RECENT CASES

ALIENS — IMMIGRATION AND NATIONALITY ACT — BRIEF EXCURSION OUTSIDE COUNTRY'S BORDERS BY RESIDENT ALIEN MAY NOT SUBJECT HIM TO CONSEQUENCES OF AN ENTRY ON HIS RETURN.

Rosenberg v. Fleuti (United States Supreme Court 1963).

Plaintiff, an alien, was originally admitted to the United States for permanent residence in 1952 and has been here continuously except for a visit "of about a couple of hours" duration to Mexico in 1956. The Immigration and Naturalization Service sought to deport plaintiff on the ground that at the time of his return in 1956, he was *afflicted with psychopathic personality.* The District Court granted the government's motion for summary judgment. The Ninth Circuit Court of Appeals set aside the deportation order, holding that as applied to plaintiff section 241(*a*)(1) of the 1952 Immigration and Nationality Act was unconstitutionally void for vagueness as applied to a non-compulsive homosexual. On certiorari, by a 5-4 decision, the United States Supreme Court held: judgment vacated. It was unnecessary to decide the constitutional issue since the threshold question was decided against the government. An innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been *intended* as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an *entry* into this country on his return. *Rosenberg v. Fleuti,* 374 U.S. 449 (1963).

All aliens seeking to make an *entry* as defined in section 1101 (*a*)(13) of the Immigration and Nationality Act are subject to examination and exclusion.[1] Even an alien who has been formerly admitted for permanent residence and is returning from a temporary visit abroad is deemed to have made an entry for purposes of examination and possible exclusion.[2] Since an alien may be deported for acts occurring within five years of his *entry,* the interpretation of this term is crucial in the administration of the deportation laws.[3] The 1952 Act defines entry as:

> . . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having lawful permanent residence in the United States shall not be regarded as making an entry into

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1 8 U.S.C. § 1101-1503 (1952).
2 United States *ex rel.* Schimmger v. Jordan, 164 F. 2d 633 (7th Cir. 1948).
3 See Note, *Development in the Law of Immigration,* 66 HARV. L. REV. 643, 663-65.

> the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was *not intended* or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary.[4] (Emphasis added.)

The dialogue between the courts and Congress concerning judicial supervision of immigration matters is hardly unique. The fact that it is conducted on the level of statutory construction, however, may prove on analysis to be deceptive.[5] Both logic and history indicate that the Supreme Court may temper the will of Congress as much in construing a statute as in striking one down on constitutional or other grounds.[6] The judicial preference for avoiding constitutional issues is based on a reluctance to foreclose an area prematurely, in the hope that congressional response will either accommodate itself to the court's views or further illuminate the area in question.

Early immigration laws used the term *alien immigrant* and the general holding was that an alien returning from a temporary stay abroad was not within that term and could not lawfully be treated as an immigrant on his return.[7] However, in the Immigration Act of March 3, 1903, the word *immigrant* was omitted and this form has been preserved in all subsequent legislation;[8] the acts instead refer to the admission of *aliens* to the United States. In view of this change, aliens returning to the United States after a temporary absence stood on the same footing as aliens seeking admission for the first time except as Acts of Congress provide otherwise.[9]

The definition of *entry* as applied for various purposes in our immigration laws has evolved judicially,[10] becoming encased in statutory form only with the inclusion of section 101(*a*)(13) in the 1952 Act. Normally the question of whether an entry has been made by

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4 8 U.S.C. § 1101(*a*)(13) (1952).

5 In Kessler v. Strecher, 307 U.S. 22 (1939), the Court construed the 1918 Act, which authorized deporation for membership or affiliation with the Communist Party, to mean *present* membership or affiliation. The *Alien Registration Act* of 1940, § 23, (now U.S.C. § 1182(28), 1251(6); amend. 1958) reversed this interpretation. Then, in Bridges v. Wixon, 326 U.S. 135 (1945), the Court restated the limited interpretation of membership as handed down in the Strecher decision.

6 E.g., Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), where a deportation hearing at which the presiding inspector functioned both as prosecutor and judge was held to be a violation of the *Administrative Procedure Act.*

7 *In re* Panzara, 51 Fed. 275 (D.C. N.Y. 1892);
In re Martorelli, 63 Fed. 437 (C.C. S.D. N.Y. 1894);
In re Buchsbaum, 141 Fed. 221 (D.C. Pa. 1905).

8 Annot., 57 A.L.R. 1131 (1928).

9 *Ibid.*

10 United States *ex rel.* Volpe v. Smith, 289 U.S. 422 (1933).

an alien is susceptible of a precise determination: Was the United States border crossed by the alien? However, for the purpose of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term *entry* has not been found to be as apparent.

