

NOTES AND COMMENTS

LIMITATIONS ON CONGRESSIONAL POWER TO DEPORT RESIDENT ALIENS EXCLUDABLE AS PSYCHOPATHS AT TIME OF ENTRY*

THE McCarran Immigration Act's provision for the deportation of aliens who were excludable at time of entry as "persons afflicted with psychopathic personality"¹ permits administrative expulsions under an indefinite standard to which the courts have added scant precision. As a result, unpredictable and largely uncontrolled deportations effecting "delayed exclusion" may occur at the order of immigration hearing officers.² While treating expulsion as an

*United States *ex rel.* Leon v. Murff, 250 F.2d 436 (2d Cir. 1957), *affirming* United States *ex rel.* Leon v. Shaughnessy, 143 F. Supp. 270 (S.D.N.Y. 1956).

1. "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: . . . Aliens afflicted with psychopathic personality . . ." Immigration and Nationality Act of 1952 (McCarran-Walters Act) § 212(a), 66 Stat. 182, 8 U.S.C. § 1182(a) (1952) [hereinafter cited as "Act of 1952"]. "Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Act of 1952, § 241(a), 66 Stat. 204, 8 U.S.C. § 1251(a) (1952).

The Act of 1952 is analyzed in *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643 (1953); AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (1955). The President's Commission on Immigration and Naturalization evaluated the policies and effects of the 1952 act in WHOM WE SHALL WELCOME (1953) [hereinafter cited as WHOM WE SHALL WELCOME]. For a collection of case studies under the 1952 act, see LOWENSTEIN, THE ALIEN AND THE IMMIGRATION LAW (1958). For a critical study of American immigration law in broad perspective, see *Immigration*, 21 LAW & CONTEMP. PROB. 211-426 (1956).

2. A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation.

Act of 1952, § 242(b), 66 Stat. 209, 8 U.S.C. § 1252(b) (1952).

For a detailed and critical presentation of the procedural steps leading to deportation, with emphasis on the role of the special inquiry officer, see Note, 42 VA. L. REV. 803 (1956). Deportation procedures are described and criticized in WHOM WE SHALL WELCOME 152-67.

In the fiscal year 1956-1957, 326,867 aliens were admitted into the United States for permanent residence. 1957 IMMIGRATION & NATURALIZATION SERVICE ANN. REP. 17. In the same year, 59 aliens were deported for mental or physical defects in a total of 5,082 deportations; in 1956, 80 out of 7,297; in 1940, 362 out of 6,954; in 1930, 1,042 out of 16,631. *Id.* at 52. "In evaluating these figures it must be borne in mind that many aliens

exercise of the generally unreviewable power of Congress over foreign relations,³ courts acknowledge that deportation proceedings constitute governmental action within the territorial boundaries of the United States and are, therefore, not exempt from constitutional requirements.⁴ In deference to the immigration policies of Congress, the judiciary has compromised these requirements by imposing due process standards on deportation procedures⁵

found deportable are permitted to depart voluntarily." AUERBACH, *op. cit. supra* note 1, at 294. In 1957, 63,379 aliens departed "voluntarily" after having been found deportable (65% across the southwestern border). 1957 IMMIGRATION & NATURALIZATION SERVICE ANN. REP. 14. A survey of case studies reports that: "In spite of this comparatively small number of actual deportations the danger of becoming deportable on the charge of mental illness or its concomitant, becoming a public charge, creates concern among newly arrived aliens." LOWENSTEIN, *op. cit. supra* note 1, at 235.

3. [T]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments . . . except so far as the judicial department has been authorized . . . or is required by the paramount law of the Constitution to intervene.

Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893).

[A]ny policy toward aliens [including deportation] is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952).

4. Bridges v. Wixon, 326 U.S. 135, 161 (1945) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."); Japanese Immigrant Case, 189 U.S. 86, 101 (1903) (due process requires hearing if alien "has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here"); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

The Civil Rights Act, REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1952), provides that: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . ."

5. Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950); Japanese Immigrant Case, 189 U.S. 86, 100 (1903); *cf.* Ludecke v. Watkins, 335 U.S. 160, 184-86 (1948) (dissenting opinion). See generally Boudoin, *The Settler Within Our Gates* (pts. 1-3), 26 N.Y.U.L. REV. 266, 451, 634 (1951); Note, *Constitutional Restraints on the Expulsion and Exclusion of Aliens*, 37 MINN. L. REV. 440 (1953).

Procedural due process has been narrowly defined in deportation cases. See, *c.g.*, Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955) (publication of Attorney General's belief that alien was deportable held not basis for attributing bias to Board of Immigration Appeals under his supervision); Low Wah Suey v. Backus, 225 U.S. 460, 470 (1912) (preliminary interrogation without presence of counsel and denial of process to compel testimony permitted); United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 134 (1924) ("mere error, even if it consists in finding an essential fact without adequate supporting evidence, is not a denial of due process"); WHOM WE SHALL WELCOME 162 (deportation procedure "fails to conform to the now generally accepted standards for fair hearings"). See generally Note, *Deportation and Due Process*, 5 STAN. L.

but not on statutory grounds for expulsion.⁶ The courts have rejected the suggestion, however, that immigration officials enjoy discretion beyond that granted by statute⁷—even if, as members of the executive branch, they partake of presidential power in foreign affairs.⁸ This limitation, coupled with the dictates of procedural due process, indicates that deportation orders will not be sustained unless supported by statutory authority and sufficient evidence.⁹ Although no McCarran Act decisions involving the delayed exclusion

REV. 722 (1953); Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309 (1956).

Doubt exists as to the applicability of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001-11 (1952). Compare *Brownell v. Tom We Shung*, 352 U.S. 180 (1956), with *Marcello v. Bonds*, 349 U.S. 302 (1955). See generally Note, *Our Immigration Laws, A Continuing Affront to the Administrative Procedure Act*, 41 GEO. L.J. 364 (1953).

Crucial to the degree of judicial protection available in deportation proceedings is a determination of the point at which entering aliens acquire the right to a modicum of procedural due process. Under present international law, the territorial boundaries of the United States lie at least three miles off shore. BRIGGS, *THE LAW OF NATIONS* 281-84, 372-85 (2d ed. 1952). But in *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), the Court upheld a statutory provision which preserved "entrant" status during a would-be immigrant's detention ashore pending determination of admissibility. The Act of 1952 contains a similar provision. § 233(a), 66 Stat. 197, 8 U.S.C. § 1223(a) (1952). The provision was recently upheld in its most extreme application when a returning resident alien was denied readmission, denied a hearing, and detained indefinitely on United States soil because he could not gain entrance to any other country. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Those conditionally admitted to the country can also be deported without due process. *Rogers v. Quan*, 357 U.S. 193 (1958); *Leng May Ma v. Barber*, 357 U.S. 185 (1958). *Contra*, *United States ex rel. Paktorovics v. Murff*, 260 F.2d 610 (2d Cir. 1958).

6. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) ("what classes of aliens shall be allowed to stay are for Congress exclusively to determine," *id.* at 597 (concurring opinion)); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954). *But see* *Bridges v. Wixon*, 326 U.S. 135, 162 (1945) (concurring opinion) ("[T]he First Amendment and other portions of the Bill of Rights make no exception in favor of deportation laws enacted pursuant to a 'plenary' power.").

