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Alien--Suspension of Deportation--Use of Confidential Information

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CASE COMMENTS

ALIEN — SUSPENSION OF DEPORTATION — USE OF CONFIDENTIAL INFORMATION. — Petitioner was ordered deported because he had been a member of the Communist Party from 1935 to 1940. Although he met the prerequisites to the granting of relief as stated in §244(a)(5) of the Immigration and Nationality Act, 66 STAT. 215, 8 U.S.C. §1245 (a)(5) (1952), his application for suspension of deportation was denied on the basis of confidential information never disclosed to him. *Held,* that the Attorney General's regulation permitting the use of undisclosed confidential information was consistent with §244(a)(5), and did not violate due process. *Jay v. Boyd,* 350 U.S. 931 (1956) (5-4 decision).

Petitioner's deportation hearing was held in accordance with congressional procedural demands, the order being based only on the evidence produced at the inquiry. §242(a)(b) of the Immigration Act. In the absence of §244 (a)(5), petitioner would have been deported immediately without recourse because of his Communist affiliation. *Galvan* v. *Press,* 347 U.S. 522 (1954); *Harisiades v. Shaughnessy,* 342 U.S. 580 (1951). However, §244(a)(5) extended him the right to apply for suspension of deportation, and to submit evidence to meet the requirements therefor. If these requirements had not been met, he would have been deported. *Vichos* v. *Brownell,* 230 F.2d 45 (D.C. Cir. 1956). Although he did meet the requirements, his application was denied under §244(a), granting the Attorney General the discretionary power to grant or refuse such applications; and under 8 C.F.R. §244.3 (1952), permitting such determinations to be made on the basis of confidential information.

Prior to this case, the Supreme Court had decided in similar cases based on the use of confidential information: (1) nonresident aliens may be excluded, *United States ex rel. Knauff v. Shaughnessy,* 338 U.S. 537 (1948); (2) resident aliens may not be excluded, *Kwong Hai Chew v. Colding,* 344 U.S. 590 (1953); (3) neither resident nor nonresident aliens may be expelled. See *United States ex rel. Mezei v. Shaughnessy,* 345 U.S. 206 (1953); *Wong Yang Sung v. McGrath,* 339 U.S. 33 (1945).

The disturbing, and perhaps the most distinctive feature of the principal case is its minute departure from years of consistent decisions upholding the proposition that resident aliens acquire the same constitutional protection of due process of law as is afforded

a citizen of this country. *United States ex rel. Knauff v. Shaughnessy, supra; Kwong Hai Chew v. Colding, supra;* Comment, 67 HARV. L. REV. 99 (1954). Justice Clark stated in *United States ex rel. Mezei v. Shaughnessy, supra,* at 212: "It is true that aliens who have passed through our gates, even though illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law."

Admitting that the resident alien and the citizen are equals so far as the fifth amendment to the Constitution is concerned, this decision may conceivably have some future adverse effect on the constitutional rights of citizens, and the use of confidential information in proceedings against them. The possibility of such an infringement should not escape the scrutiny of those who adhere to the letter and the spirit of the Constitution. The fact that an alien is involved in this case is inadequate refutation or assurance that the decision will not be extended in the future. The mere fact that the decision was made is sufficient cause for concern.

It must be admitted that the court was faced with the task of weighing certain considerations on each side. The government implies essentially three reasons for using such information, asserting that the presentment in open court of certain facts would: (1) disclose the identity of secret service agents, bringing an end to their activity as such; (2) expose government informers who are in positions to supply pertinent information; (3) necessitate revealing names and data concerning suspected or known, unsuspecting subversives, thereby disclosing the government's awareness of their activities. See *Parker v. Lester,* 112 F. Supp. 433 (N.D. Cal. 1953).

On the other side are the following considerations: (1) the possible loss of constitutionally guaranteed rights; (2) the use of inadequate, false, or generally inadmissible evidence; (3) the inability, through the denial of the right of cross-examination, to expose the prejudice, mistake, veracity, credibility, and character of the government's secret witness. See *Mesatrosh v. United States,* 77 Sup. Ct. 1 (1956); *Jay v. Boyd, supra,* (dissenting opinion of Justice Black) at 744, (dissenting opinion of Justice Frankfurter) at 749; *Matuso v. United States,* 229 F.2d 335 (5th Cir. 1956).

It should be noted that the decision in the principal case motivated General Joseph M. Swing, Immigration Commissioner, to reevaluate the procedure of using confidential information. He points out that such information will be used only when "the most compel-

ling reasons involving the national safety or security are present", and that the Commissioner himself—not a subordinate as in the past—will certify that such secrecy is necessary. N.Y. Times, Nov. 4, 1956, §4E, p. 12, col. 2.

While the recognition of the problem is of some consolation, it may be argued that the doubtful use of confidential information will not be rectified by a mere shift in administrative responsibility.

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CONSTITUTIONAL LAW—SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION—NATUROPATHS REQUIRED TO BE MEDICAL DOCTORS.—Plaintiffs brought an original action in the supreme court of South Carolina for a declaratory judgment that an act making it unlawful for any person, whether previously licensed or not, to practice naturopathy in the state, unless he meets certain prescribed qualifications, was unconstitutional. *Held*, that the act does not deprive naturopaths of their property rights without due process of law or deny them equal protection of the law. *Dantzler v. Callison*, 94 S.E.2d 177 (S.C. 1956).

The power of the states to regulate and license the practice of certain callings has been universally accepted and stands virtually uncontroverted. *Lambert v. Yellowley*, 272 U.S. 581 (1926); *Hawker v. New York*, 170 U.S. 189 (1898); *Dent v. West Virginia*, 129 U.S. 114 (1889). A person's business, profession or occupation is "property" within the meaning of the constitutional provision as to due process of law. *People v. Love*, 289 Ill. 304, 131 N.E. 809 (1921). Thus, while the legislature can regulate a calling, it cannot prohibit it, unless the calling is inherently injurious to the public health, safety or morals, or has a tendency to become so. *Adams v. Tanner*, 244 U.S. 325 (1917). This power of regulation or prohibition is exercised by the legislature, and the courts refuse to consider the wisdom behind the action, confining themselves to the constitutional limitations which may be involved. *Zahn v. Board of Public Works*, 274 U.S. 325 (1927); *Adams v. Tanner, supra.* These limitations relate to the reasonableness of the action taken. When the legislature makes requirements which have no relation to a calling or are unattainable by reasonable study and application they may operate to deprive an individual of his constitutional property rights. *Butcher v. Maybury*, 8 F.2d 155 (W.D. Wash. 1925);