

COLYER V. SHEFFINGTON.<sup>1</sup>

In the case of Colyer v. Sheffington, we have a writ of *habeas corpus* commanding the Commissioner of Immigration to show cause why certain aliens held for deportation should not be given their liberty.

The facts were these: In the summer of 1919, the Socialist Party split, and as an offshoot the Communists and the Communist Labor Parties were formed. The Department of Justice made the determination that alien membership in either party constituted sufficient ground for deportation.<sup>2</sup> A wholesale raid was planned whereby the aliens and evidence of their affiliation with the Communist or Communist Labor Party would be secured. Through a system of spies, "under cover informants" within the parties, meetings generally were called for the night of January 2, 1920, and the assemblies were raided. Four hundred and forty aliens were thus sent to Deer Island for deportation proceedings to be in form and record by the Department of Labor, though in effect predetermined by the Department of Justice. As a result of these proceedings, the petitioners were held for deportation.

We may well classify the issues under two heads: First, has an alien held for deportation a right to the writ of *habeas corpus*; and, second, what acts of the deportation are reviewable on *habeas corpus*? In considering the first main issue, we have as established law that there is no constitutional restriction upon the power of Congress to expel aliens. An invitation once extended to an alien to come within our borders may be withdrawn, for he has no vested right to remain.<sup>3</sup> Aliens do, however, have the constitutional right under the Fifth Amendment not to be deprived of life, liberty or property without due process of law.<sup>4</sup> And aliens who are deprived of their liberty through deportation proceedings may have their legal right to liberty tested on *habeas corpus* proceedings.<sup>5</sup>

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1. 265 Fed. 17.

2. The Department of Labor adopted this determination.

3. Chae Chan Ping v. United States, 130 U. S. 581.

4. 118 U. S. 356.

5. Whitfield v. Hangers, 222 Fed. 745.

With the right to the writ of *habeas corpus* established, we are next concerned with the determination of the acts of the deportation proceedings of the Department of Labor that are conclusive, and of those that are reviewable by the court on *habeas corpus*.<sup>6</sup> Although the administration of the immigration laws has been intrusted by Congress to the Department of Labor, and under the immigration laws authority is vested in the Secretary of Labor to provide rules and regulations for enforcing the provisions of the acts;<sup>7</sup> and although this case is the testing by the writ of *habeas corpus* of the acts of an administrative tribunal that has been given ABSOLUTE AUTHORITY by Congress, decisions of all administrative tribunals are reviewable where the requirements of DUE PROCESS OF LAW have NOT been observed.

An examination of the deportation proceedings affecting the petitioners brings one to the conclusion that due process of law was not observed:

On December 31, 1919, before the raid, and two days after the date of a CONFIDENTIAL letter from the acting Secretary of Labor to the Boston Commissioner of Immigration setting forth the plan of the proposed raid, there was a change made by said acting Secretary of Labor of a rule for the conducting of hearings (Rule 22, Subdivision 5b). It previously read: "At the beginning of the hearing under the warrant of arrest, the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel."

This rule was changed to read: "Preferably at the beginning of the hearing under the warrant of arrest, or, at any rate, as soon as the hearing has proceeded sufficiently in the development of facts to protect the government's in-

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6. An outline of the acts of an administrative tribunal which will be considered on *habeas corpus* proceedings will be found in an article by E. H. Grimm in 3 St. Louis Law Review 140.

7. Judge Anderson clearly states that the Department of Justice has no more to do with the administration of the Immigration laws than does the Department of Interior, but the information once in the hands of the Department of Labor, it is immaterial from whence it came, and that the deportation proceedings are not void *ab initio*. The further activity of the Department of Justice may, however, prevent a fair trial, or "due process of law."

terests, the alien shall be allowed to inspect the warrant of arrest and evidence on which it was issued and thereafter may be represented by counsel." On January 28, 1920, about a month after the modification of the rule, and after MOST OF THE HEARINGS OF THE ALIENS NETTED ON THE NIGHT OF January 2, 1920, WERE HAD, the Secretary of Labor sent the following telegram to the Immigration Service in Boston: "By the direction of the Secretary, the paragraph on the subject of hearings shall be restored to the form in which it was previous to the admendment of December 31, 1919."

Though we might go so far as to consider the proceedings tainted with fraud, Judge Anderson considers it along with the rest of the hearing as being a failure of "due process of law."<sup>8</sup> Deliberately to plan to cut off these aliens from the advice and assistance of counsel until they are involved in apparent admissions that they are members of or affiliated with an organization teaching the overthrow of this government by force and violence, the practical equivalent of a charge of treason if against citizens, is utterly inconsistent with every notion involved in the conception of "due process of law." As to the rights of the Secretary of Labor to change the rule, Mr. Frankfurter, for the petitioners, puts it as follows: "Now, if there is one thing that is established in the law of administration, I take it that it is that a rule cannot be repealed specifically to affect a case under consideration by the administrative tribunal; that is, if there is an existing rule which protects certain rights, it violates every sense of decency, which is the very heart of due process, to repeal that protection just for the purpose of accomplishing the ends

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8. The hearing was one of a non-English speaking people, say a Russian peasant, arrested suddenly in the night without any warrant or explanation of the arrest, and given no instructions except to answer a set of questions which were meant to secure a confession of membership in the Communists or Communist Labor Party. In this frightened state, after being held first in jail, then in the city prison at Deer Island, they were called to the hearing where they had no counsel, and often an interpreter, whom they could but partly understand, and here the inspector was assisted by agents of the Department of Justice, who had stringent instructions from the Department to make every possible effort to obtain evidence of the alien's membership in one of the proscribed parties.

of the case which has come before the administrative authority." To that, Judge Anderson says, the Government gave no convincing answer.

As to the decision that membership in the Communist or Communist Labor Party was sufficient ground for deportation, we find that by the Act of October 16, 1918, the pertinent part of which follows: "Aliens who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the government of the United States \* \* \* shall upon the warrant of the Secretary of Labor be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917." The Secretary of Labor ruled that the Communist Party is a "force or violence" party within the meaning of the foregoing act. What is meant by "force or violence" party, being the interpretation of a statute, is a question of law and reviewable.<sup>9</sup> The determination whether or not the Communist Party comes within the interpretation is a mixed question of law and fact, but whether there were sufficient facts before the Secretary of Labor that the Communist Party is a "force or violence" party is a sufficiently separate question of law for the Court to review.<sup>10</sup> Judge Anderson ruled, though with a flinching of doubt,<sup>11</sup> that the Communist Party advocates the "general strike" as their political weapon, and that the "general strike" is not "force or violence" for the "overthrow" of the government, as laid down in the Act of October 16, 1918. This case has been appealed to the Supreme Court, and we wait with much interest the final ruling on this point.<sup>12</sup>

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9. *Gegiow v. Uhl*, 239 U. S. 3.

10. *Am. School of Magnetic Healing v. McAnnulty*, 187 U. S. 94.

11. Judge Anderson infers that were it possible he would refer the case to the Supreme Court without a decision but states that such is not possible, and that he must first render a decision and the proper appeal must be taken.

12. Judge Knox, district judge for the Second Circuit in New York, has since ruled that the Communist Party is a party advocating the overthrow of the government by "force and violence" through means of the "general strike."