7. See *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) ("The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases."); *Karayannis v. Brownell*, 251 F.2d 882 (D.C. Cir. 1957); *United States ex rel. Duner v. Curran*, 10 F.2d 38 (2d Cir. 1925); VAN VLECK, *THE ADMINISTRATIVE CONTROL OF ALIENS* 153-57 (1932); Note, 52 COLUM. L. REV. 1060, 1061 (1952).

8. In one case the Court attributed to the executive a nonstatutory power to exclude entering aliens. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("When Congress prescribes a procedure concerning the admissibility of aliens . . . it is implementing an inherent executive power.").

9. On the sufficiency of evidence, see *Bridges v. Wixon*, 326 U.S. 135, 156 (1945); *United States ex rel. Jim Leong v. O'Rourke*, 125 F. Supp. 769 (W.D. Mo. 1954); *United States ex rel. Chen Ping Zee v. Shaughnessy*, 107 F. Supp. 607 (S.D.N.Y. 1952); *Sang Ryup Park v. Barber*, 107 F. Supp. 605 (N.D. Cal. 1952); Note, 5 STAN. L. REV. 722, 739-40 (1953). *But see* *United States ex rel. Tisi v. Tod*, 264 U.S. 131 (1924); Note, 56 COLUM. L. REV. 551, 566 (1956) (sufficient evidence not normally regarded as a requirement of due process). The Act of 1952 provides that "no decision of deport-

of "persons afflicted with psychopathic personality" have been reported, cases arising under a virtually identical provision of the Immigration Act of 1917¹⁰ suggest that judicial review will be of no avail to aliens protesting their delayed exclusion as psychopaths.

ability shall be valid unless it is based upon reasonable, substantial, and probative evidence." § 242(b)(4), 66 Stat. 210, 8 U.S.C. § 1252(b)(4) (1952). This has been held to equal the standard required by the Administrative Procedure Act § 7(c), 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1952). *Cartellone v. Lehmann*, 255 F.2d 101 (6th Cir. 1958), *cert. denied*, 358 U.S. 867 (1958).

Judicial review has generally been predicated upon a distinction between fact and law. The interpretation of statutory language is a judicial prerogative, see cases cited note 7 *supra*, but weighing the evidence is exclusively the function of executive officials, *Lum Mon Sing v. United States*, 124 F.2d 21, 23 (9th Cir. 1941). *But see Ex parte Lee Bock Fook*, 40 F. Supp. 937, 940 (S.D. Cal. 1941) (court weighed and rejected Government's expert testimony). That the distinction between law and fact is elusive is well illustrated in *United States ex rel. Duner v. Curran*, 10 F.2d 38, 41 (2d Cir. 1925) ("The record is destitute of the slightest evidence justifying such a conclusion It is impossible that the statute meant to exclude all such children."), and in *United States ex rel. Fink v. Tod*, 1 F.2d 246, 257-58 (2d Cir. 1924) ("Unless it appears that a proper hearing was denied, the merits . . . are not open for our consideration Feeble-mindedness is a question of fact."), *rev'd on Government's confession of error*, 267 U.S. 571 (1925). For a discussion of judicial review for sufficiency of evidence in deportation cases, see Note, 56 COLUM. L. REV. 551 (1956).

Common-law rules of evidence need not be applied in immigration proceedings. *United States ex rel. Smith v. Curran*, 12 F.2d 636 (2d Cir. 1926).

10. "[T]he following classes of aliens shall be excluded from admission into the United States: . . . persons of constitutional psychopathic inferiority . . ." Immigration Act of 1917, ch. 29, § 3, 39 Stat. 875. "[A]t any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law . . . shall . . . be . . . deported." Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889. Both sections were repealed by the Act of 1952, § 403(a)(13), 66 Stat. 279, 8 U.S.C. §§ 136, 155 (1952).

The old and new versions of the "psychopath" clause are treated as equivalent in *United States v. Flores-Rodriguez*, 237 F.2d 405 (2d Cir. 1956). *But see id.* at 412 (concurring opinion) ("psychopathic personality" must have a different meaning from "constitutional psychopathic inferiority," or the word "constitutional" would have been superfluous in the 1917 act). Current Public Health Service instructions use the terms "constitutional psychopathic inferiority" and "psychopathic personality" interchangeably. U.S. Public Health Service, Manual for Medical Examination of Aliens II-1-6 (1950; letter correction dated Dec. 19, 1952).

The language of the exclusion clause was altered in 1952 because "the chief difficulties in the administration of the exclusion clauses of the 1917 Act pertaining to mentally and physically defective aliens arise in diagnosing 'constitutional psychopathic inferiority.'" S. REP. NO. 1515, 81st Cong., 2d Sess. 343 (1950). The 1950 committee also took a different view of the purpose of the clause. The legislative history of the 1917 act indicates that "the real object of excluding the mentally defective [including presumably, the constitutional psychopathic inferior] is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations . . ." S. REP. NO. 352, 64th Cong., 1st Sess. 5 (1916). The 1950 committee felt that "the exclusion of persons with 'constitutional psychopathic inferiority' was aimed at keeping out of the country aliens with a propensity to mental aberration, those with an inherent like-

Effective judicial review has been frustrated because the delayed exclusion of mental defectives poses unusually difficult evidentiary problems. The inaccessibility of overseas evidence and practical limits on examinations conducted when aliens enter the country necessitate findings of preadmission mental condition based entirely on retrospective diagnosis.¹¹ In the first reported case concerning the delayed exclusion of an allegedly psychopathic alien under the 1917 act, the administrative decision was supported by a post-entry psychiatric examination but not by any direct proof of disability at time of entry.¹² Reviewing a petition for habeas corpus, the court found the evidence insufficient and held that the inference as to psychopathic condition at

likelihood of becoming mental cases, as indicated by their case history." S. REP. No. 1515, 81st Cong., 2d Sess. 343 (1950). This is apparently the congressionally conceived purpose of the present provision, since the only reason for modifying the terminology was to make enforcement "more definite and practicable." *Id.* at 344. The 1950 committee did not indicate why it disagreed with its predecessor, but the difference in approach probably stems from a change in psychiatric theory. Most modern psychiatrists attribute psychopathic personality to environmental factors, whereas many earlier authorities assumed that the illness was either hereditary or acquired at birth. CLECKLEY, *THE MASK OF SANITY* 28-30 (3d ed. 1955) [hereinafter cited as CLECKLEY]; Guttmacher, *Diagnosis and Etiology of Psychopathic Personalities as Perceived in Our Time*, in CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS 139, 142, 146 (Hoch & Zubin ed. 1953).

Despite changing theories of the condition's cause, its delineation by medical authorities remains substantially if not exactly the same—both terms refer to a lifelong pattern of behavior in conflict with social norms but without accompanying guilt or anxiety. See text at notes 34, 35 *infra*; CLECKLEY 29.

See generally Curran & Mallinson, *Psychopathic Personality*, 90 J. MENTAL SCI. 266 (1944).

