).

¹²³ See, *e.g.*, *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956).

¹²⁴ See *Vichos v. Brownell*, 230 F.2d 45 (D.C. Cir. 1956).

¹²⁵ For a court recognizing this point, see *United States ex rel. Weddeke v. Watkins*, 166 F.2d 369 (2d Cir. 1948).

¹²⁶ *United States ex rel. Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957).

court had two tasks: (1) to decide whether the correct legal standards were applied to determine eligibility for discretion, and (2) to judge whether discretion was exercised with caprice or arbitrariness.

In the determination of good moral character this distinction is most easily overlooked. The fact that Congress has set some specific minimum standards does not indicate that the decision as to character beyond these standards is discretionary, not legal. It must be recalled that this standard is the same one which the courts review in the naturalization cases, and the express congressional desire for uniformity requires the same review of suspension decisions.

In construing the legal standards the courts agree that deportation is so nearly penal as to require strict interpretation in favor of the alien.¹²⁷ The bias toward the respondent is bolstered in the suspension cases by the remedial purposes of the statutory provision.¹²⁸ The Board has echoed these sentiments¹²⁹ and on occasion has applied them.¹³⁰ Other cases, however, raise doubts as to just what the Board thinks is the evil to be remedied.¹³¹

If the reviewing court finds an erroneous refusal to exercise discretion, all that it can do is to remand the case, ordering the Board to exercise its discretion.¹³² This has led to the practice of denying relief both on the legal and, in the alternative, on discretionary grounds.¹³³

V. SOME CONCLUSIONS AND OBSERVATIONS

Our immigration laws, unlike those of other Western nations, make deportation mandatory, not discretionary. The relevant statute commands deportation whenever one of more than 700 grounds for expulsion is found to exist. Since the 1952 law was more severe than earlier legislation, and since it made many aliens

¹²⁷ See *Barber v. Gonzales*, 347 U.S. 637 (1954); *Sharaiha v. Hoy*, 169 F. Supp. 598 (S.D. Cal. 1959).

¹²⁸ See *Sevitt v. Del Guercio*, 150 F. Supp. 56 (S.D. Cal. 1957).

¹²⁹ See *Matter of L. D. E.*, 8 I. & N. Dec. 399 (1959); *Matter of D.*, 6 I. & N. Dec. 285 (1954).

¹³⁰ See *Matter of J. M. D.*, 7 I. & N. Dec. 105 (1956).

¹³¹ See, e.g., *McCleod v. Peterson*, 283 F.2d 180 (3d Cir. 1960); *Acosta v. Landon*, 125 F. Supp. 434 (S.D. Cal. 1954); *Matter of V. R.*, I.D. No. 1152 (1961); *Matter of P.*, 6 I. & N. Dec. 788 (1955).

¹³² See *Mastrapasqua v. Shaughnessy*, 180 F.2d 999 (2d Cir. 1950); *Dickhoff v. Shaughnessy*, 142 F. Supp. 535 (S.D.N.Y. 1956).

¹³³ See *Matter of A.*, I.D. No. 1145 (1961); *Matter of O.*, 7 I. & N. Dec. 486 (1957); *Matter of A.*, 6 I. & N. Dec. 242 (1954). *But cf.* *Vichos v. Brownell*, 230 F.2d 45 (D.C. Cir. 1956).

deportable for acts which were neither unlawful nor grounds for deportation when committed, it was obvious that, without an improvement in the suspension provisions and other devices for discretionary relief, great hardship on aliens and their families would ensue. Further it was felt that the private immigration bill, the principal mode of relief prior to suspension legislation, was an inappropriate method of alleviating this hardship.

Judged against this background the suspension provisions appear inadequate.¹³⁴ The number of private bills continues to rise¹³⁵ until it is now estimated that one out of five bills in Congress is private immigration legislation.¹³⁶ In 1961 the number reached 2,207, while in the same year suspension was granted in only 128 cases.¹³⁷

One of the major shortcomings in the legislation as enacted was the failure to include all deportable aliens. This may have been partially an inadvertent result of poor drafting in establishing the five classes. But as regards aliens who last entered before June 26, 1950, the result was intentional, and highly criticized. Since those aliens are most apt to have strong ties in this country and only dim connections with their native land, it was thought ironic that only the gangsters and subversives among them were eligible for suspension after 1957. This was not the result of a bias in favor of less worthy aliens, but rather a recognition by the drafters that criminals and subversives had not formerly been eligible for suspension. As to the rest of the long-term residents, the thinking was apparently that seven years was a sufficient time in which to have their status regularized, and that by placing a deadline on suspension these individuals would be encouraged to come forth on their own.

There are two flaws in this reasoning. In the first place not all deportable aliens recognize themselves as such because of the highly technical nature of the immigration laws as well as the alien's own circumstances, *e.g.*, those who entered as infants. In the second place, even if the alien was aware of his status and of the deadline under the act, he may have also heard of the numerous cases in which suspension was denied and aliens who came forth voluntarily were deported.

At the other extreme from the alien who fits into none of the

¹³⁴ See STAFF REPORT 32.

¹³⁵ See 1961 ATT'Y GEN. ANN. REP. 385; WHOM WE SHALL WELCOME 215.

¹³⁶ See 1958 ATT'Y GEN. ANN. REP. 382.

¹³⁷ See 1961 ATT'Y GEN. ANN. REP. 385.

statutory classes is the one who falls within more than one class, by virtue of being deportable on more than one ground. Furthermore, there are some instances, perhaps due to the complexity of the statutory scheme, where a single ground for deportation falls within two of the statutory classes. In this latter situation the Supreme Court has held that if the alien could qualify under the least rigorous requirements he was eligible for suspension.¹³⁸ In the former situation the Board held that where the only charge lodged against an alien woman would place her in Class I and hence make her ineligible for suspension, the woman might be considered for suspension if she could show that she had been a prostitute and thus deportable for a charge that would place her in an eligible class.¹³⁹ Recently, however, there was a suggestion by way of dictum that the Immigration Service might make the alien ineligible by a careful choice among possible deportation charges.¹⁴⁰

It is not clear what policy was thought to be served by the Procrustean classification, particularly when compared with the amorphous general requirements, the discretion granted, and the congressional veto retained. Perhaps a greater number of cases could be handled under the suspension process if all aliens were made initially eligible and the factors which now delineate the statutory classes were merely to be considered along with the other facts of the particular case in the exercise of discretion.

Even under the general requirements results can appear to be highly arbitrary. This is especially true of the requirement of "good moral character." As one court has said, results turn "often on moral judgments unrealistic in modern society."¹⁴¹ If what was intended was an actual comparison with the common mores, the question would appear to be one that a jury or similar body might be especially suited to handle in those cases where it is in dispute. The major objection would presumably be cost, yet it is not readily apparent that the services of a jury are necessarily more expensive than the efforts of three conscientious circuit judges. The additional expense, if there be such, would appear to be justified. Fairer treatment of our resident aliens, even though not a constitutional requirement, is more in accordance with our national traditions.

Kenneth W. Graham, Jr., S.Ed.

¹³⁸ *Dessalernos v. Savoretti*, 356 U.S. 269 (1958).

¹³⁹ *Matter of D.*, 5 I. & N. Dec. 285 (1953).

¹⁴⁰ *Matter of V. R.*, I.D. No. 1152 (1961).

¹⁴¹ *United States ex rel. Exarchou v. Murff*, 265 F.2d 504, 506 (2d Cir. 1959).