In the past, statutory interpretation has been limited to the question of *voluntariness*[11] rather than *briefness.*[12] It was held that there was no new entry where an alien pupil in a state public school went with her class, under her teacher's direction, across Lake Erie for a day's picnic;[13] where an alien rode a sleeping car on a trip to Detroit and without his knowledge the route of the train was through Canada;[14] or where there was a departure from the United States into foreign waters which included an unscheduled stop in Canada en route from Alaska.[15]

These cases liberalized the interpretation of *voluntariness* and paved the way for the decision in the principal case. In *Di Pasquale v. Karnuth,*[16] Judge Hand recognized that "Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment."[17]

In *Kwong Hai Chew v. Colding,*[18] it was held that a returning resident alien is entitled as a matter of due process to a hearing on the charge underlying any attempt to exclude him. The holding supports the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights.

Although there are numerous cases[19] where the appellate courts have applied the strict re-entry doctrine to aliens who left the country for brief visits to Canada or Mexico or elsewhere, two courts have applied the doctrine with express reluctance and explicit recognition of its harsh consequences.[20] There are also two instances in which district judges refused to hold that aliens who had been ab-

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11 Delgadillo v. Carmichael, 332 U.S. 388 (1947).
12 Jackson v. Zurbrich, 59 F. 2d 937 (6th Cir. 1932); Pemental-Navarro v. Del Guercio, 256 F. 2d 877 (9th Cir. 1958).
13 United States *ex rel.* Valenti v. Karnuth, 1 F. Supp. 370 (D.C.N.Y. 1932).
14 Di Pasquale v. Karnuth, 158 F. 2d 878 (2d Cir. 1947).
15 Yukio Chai v. Bonham, 165 F. 2d 207 (9th Cir. 1947).
16 158 F. 2d 878 (2d Cir. 1947).
17 *Id.* at 879.
18 344 U.S. 590 (1953).
19 E.g., *Ex Parte* Parianos, 23 F. 2d 918 (9th Cir. 1928); United States *ex rel.* Medich v. Burmaster, 24 F. 2d 57 (8th Cir. 1928); United States *ex rel.* Fisk v. Riemer, 97 F. 2d 1020 (2nd Cir. 1938).
20 Jackson v. Zurbrick, 59 F. 2d 937 (6th Cir. 1932); Zurbrick v. Woodhead, 90 F. 2d 991 (6th Cir. 1937).

sent from the country only briefly had made an *entry* upon their return.[21]

In arriving at its decision in *Rosenberg*, the Court looked to congressional intent.[22] It pointed to the fact that in codifying the definition of *entry* in the 1952 Act, Congress was ameliorating the harsh results visited upon resident aliens by the rule of *Volpe v. Smith*[23] and that the bill gave due recognition to judicial precedents.[24] The Court concluded that to effectuate congressional purpose, *intent* would have to be construed as meaning an intent "to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[25] Factors relevant to the determination of this intent are the length of time the alien is absent, the purpose of the visit, and a need of the alien to procure travel documents.[26]

While the Court's interpretation of congressional intent is rather tenuous,[27] the end result seems only fair. The insignificance of a brief trip to Mexico or Canada bears little relation to the punitive consequence of subsequent excludability.

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WORKMEN'S COMPENSATION — WIDOW IS ENTITLED TO DEATH BENEFITS. DECEASED HUSBAND, RECIPIENT OF A FOOTBALL SCHOLARSHIP, IS AN EMPLOYEE OF HIS COLLEGE WITHIN THE MEANING OF THE WORKMEN'S COMPENSATION ACT. *Van Horn v. Industrial Accident Commission* (Cal. App. 1963).

Van Horn, an outstanding athlete while in high school, was recruited by California State Polytechnic Institute for its football team. In accordance with the promises made to him by the school coach, he was paid $50 at the beginning of each academic quarter, and another sum to defray his rental expenses during the football season. In addition, he was paid an hourly wage to line the football field;

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21 United States *ex rel.* Valenti v. Karnuth, 1 F. Supp. 370 (D.C. N.Y. 1932); Annello *ex rel.* Annello v. Ward, 8 F. Supp. 797 (D.C. Mass. 1934).
22 374 U.S. at 457.
23 289 U.S. 422 (1933).
24 Rosenburg, 374 U.S. at 457.
25 *Id.* at 462.
26 *Ibid.*
27 Previous legislation, by making administrative orders of deportation and exclusion final, reflected a consistent congressional desire to limit judicial participation in immigration matters, 3 DAVIS, *Administrative Law Treatise* § 23.08, See also, Note, 71 YALE L.J. 760 (1962).