11. Entering aliens may but are not required to be thoroughly examined when they apply abroad for visas, and again upon arrival in the United States. Act of 1952, §§ 221(d), 232, 66 Stat. 192, 196, 8 U.S.C. §§ 1201(d), 1222 (1952). And "psychopathic personality" is often difficult to diagnose except after extensive psychiatric examination. Note 28 *infra*. Thorough mental examination of each entering alien would presumably be unfeasible.

The statute does not authorize deportation for postentry mental illness unless the alien is hospitalized at public expense. See Act of 1952, § 241(a)(3), 66 Stat. 204, 8 U.S.C. § 1251(a)(3) (1952). Hence, in the absence of such hospitalization, diagnosis does not relate to the time of examination but must relate back by inference to the time of entry. The validity of such an inference has been disputed in cases of delayed exclusion for physical as well as mental illness. See *Ex parte Wong Nung*, 30 F.2d 766 (9th Cir. 1929) (retrospective diagnosis of leprosy contested but upheld). The difficulties of retrospective diagnosis are set forth in VAN VLECK, *op. cit. supra* note 7, at 87-88; Kane, *The Challenge of the Wickersham Deportations Report*, 23 J. AM. INST. CRIM. L. & C. 575, 593 (1932). To avoid administrative difficulties, the Immigration Service recommended the deportation of all aliens hospitalized for mental illness within 10 years after entry, but Congress did not respond. See S. REP. No. 1515, 81st Cong., 2d Sess. 343-44 (1950). Potential difficulties with retrospective diagnosis are increased by the absence of a statute of limitations on deportation for previous excludability. See statute cited note 1 *supra*. The analogous provision of the Immigration Act of 1917 did not permit delayed exclusion more than five years after entry. Statute cited note 10 *supra*.

12. United States *ex rel.* Brugnoli v. Tod, 300 Fed. 918 (2d Cir. 1924).

entry was untenable without "some previous history."¹³ But this case was later overruled in *United States ex rel. Powlowec v. Day*, in which the court upheld a deportation order based solely upon a diagnosis of postentry derangement.¹⁴ Interpreting the 1917 act's criterion—"constitutional psychopathic inferiority"¹⁵—as a mental instability "inherent in [the] nervous structure," the court reasoned that, if the inference of prior illness was scientifically tenable, the evidence was sufficient to sustain the hearing officer's order.¹⁶ Conflicting expert testimony had been introduced on this point, but the court declined to question the administrator's choice of medical theory: "[W]e must accept the opinion of those formally qualified. . . . The whole subject is one of excessive uncertainty at best; whoever is fitted for the responsibility, it is certain that we are not. . . ."¹⁷

13. *Id.* at 920. The opinion went on to say, however, that if some previous history had been shown, its sufficiency would not have been reviewed by the court even if the experts disagreed. *Ibid.* See note 17 *infra*.

14. 33 F.2d 267, 268 (2d Cir.), *cert. denied*, 280 U.S. 594 (1929).

A Public Health Service regulation promulgated in the year after this case stated that "the diagnosis . . . is, as a rule, based upon the social history of the individual and without this history it is seldom possible to make it." U.S. Public Health Service Regulations Governing the Medical Examination of Aliens § 59 (rev. Aug. 30, 1930), quoted in *United States ex rel. Leon v. Shaughnessy*, 143 F. Supp. 270, 272 (S.D.N.Y. 1956), *aff'd sub nom. United States ex rel. Leon v. Murff*, 250 F.2d 436 (2d Cir. 1957). Nevertheless, *Powlowec* is cited as the single controlling authority in two per curiam opinions. *United States ex rel. Kreisberg v. Day*, 37 F.2d 1014 (2d Cir. 1930); *United States ex rel. De Brito v. Corsi*, 72 F.2d 1022 (2d Cir. 1934).

15. Statute cited note 10 *supra*.

16. 33 F.2d at 268. The court's definition reads in full: "[The phrase] was intended to include those who by nature were subject to insanity of one sort or another; that is to say, whose constitution was such that they had not normal mental stability. . . . [T]heir inferiority . . . is inherent in their nervous structure." This definition unduly emphasizes the now outmoded neurological theory of the cause of psychopathy, and completely overlooks the sociopathic characteristics of the condition. See discussion and materials cited in note 10 *supra*. It also utilizes the legal term "insanity," which is not used in clinical terminology and is particularly inappropriate to an exposition of psychopathy because this condition is rarely of legal significance, while "insanity" has well established legal consequences. Psychopathic personality, unlike insanity, is hardly ever a defense to criminal liability, WEIHOFFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 97 (1933), or sufficient grounds for civil commitment, CLECKLEY 31, 37.

17. 33 F.2d at 268.

"[T]hose formally qualified" apparently means psychiatrists, not immigration officers. But, by refusing to question the instant officer's choice between conflicting expert opinions, the court expresses equal deference to him.

If neither the merit of psychiatric opinion nor the hearing officer's choice of experts can be judicially evaluated, judicial review for sufficiency of evidence is little more than an empty formality. In *Powlowec*, the Government's evidence was questionable at best. The alien had been discharged from a mental hospital as a "psychopathic personality—condition recovered." He was then certified by one psychiatrist, after a half-hour examination, as having been a psychopath at time of entry. A board of three Public Health Service psychiatrists found him "free from mental defects" and declined to find that he had been mentally ill at time of entry. *Id.* at 267. The court sustained the immigration

The *Powlowec* rationale was recently employed in *United States ex rel. Leon v. Murff*¹⁸ to restrict the scope of judicial review still further. The alien, a Cuban national, was admitted into the United States for permanent residence in 1942; she re-entered six years later after a trip to Cuba.¹⁹ In 1950, following an altercation in which she struck a bartender with a bottle, she was committed to a mental hospital.²⁰ Her condition was diagnosed as "psychosis with psychopathic personality, paranoid trends."²¹ Released five months later, she resumed gainful employment and was not apprehended on any subsequent charge.²² The hospital forwarded her record to the Immigration Service,²³ which, two years after her release, summoned her before a special inquiry officer.²⁴ He found that she was deportable as a person afflicted with "constitutional psychopathic inferiority" at the time of her re-entry in 1948.²⁵ The evidence consisted primarily of a medical certificate to this effect based on the following history:

officer's determination even though the medical certification of prior illness failed to specify the grounds on which it was based. The court did suggest that such specification would have been desirable.

The requisite content of medical certificates has caused difficulty in other types of cases. Compare *United States ex rel. Fong On v. Day*, 54 F.2d 990 (2d Cir. 1932) (certification containing only conclusion as to alien's age held sufficient), with *United States ex rel. Papa v. Day*, 45 F.2d 435 (S.D.N.Y. 1930) (medical certification of tuberculosis held insufficient evidence of excludability because it failed to state qualifications of physician and grounds for conclusion). Generally, however, courts have not gone behind medical certificates. See Annot., 93 L. Ed. 1063, 1065-66 (1950), and cases cited therein. But cf. *United States ex rel. Devenuto v. Curran*, 299 Fed. 206, 213 (2d Cir. 1924) ("[W]here an alien is excluded on the ground that he cannot read, the courts are entitled to know exactly what test was used").

18. 250 F.2d 436 (2d Cir. 1957), affirming *United States ex rel. Leon v. Shaughnessy*, 143 F. Supp. 270 (S.D.N.Y. 1956).

19. 143 F. Supp. at 271. In this connection, see discussion of the "re-entry doctrine" in note 25 *infra*.

20. 250 F.2d at 437; Brief for Appellant, pp. 58a, 66a.

21. 250 F.2d at 437; Brief for Appellant, p. 57a.

22. 250 F.2d at 440.

23. Brief for Appellant, p. 20a. The court ruled that this action was proper under N.Y. MENTAL HYGIENE LAW § 23, in spite of a conflicting rule against the divulgence of confidential medical records in N.Y. CIV. PRAC. ACT § 352. 250 F.2d at 440.

There is no privilege against self-incrimination in deportation proceedings. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Loufakis v. United States*, 81 F.2d 966 (3d Cir. 1936); cf. *United States v. Matles*, 247 F.2d 378 (2d Cir. 1957), *rev'd*, 356 U.S. 256 (1958).

24. The alien was discharged from the hospital on May 27, 1951, and deportation hearings were commenced on May 11, 1953. 143 F. Supp. at 271, 275.

25. *Id.* at 271.

The Act of 1952 provides that the law in effect at the time of the challenged entry shall be applied in cases of delayed exclusion. Statute cited note 1 *supra*; Act of 1952, § 405(a), 66 Stat. 280, note to 8 U.S.C. § 1101 (1952).

Under the "re-entry doctrine," a long-time resident alien who voluntarily travels abroad is subject upon his return to the same tests, and is only entitled to the same

Patient was a problem in childhood, eloped from school with a man at age of 15, has had two divorces and has lived without marriage with a man for the past nine years, except for brief interval when she married and deserted husband. Described by others as unreliable, untruthful, intemperate, quarrelsome, and bad tempered.²⁶

Hospital records also revealed that she had once been treated in this country for alcoholism.²⁷ After the hearing officer had ordered her deportation, she exhausted her administrative remedies,²⁸ then petitioned for and was denied

constitutional rights, as if he were entering for the first time. Act of 1952, § 101(a) (13), 66 Stat. 167, 8 U.S.C. § 1101(a) (13) (1952); *Pimental-Navarro v. Del Guercio*, 256 F.2d 877 (9th Cir. 1958). "Re-entry permits" serve only to fulfill the requirement for a visa. Act of 1952, § 223(e), 66 Stat. 195, 8 U.S.C. § 1203(e) (1952). Exclusion and "delayed exclusion" under the re-entry rule accomplish indirectly the same result as deportation. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* 92 (1953). And the threat of such exclusion imposes a restraint upon the alien's freedom to travel. Since an alien once within the territorial jurisdiction of the United States is entitled to procedural due process of law in immigration proceedings, note 5 *supra*, it seems unnecessarily harsh and unduly conceptualistic to revoke these rights merely because the alien temporarily absents himself from the country. This feeling is reflected in judicial reluctance to apply the re-entry rule in some cases. *E.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 601 (1953); *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Chew Heong v. United States*, 112 U.S. 536 (1884). *But see* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), for an extremely harsh application of the rule.

Relief from the re-entry doctrine is available at the Attorney General's discretion. Act of 1952, § 211(b), 66 Stat. 181, 8 U.S.C. § 1181(b) (1952). But the exercise of such discretion is probably not reviewable. *Cf.* *Jay v. Boyd*, 351 U.S. 345 (1956). The rule is criticized in *WHOM WE SHALL WELCOME* 179, 199-200.

26. 143 F. Supp. at 272.

27. This and other details of the alien's personal history appear in the Brief for Appellant, pp. 56a-59a, partially quoted in 143 F. Supp. at 271.

28. The first decision of the special inquiry officer is set forth in Brief for Appellant, pp. 19a-24a. Upon appeal, the Board of Immigration Appeals held the evidence insufficient because certification by the Public Health Service was based not on any "actual examination" but upon hospital records alone. The Board ordered the proceedings reopened for further medical examination. The Board's opinion appears in *id.* at 25a-26a. After a single examination, the Public Health Service reiterated its former diagnosis: "In view of the history and the patient's present condition there appears to be no doubt that the patient was properly certified . . ." This certification was contradicted by a mental hygiene specialist and a psychiatrist, both of whom had examined the alien at considerable length. The hearing officer found the alien deportable. See the second decision of the special inquiry officer, *id.* at 27a-33a.

Respondent appealed the second deportation order to the Board of Immigration Appeals, which dismissed. The opinion is set forth in *id.* at 34a-39a. Unaccountably, the Board made no mention of the personal examination which it had previously emphasized. "In our opinion, the clinical report of respondent's 1950-1951 illness . . . amply supports the Public Health Service certification that respondent was a person afflicted with constitutional psychopathic inferiority at the time of her last entry." *Id.* at 39a.

The Board would appear to have been correct in requiring a personal examination. But, in view of the conflicting testimony, its reliance upon the report of a single Public Health Service officer who conducted only one examination is unconvincing. Prevailing

a writ of habeas corpus.²⁹ On appeal, she argued that the phrase "constitutional psychopathic inferiority" had never been given a "proper definition."³⁰ Denying relief, the Second Circuit held that the statutory language had been construed in the *Powlowec* case.³¹ The court then quoted the *Powlowec* statement favoring the conclusiveness of expert opinion, and thus implied that the task of statutory construction as well as that of weighing evidence was properly left to administrative discretion.³²

medical authority and interviews with Public Health Service psychiatrists indicate that "psychopathic personality" is an unusually difficult condition to diagnose, NOYES, MODERN CLINICAL PSYCHIATRY 412 (3d ed. 1949) [hereinafter cited as NOYES], and that extensive personal examination is essential, ENGLISH & FINCH, INTRODUCTION TO PSYCHIATRY 261 (2d ed. 1957). "[S]ome of the most radical nonconformists may be relatively healthy." Redlich, *The Concept of Health in Psychiatry*, in EXPLORATIONS IN SOCIAL PSYCHIATRY 138, 153 (Leighton, Clausen & Wilson ed. 1957).

29. 143 F. Supp. 270 (S.D.N.Y. 1956).

Under the 1917 act, the governing statute in *Leon*, see note 25 *supra*, habeas corpus was the only avenue to judicial review. *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953). This remedy is unavailable until personal restraint has been imposed. Recent cases have held, however, that, under the 1952 act, review can also be had by suit for declaratory judgment. *Brownell v. Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

The question whether Congress could constitutionally preclude all judicial review of expulsion orders is answered in the negative in Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1387-96 (1953).

30. 250 F.2d at 439.

31. *Ibid.* For the *Powlowec* definition, see note 16 *supra*. A more recent judicial interpretation by the same court that decided *Powlowec* and *Leon* appears in *United States v. Flores-Rodriguez*, 237 F.2d 405, 411 (2d Cir. 1956): "We understand this little-understood and rarely interpreted phrase—presumably out of the psychology books—to characterize individuals who show a life-long and constitutional tendency not to conform to group customs, and who habitually misbehave so flagrantly that they are continually in trouble with authorities." Compared with the *Powlowec* definition, *Flores* reflects the current disrepute of the neurological approach, see note 10 *supra*. It is difficult to see how the appellant in *Leon* could have been deported under the *Flores* interpretation. See text accompanying note 39 *infra*. Although the *Leon* court cited *Flores*, it did not distinguish or discuss it. 250 F.2d at 439. More significant, perhaps, is the court's failure to apply the current standards established by the Public Health Service. See *United States ex rel. Johnson v. Shaughnessy*, 336 U.S. 806 (1949) (administrative regulations in an exclusion case must be observed); *cf. Service v. Dulles*, 354 U.S. 363 (1957). The U.S. Public Health Service Manual for Medical Examination of Aliens in force since 1950 states, at p. II-1—6, that:

It is . . . necessary that the written records of the physician's examination include statements of fact indicating that the condition of psychopathic inferiority, or the symptoms that indicate this diagnosis, were present, and are traceable rather clearly back to the early years of the individual's existence, and therefore could be considered to have been present at birth.

32. 250 F.2d at 439. The implication follows from the *Powlowec* case, quoted in text at note 17 *supra*, since complete discretion as to sufficiency of evidence is ultimately the same as complete discretion to interpret statutory language.

So read, the *Leon* case makes administrative officials solely responsible for interpreting what is probably the most disputed and open-ended diagnostic label in the field of psychiatry.³³ Unlike other types of mental illness, "psychopathic personality" is not associated with cognitive or emotional disturbances; rather, its identifying characteristic is a long-standing pattern of culturally unacceptable behavior.³⁴ Psychopaths are intellectually cognizant of their environment, their conduct, and the moral and legal standards obtaining in the community, but appear to lack an effective "conscience" to control their antisocial impulses.³⁵ Consequently, diagnosis requires the application of prevailing social norms to persons who may be mentally ill only by virtue of criminal, "eccentric," or "unusual" behavior.³⁶ Recognizing this, the Public Health Service regulations relied upon in *Leon* provide that:

There shall be certified as cases of constitutional psychopathic inferiority all psychopathic characters such as "chronic litigants," "sexual perverts," "pathological liars," "dipsomaniacs," "moral imbeciles," and mentally peculiar persons who because of eccentric behavior, defective judgment.

33. NOYES 410 (Psychopathic personality "is considered by many to be a meaningless designation Not yet is there any common agreement . . . as to classification or . . . etiology."); Curran & Mallinson, *supra* note 10, at 278 ("The only conclusion that seems warrantable is that, at some time or other and by some reputable authority, the term psychopathic personality has been used to designate every conceivable type of abnormal character."); Guttmacher, *supra* note 10, at 154 ("At present, the diagnosis of a psychopathic personality is practically meaningless."); Tappan, *Sexual Offences and Treatment of Sexual Offenders in the United States*, in *SEXUAL OFFENCES* 500, 507 (Radzinowicz ed. 1957) ("consensus is impossible in the no man's land of psychopathic personality").

Congress was aware of the nebulous meaning of the term. "Although the term 'psychopathic personality' is vague and indefinite, no more appropriate expression can be suggested at this time Until a more definite expression can be devised, the term 'psychopathic personality' should be retained." Report of the Public Health Service on the Medical Aspects of H.R. 2379, in H.R. REP. NO. 1365, 82d Cong., 2d Sess. 46-47 (1952).

34. *United States v. Flores-Rodriguez*, 237 F.2d 405, 411 (2d Cir. 1956), quoted note 31 *supra*; Report of the Public Health Service on the Medical Aspects of H.R. 2379, *supra* note 33 ("The conditions classified within the group of psychopathic personalities . . . are characterized by developmental defects or pathological trends in the personality structure manifest by lifelong patterns of action or behavior, rather than by mental or emotional symptoms."); CLECKLEY 28; ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 137 (1953); Note, 28 TEMP. L.Q. 623 (1955).

Although the diagnostic label "psychopathic personality" is sometimes linked with other classifications pertaining to psychosis or neurosis (as in the *Leon* case, see text accompanying note 21 *supra*) a number of contemporary authorities reject this association as unsound. *E.g.*, ENGLISH & FINCH, *op. cit. supra* note 28, at 261; Guttmacher, *supra* note 10, at 142.

35. Gough, *A Sociological Theory of Psychopathy*, in *MENTAL HEALTH AND MENTAL DISORDER* 279 (Rose ed. 1956); ENGLISH & FINCH, *op. cit. supra* note 28, at 239, 261; Guttmacher, *supra* note 10, at 150.

36. See NOYES 412.

or abnormal impulses are in repeated conflict with social customs and constituted authorities.³⁷

Thus, since *Powlowec* approves a deportation order based solely upon post-entry behavior, virtually any unconventional conduct in this country might give rise to an inference of psychopathic personality at time of entry and result in deportation.³⁸ In *Leon*, for example, the severe sanction of expulsion from the United States after more than fifteen years of permanent residence was based primarily upon a single instance of disorderly conduct, a brief treatment for alcoholism, and a history of marital instability.³⁹ Similar con-

37. U.S. Public Health Service Regulations Governing the Medical Examination of Aliens § 59 (rev. Aug. 30, 1930), quoted in 143 F. Supp. at 272-73. These regulations have presumably been repealed, since no definition of "psychopathic personality" is included in the current regulations governing the medical examination of aliens. See 42 C.F.R. §§ 34.1-14 (Supp. 1958). The Service relies upon standard treatises, in particular the *Diagnostic and Statistical Manual—Mental Disorders*, of the American Psychiatric Association Mental Hospital Service (1952). Interviews with Dr. Eugene W. Green, Chief, Psychiatric Service, and Staff Psychiatrists, U.S. Public Health Service Hospital, Staten Island, N.Y., Jan. 9, 1959. This manual defines "personality disorder—antisocial reaction" as follows:

This term refers to chronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of sense of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and justified.

The term includes cases previously classified as "constitutional psychopathic state" and "psychopathic personality." As defined here the term is more limited, as well as more specific in its application.

38. "[T]he extent to which these distorting processes may extend before the personality is to be called pathological is a matter of individual opinion and not determined by definite criteria." NOYES 412. "The problem of a model [of health or normality] brings with it the accompanying intrusions of value judgments . . ." Leighton, Clausen & Wilson, *Some Key Issues in Social Psychiatry*, in *EXPLORATIONS IN SOCIAL PSYCHIATRY* 3, 7 (Leighton, Clausen & Wilson ed. 1957). For the great range of behavior which may be called "psychopathic," see generally CLECKLEY 380-417; KAHN, *PSYCHOPATHIC PERSONALITIES* (1931). Under the rules governing judicial review for sufficiency of evidence in these cases, all that is required to deport an alien is the unfavorable testimony of one psychiatrist. See notes 17, 28 *supra*.

Cultural relativity in a broader sense is pertinent to the analysis of an alien's deportability. For behavior which violates the standards of one society may be accepted in another. Thus, in the *Leon* case, one of the alien's psychiatric witnesses testified that: "[W]e see many young individuals elope and there is nothing wrong about the situation and even at the age of fifteen for a Latin person who matures sexually a little before the Caucasian individual . . ." Brief for Appellant, p. 51a.

In view of the above, it is at least questionable whether diagnosis of psychopathic personality for the purpose of establishing deportability is primarily a medical problem.

39. It is dubious that these incidents meet the medically avowed requirements for a "lifelong pattern" of "repeated conflict" with law or social customs. (The *Powlowec* case, of course, holds such previous history to be unnecessary. Text accompanying note 14

duct could undoubtedly be found in the personal histories of many resident aliens and used to deport them.⁴⁰

The vague language of the "psychopath" clause impinges upon the due process requirement that a penal provision must forewarn potential offenders by specifically describing what conduct will result in punishment.⁴¹ True, the courts generally do not view deportation as a criminal sanction.⁴² But a finding of psychopathic personality based upon postentry behavior operates to penalize antisocial conduct occurring in this country.⁴³ Because of the "grave nature of deportation," the Supreme Court assumed in *Jordan v. De George* that a deportation statute, while not technically penal, can be "void for vague-

supra.) Epithets such as "unreliable, untruthful, intemperate, quarrelsome, and bad-tempered" would not seem to remedy the paucity of deviant behavior revealed by the evidence. Brief for Appellant, p. 55a. Furthermore, the diagnosis of postentry psychosis, see text accompanying note 21 *supra*, does not support an inference of psychopathic personality at entry. U.S. Public Health Service, Manual for Medical Examination of Aliens II-1-7 (1950).

40. See CLECKLEY 35-38 (psychopathic personality "hundreds of times more common than poliomyelitis").

41. For this requirement, see *Musser v. Utah*, 333 U.S. 95, 97 (1948) ("Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding . . ."); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("All are entitled to be informed as to what the state commands or forbids."). Cases are collected in Annot., 83 L.Ed. 893 (1939).

Since the vagueness doctrine is designed to protect persons from unforeseeable deprivation, it follows that its protection is properly available only to those who are capable of choosing between compliance and noncompliance. No definite knowledge exists on whether psychopaths are capable of such a choice. The consensus appears to be that many but not all criminals are psychopaths, and that, at some point, psychopathic criminals are partially capable of societal compliance and amenable to deterrents. CLECKLEY 292-94; Guttmacher, *supra* note 10, at 145; NOYES 410. Since psychopaths demonstrate no cognitive or emotional disturbances, they are rarely subject to commitment and are almost always held criminally responsible for their conduct. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 139 (1953); CLECKLEY 37, 515; WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 97 (1933). Until it is certain that the potential psychopath is incapable of choosing between compliance and noncompliance, he should be entitled to forewarning of prohibited conduct. See Rockwell, *Nosology and The Law*, in CURRENT PROBLEMS IN PSYCHIATRIC DIAGNOSIS 138 (Hoch & Zubin ed. 1953). *Contra*, Note, 62 HARV. L. REV. 77, 78 n.8 (1948).

42. *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

43. Deportation has frequently been recognized by the courts as a form of punishment. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (Deportation is "the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."); *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2d Cir. 1926) ("However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples."). See generally KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* ch. 2 (1953); *WHOM WE SHALL WELCOME* 200-03; VAN VLECK, *op. cit. supra* note 7, at 219-90; Bullitt, *Deportation as a Denial of Substantive Due Process*, 28 WASH. L. REV. 205 (1953) (deportation characterized as "administrative punishment for bad char-

ness."⁴⁴ At issue was a provision authorizing the expulsion of aliens twice convicted of "crimes involving moral turpitude." A majority upheld the act, over strong dissent, on the ground that "moral turpitude" was adequately defined by long legal usage.⁴⁵ Unlike this phrase, "psychopathic personality" has no "deep roots in the law." Nor does legislative history, judicial and administrative interpretation, or medical authority provide a workable definition.⁴⁶

Constitutional strictures as to vagueness might be circumvented if the *Powlowec* case were overruled and deportability were determined exclusively from evidence of pre-entry behavior. The "psychopath" clause then would not operate to penalize conduct in this country, and hence would look less like a criminal provision. As a result, the vagueness doctrine might be inapplicable.⁴⁷ Excluding evidence of postentry behavior, however, would not resolve yet another constitutional problem—that of providing adequate legislative standards for administrators determining what conduct supports a diagnosis of "psychopathic personality."

acter"); Note, 37 MINN. L. REV. 440, 456-58 (1953) (grounds for deportation "read . . . like a penal code").

Absent a private congressional bill, a deported alien can gain readmission only at the discretion of the Attorney General. Act of 1952, § 212(a)(17), 66 Stat. 183, 8 U.S.C. § 1182(a)(17) (1952).

44. 341 U.S. 223, 231 (1951).

45. *Id.* at 227-29, 232.

46. Lack of authority in support of any one definition underlay the dissent by four justices in *Jordan*. *Id.* at 232. "Moral turpitude," they said, was a term "knowingly conceived . . . in confusion" by Congress. *Id.* at 233. The same can be said of "psychopathic personality," see note 33 *supra*, to which judicial interpretation has only added confusion. See notes 16, 31 *supra*. The Supreme Court's refusal to condemn "sexual-psychopath" laws for undue vagueness, *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), is inapposite because these laws are aimed at a particular type of deviant behavior—sexual—while the "psychopath" clause of the immigration statute condemns virtually any "eccentric" conduct.

Administrative decisions construing "psychopathic personality" are likewise bewildering. See the Board of Immigration Appeals' decision in Brief for Appellant, pp. 34a-39a, 250 F.2d 436 (1957), discussed in note 28 *supra*. Compare 5 I. & N. Dec. 209 (1953); 2 I. & N. Dec. 68 (1944).

Medical authority on "psychopathic personality" also proclaims the inadequacy of the phrase. See note 33 *supra*. Unlike most other medical categories, it necessitates a personal estimate of community mores by psychiatrists, administrators, and courts. See note 38 *supra*. Thus, the question posed by the dissent in *Jordan* is pertinent: "How should we ascertain the moral sentiments of masses of persons on any better basis than a guess?" 341 U.S. at 238.

47. While removing the element of retribution for antisocial behavior within United States jurisdiction, this solution would neither lessen the severity of deportation as a deprivation, nor alter the fact that it is associated with misconduct. Thus, the vagueness doctrine still might be applied, especially since legislation has sometimes been held void for vagueness in civil proceedings simply because it defied rational interpretation and application. *E.g.*, *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233, 239 (1925); see Annot., 70 L.Ed. 322, 323 (1927) (collecting cases); Note, 62 HARV. L. REV. 77-78 n.5 (1948).

Congress may not constitutionally delegate to administrative officials the authority to impose serious sanctions unless it provides the officials with sufficiently precise statutory guidance.⁴⁸ This doctrine—originally utilized to preserve the separation of the legislative and executive branches⁴⁹—has also been expounded as a necessary prophylaxis against the creation of excessive and arbitrary administrative power.⁵⁰ Although the delegation doctrine is now seemingly defunct in the field of federal economic regulation,⁵¹ the Supreme Court has recently revived it to check inroads upon personal liberty, and has suggested a different rationale. In *Watkins v. United States*, the Court held that a resolution authorizing a congressional committee to investigate “un-American propaganda” delegated the power of the House of Representatives to compel testimony without “sufficient particularity” to preserve authority over and responsibility for the committee’s action.⁵² Accordingly, the Court reversed the contempt conviction of a witness who refused to testify before the committee. In the more recent case of *Kent v. Dulles*, the delegation doctrine was employed to justify the narrow interpretation of a statute authorizing the Secretary of State to grant or deny passports under “such rules

48. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935).

Although the issue of improper delegation has been frequently raised, only in *Schechter* and *Panama* did the Court find congressional delegations to administrative officials invalid. 1 DAVIS, ADMINISTRATIVE LAW § 2.01, at 76 (1958).

49. *Field v. Clark*, 143 U.S. 649, 692 (1892): “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.” *But see United States v. Grimaud*, 220 U.S. 506, 517 (1911): “It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations.”

50. See *Currin v. Wallace*, 306 U.S. 1, 17-18 (1939); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-42 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 432-33 (1935); *United States v. Goldsmith*, 91 F.2d 983, 985 (2d Cir.), *cert. denied*, 302 U.S. 718 (1937). See generally Jaffe, *An Essay on Delegation of Legislative Power* (pt. 2), 47 COLUM. L. REV. 561, 561-66 (1947).

51. See, *e.g.*, *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 142-46 (1941) (Fair Labor Standards Act); 1 DAVIS, ADMINISTRATIVE LAW § 2.15, at 150 (1958); GELLHORN & BYSE, ADMINISTRATIVE LAW 114 (1954). The courts have upheld broad delegations in large part because of Congress’ inability to provide detailed regulatory legislation in an expanding, fluctuating, complex economy. See, *e.g.*, *Opp Cotton Mills, Inc. v. Administrator*, *supra* at 145; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940); *Guisseppi v. Walling*, 144 F.2d 608, 622 (2d Cir. 1944).

52. 354 U.S. 178, 203-05 (1957) (alternative holding).

The majority opinion also held that the conviction must be reversed under the vagueness doctrine because the witness had been unable to evaluate the “pertinence” of the question and hence to determine whether or not he would be criminally liable if he failed to respond. *Id.* at 206-15. One Justice, by concurring specially on this ground alone, *id.* at 216-17, indicated that the delegation doctrine was vital to the majority’s decision. See also *Sacher v. United States*, 252 F.2d 828 (D.C. Cir.), *rev’d per curiam*, 356 U.S. 576 (1958).

as the President may designate.”⁵³ The Court reasoned that a literal construction of this language might render the statute an unconstitutionally broad delegation of power restricting an important liberty.⁵⁴ Implicit in these cases is the premise that representative rule cannot be effective if Congress, through sweeping statutory language, transfers the power to formulate fundamental policy.⁵⁵ In violation of this principal, Congress, by authorizing the delayed exclusion of “psychopathic” aliens, has vested in unelected officials virtually unlimited power to impose deprivations of personal liberty which may be more severe than those at issue in the *Watkins* and *Kent* decisions.⁵⁶ Consequently, if ordinary constitutional inhibitions govern the deportation of aliens, the “psychopath” clause delegates an impermissible degree of congressional power.

The “psychopath” clause may be invulnerable to the delegation doctrine,

53. 357 U.S. 116 (1958). The statute appears at 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1952).

54. 357 U.S. at 129-30.

55. Compare *United States v. Sharpnack*, 355 U.S. 286, 297-98 (1958) (dissenting opinion) (“The power to make laws under which men are punished for crimes calls for . . . serious . . . deliberation . . . [and] the exercise of legislative judgment.”); *Levine v. O’Connell*, 275 App. Div. 217, 224, 88 N.Y.S.2d 672, 677-78 (1949), *aff’d*, 300 N.Y. 658, 91 N.E.2d 322 (1950) (“[T]he orderly processes of representative government require that the Legislature should make . . . important decisions itself.”). See also *United States v. Minker*, 350 U.S. 179, 190 (1956) (“Congress has not provided with sufficient clarity that the subpoena power . . . extends over persons who are the subject of denaturalization investigations . . .”).

The majority in *Watkins* stated that the House committee’s charter defied judicial interpretation. 354 U.S. at 204. More accurately, judicial interpretation would have resulted either in ratifying whatever the committee did under its broad grant of authority or in substituting the Court’s own definition of “un-American” for the committee’s. Both alternatives were properly rejected, for this responsibility rested with the entire House of Representatives. See 1 DAVIS, ADMINISTRATIVE LAW §§ 2.04-.05 (1958); *cf.* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (1952) (concurring opinion).

While “many questions of basic policy may better be worked out by an agency than by a legislative body,” 1 DAVIS, ADMINISTRATIVE LAW § 2.15, at 149 (1958), and courts can control administrative discretion by judicial review, the question still remains which policy decisions may be made by the legislature rather than by administrative officials or courts. Relying to a considerable extent upon judicial review as a means of controlling administrative action under broad statutory language, some contemporary commentators suggest that courts are better suited than administrators to make important policy decisions without a clear mandate from Congress. See 1 *id.* § 2.15; COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 34 (1951); Nutting, *Congressional Delegations Since the Schechter Case*, 14 MISS. L.J. 350, 367 (1942). But this suggestion contradicts the institutional considerations which stimulated the growth of the administrative process. See, *e.g.*, GELLHORN & BYSE, ADMINISTRATIVE LAW 1-21 (1954). “[I]n final analysis the problem is one of determining what organs of the government are best qualified to determine particular policies.” 1 DAVIS, ADMINISTRATIVE LAW § 2.16, at 153 (1958).

56. Cases and materials cited note 43 *supra*.

however, if it implements congressional policy in foreign affairs.⁵⁷ Admittedly, broad executive authority to deport enemy aliens or to expel foreigners as a diplomatic measure may be necessary;⁵⁸ and, arguably, the exclusion of undesirable immigrants is connected with the conduct of foreign relations.⁵⁹ Hence, extensive delegations of congressional power in these areas can perhaps be justified. But to view the deportation of an alien psychopath long resident in the United States as effectuating foreign policy or as combating an external danger is absurdly unrealistic. The judiciary can require more precise statutory standards in this type of case without infringing upon any legislative prerogative necessary to the conduct of foreign affairs.⁶⁰

57. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-22 (1936) (congressional delegations of power to the President for the conduct of foreign relations need not satisfy the requirement of adequate standards). In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950), an exclusion case, the Court, citing *Curtiss-Wright*, rejected a defense predicated on the delegation doctrine, but explicitly left undecided the doctrine's applicability in deportation cases.

58. Emergency executive authority over aliens is found in the Act of 1952, § 215, 66 Stat. 190, 8 U.S.C. § 1185 (1952), and in the Alien Enemy Act §§ 1-3, 1 Stat. 577 (1798), as amended, 50 U.S.C. §§ 21-23 (1952). See *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952) (the judiciary should not "deprive our . . . Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities").

59. On this theory, the courts have denied virtually all constitutional protection to aliens in exclusion proceedings. *Chinese Exclusion Case*, 130 U.S. 581, 603-06 (1889); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1903); *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

The power of Congress to exclude has been held immune from procedural as well as substantive limitations. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 214 (1953); KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* 39-53 (1953). The present statute provides only a limited hearing in exclusion proceedings which may be denied at the Attorney General's discretion. Act of 1952, §§ 235, 236, 66 Stat. 198-200, 8 U.S.C. §§ 1225-26 (1952).

Judicial intervention on constitutional grounds may not be foreclosed, however. The *Mezei* and *Knauff* cases, *supra*, gave rise to strong dissenting opinions asserting the requirement of procedural due process in exclusion proceedings; and *United States ex rel. Johnson v. Shaughnessy*, 336 U.S. 806 (1949), held that an exclusion proceeding in violation of administrative regulations constituted an improper hearing.

60. Although the delegation doctrine has never been successfully urged against an immigration statute, two cases suggest that deportation provisions are not immune from its requirements. *Carlson v. Landon*, 342 U.S. 524, 544 (1952) ("This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards."); *Rubenstein v. Brownell*, 206 F.2d 449 (D.C. Cir. 1953) (delegation argument considered; held, "discretion not an arbitrary and capricious one").

The delegation of power to deport an "undesirable resident" under the Act of May 10, 1920, ch. 174, §§ 1-3, 41 Stat. 593, was approved in *Mahler v. Elby*, 264 U.S. 32, 40-41 (1924). The Court rejected an argument based on the delegation doctrine because "The sovereign power to expel aliens . . . is vested in the political departments . . . [and] Congress can not in the nature of things, designate all the persons to be excluded [sic]." *Id.* at 40. The Court also reasoned, however, that "previous legislation of a

Adequate standards cannot be provided by judicial interpretation, as in the *Kent* case,⁶¹ since no nucleus of accepted meaning inheres in the phrase "psychopathic personality."⁶² Accordingly, the courts should declare the provision unconstitutional. To shirk this declaration and say that the remedy for unlimited administrative discretion must come from Congress alone, as was asserted in *Powlowec*,⁶³ is to ignore the delegation doctrine. This doctrine is essential to the integrity of representative government as conceived by the advocates of judicial deference to Congress.⁶⁴ Moreover, for those commentators and jurists who read the Constitution as limiting popular sovereignty, the *Powlowec* solution means the abdication of an essential judicial function. In their view, the judiciary is the institution responsible for checking the majority abuse of minority groups such as aliens.⁶⁵

similar character" provided criteria which limited executive discretion. *Ibid.* Moreover, "undesirable resident" was limited by the statute to aliens who had violated specifically named war legislation. In any event, the Court's discussion of the delegation issue was dictum, since the case was reversed on other grounds. *Id.* at 45-46.

61. In *Kent*, it was not necessary to strike down the statute. A considerable body of precedent enabled the Court to frame a narrow interpretation without relying exclusively upon its own or the Secretary of State's discretion. 357 U.S. at 124-28.

62. True, courts have with some difficulty given content to elastic statutory standards for naturalization, such as "good moral character" and "attached to the principles of the Constitution," currently prescribed by the Act of 1952, § 316(a), 66 Stat. 242, 8 U.S.C. § 1427(a) (1952). See, *e.g.*, *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949); *United States v. Schwimmer*, 279 U.S. 644 (1929), overruled in *Girouard v. United States*, 328 U.S. 61 (1946). But these phrases are more limited by precedent than "psychopathic personality." Annot., 22 A.L.R.2d 244 (1952); Annot., 75 L. Ed. 1316 (1931). Moreover, denial of citizenship is not as severe a deprivation as deportation; hence, such denial can more properly be delegated to administrative or judicial discretion. See text accompanying note 48 *supra*.

63. 33 F.2d at 268.

64. It is of course true that when a court holds that a legislature has left too much latitude to an administrative tribunal, it overrules a decision of the legislature as to its powers; but there appears to me a tenable distinction between that situation and one where a court overrules the actual exercise of legislative authority; for the delegation of authority is *pro tanto* the abdication of authority over the subject matter by a transfer to others of authority that the legislature alone may exercise. Once we assume that courts are to set the boundaries of each "Department's" authority, it follows that they must say where legislation begins, however hazy its boundaries may be.

HAND, BILL OF RIGHTS 49 (1958).

A constitution is primarily an instrument to distribute political power; and so far as it is, it is hard to escape the necessity of some tribunal with authority to declare when the prescribed distribution has been disturbed.

HAND, THE SPIRIT OF LIBERTY 159 (2d ed. Dilliard 1953).

65. "[The Constitution] is the guarantee of the minority, who, when threatened by the impatient vehemence of a majority, can appeal to this permanent law, finding the interpreter and enforcer thereof in a court set high above the assaults of faction." 1 BRYCE, THE AMERICAN COMMONWEALTH 273 (rev. ed. 1913); see *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-40 (1943) ("One's right to life, liberty,

If Congress, as a matter of legislative policy, utilizes delayed exclusion to correct oversights occurring in the examination of entering aliens, it should not only supply statutory criteria which meet the requirements of the delegation doctrine but should also subject deportation for previous excludability to a statute of limitations.⁶⁶ A requirement that grounds for exclusion overlooked at time of entry be discovered within one year should not prove administratively impractical. Were Congress to forbid proceedings initiated thereafter, it would avoid the cruel uprooting of established residents on the basis of long-past conditions or events.

Preferably, Congress should simply abolish the delayed exclusion of psychopaths. The proscribed condition straddles the borderline between mental health and mental illness.⁶⁷ Its diagnosis is difficult under the best of conditions and is persistently embroiled in medical controversy. More important, the public would be adequately protected in the absence of the "psychopath" clause. The condition is not hereditary, as Congress once assumed.⁶⁸ Dangerous antisocial behavior will ordinarily result in a criminal sentence or commitment to an institution. If an alien is convicted of "crimes involving moral turpitude" or institutionalized at public expense, he is deportable under other provisions of the Immigration Act.⁶⁹ In sum, the delayed exclusion of alien psychopaths is an unnecessary as well as undesirable feature of immigration policy.

and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."). Some historical roots of this view and objections to it are discussed in Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 193-210 (1952).

For the suggestion that constitutional rights of citizens are linked to those of aliens, see Comment, 20 U. CHI. L. REV. 547 (1953). Cf. *Knauer v. United States*, 328 U.S. 654, 675-76 (1946) (dissenting opinion).

Approximately 2.8 million aliens reside in the United States. 1957 IMMIGRATION & NATURALIZATION SERVICE ANN. REP. 7.

66. The five-year limitation set by the Immigration Act of 1917, note 10 *supra*, was not carried over into the Act of 1952 because "if the cause for exclusion existed at the time of entry, it is believed that such aliens are just as undesirable at any subsequent time as they are within the 5 years after entry." S. REP. NO. 1515, 81st Cong., 2d Sess. 389 (1950).

No one has suggested any sound reason why the purpose of limitations—recognition of the unfairness involved in requiring a person to make a defense long after the event, when it is difficult or impossible to assemble witnesses and evidence—does not apply to immigration matters at least with equal force as to prosecution for serious crimes.

WHOM WE SHALL WELCOME 198. A limitation period of ten years was recommended. *Ibid.*

67. NOYES 410; WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 96 (1933).

68. See note 10 *supra*.

69. Act of 1952, § 241(a)(3)-(4), 66 Stat. 204, 8 U.S.C. § 1251(a)(3)-(4) (1952).