Signed Copy

Supreme Court of the United States

October Term, 1952

No. 722

CYRIL LIONEL ROBERT JAMES,
Petitioner,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service of the Port of New York,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDICES ANNEXED

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EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service of the Port of New York,

Respondent.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, rendered the 11th day of March, 1953 which affirmed the order of the United States District Court in and for the Southern District of New York, rendered the 1st day of October, 1952, dismissing your petitioner's petition for the writ of habeas corpus theretofore allowed.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated March 11, 1953, has not yet been reported, but a certified copy of the same is annexed to the Transcript of Record presented herewith.

The first opinion of the District Court, dated August 28, 1952, which conditionally sustained the writ of habeas corpus, but upon which no order was entered, is unreported. It appears in full, however, in the Transcript of Record (R. ff. 70-72).[1]

The second opinion of the District Court, dated September 26, 1952, upon which an order was entered October 1, 1952, granting respondent's motion to reargue and dismissing the writ of habeas corpus, is reported at 107 F. Supp. 280 and appears in full in the Transcript of Record (R. ff. 103-144).

[1] References to folio numbers of the Record below are indicated by "R. f." References to folio numbers of the Appendix to this petition are indicated by "A. f."

In conformity with Rule 38, paragraph 7, of this Court, this Court is being furnished with "ten copies of the Record as printed below together with the proceedings and opinion" in the Court of Appeals. However, this Court's attention is drawn to the fact that the administrative file was so voluminous, including your petitioner's published books, that the parties below stipulated to dispense with the printing of said administrative file (R. f. 132). That stipulation is expected to be in compliance with Rule 38, paragraph 8, of this Court, which enjoins counsel to "stipulate to omit from the printed record all matter not essential to a consideration of the questions presented by the petition for the writ."

For the convenience of the Court of Appeals and of this Court, an Appendix was printed, containing the three administrative opinions, as well as excerpts from the administrative hearing and the Internal Security Act's "Statement of Findings and Purposes", and the full text of 8 U. S. C. §137 (as amended by the Internal Security Act).

Jurisdiction

The judgment of the Court of Appeals was rendered and filed the 11th day of March, 1953. The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C., §1254(1) and §2101(e). The jurisdiction of this Court further appears from Rule 38, subd. 5(b) of the Rules of this Court.

Questions Presented

(1) Whether it was an abuse of discretion for the Attorney General to apply the Internal Security Act of 1950 (64 Stat. 1006), which was in terms directed against "the world Communist movement • • • subservient to the most powerful existing Communist totalitarian dictationship",[2] to an alien who had in the past held Marxist convictions but was nevertheless conceded to have been, at all times, a foe of said "world Communist movement" and of such "world-wide conspiracy".[3]

(2) Whether the Internal Security Act of 1950, if construed to apply to life-long anti-Communists who nevertheless held Marxist convictions, is, as thus construed, repugnant to the First and Fifth Amendments to the United States Constitution.

(3) Whether the Attorney General, by determining an alien's application for suspension of deportation in

[2] Congressional Statement of Findings and Purposes, Act of September 23, 1950 (64 Stat. 1006), 50 U. S. C. §781 (1)(6) (A. ff. 71-73).

[3] *Ibid.*, 50 U. S. C., §781(15) (A. f. 75).

the light of the Internal Security Act of September 23, 1950, which was enacted subsequent to the close of the administrative hearings, offended the Fifth Amendment's guarantee of procedural due process, in that said alien was deprived of the opportunity to meet the issues raised by the subsequently enacted legislation.

The Statutes Involved

The two statutes directly involved are (1) the Immigration Act of February 5, 1917 (39 Stat. 874), and (2) the Internal Security Act of September 23, 1950 (64 Stat. 1006), to the extent that the latter amended and revised the Immigration Act of October 16, 1918 (40 Stat. 1012).

During the pendency of this proceeding, the pertinent sections of the 1917 Act appeared as 8 U. S. C. §§155(c) and (d), and the pertinent sections of the 1950 Internal Security Act appeared[4] as 8 U. S. C. §§137 and as 50 U. S. C. §781.[5]

The pertinent portion of 8 U. S. C. §155(c) read:

> "§155(c) In the case of any alien (other than one to whom subsection (d) of this section is applicable)

[4] The past tense "appeared" is used because, since the inception of the instant proceedings, the Immigration and Nationality Act of June 27, 1952 (66 Stat. 280) repealed the above-mentioned sections appearing at Title 8, U. S. C., Chapter 6, Subchapter II and gathered them together, but in a revised form, at Title 8, U. S. C., Chapter 12, Subchapter II. However, §405(a) of the 1952 Act states that, as to proceedings pending on the effective date thereof, "the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in full force and effect."

[5] This is the Congressional Statement of Findings and Purposes. The Appendix to this petition contains excerpts from this section (A. ff. 71-75).

> who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien. * * *"

The pertinent portion of 8 U. S. C. §155(d) read:

> "§155(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) section 137 of this title * * *."

However, §137, which was enacted by the Act of October 16, 1918, was subsequently amended, revised and expanded by the Internal Security Act of September 23, 1950;[6] furthermore, the 1950 Act elaborated upon the now amended §137 by adding thereto subdivisions §§137-1 to 137-8. And in addition, the 1950 Act set forth in Title 50 U. S. C. §782 an entirely new set of definitions, in the light of which the revised §§137 (and its new subdivisions §§137-1 to 137-8) were commanded to be read.

Thus, the Internal Security Act of 1950 increased the classes of aliens deportable under 8 U. S. C. §137 and, by operation of 8 U. S. C. §155(d), therefore ineligible to apply for suspension of deportation pursuant to 8 U. S. C. §155(c).

[6] Section 137, as amended by the Internal Security Act of 1950, appears in full in Appendix F to this petition.

Statement of Matter Involved

The petitioner, a West Indian by birth and a subject of Her Majesty Queen Elizabeth, was legally admitted to the United States on May 3, 1939 as a visitor for a five months' period. He was served with a warrant of arrest in December, 1947, released immediately by the Attorney General on a bond of $500, and advised to appear for hearings to show cause why he should not be deported for having overstayed his leave. The terms of the bond permitted him to travel about the United States and, until he voluntarily surrendered himself at Ellis Island on June 10, 1952, he supported himself and his family by lecturing before church, university and lay groups throughout the United States (R. ff. 11, 12, 15).

The administrative hearings began in November, 1949 and closed in August, 1950 (R. f. 30). Petitioner did not dispute the charge that he had overstayed his leave (A. f. 36).[7] But in the course of the hearings he made formal application for suspension of deportation, pursuant to §19(c) of the Immigration Act of February 5, 1917 [Title 8 U. S. C. 155(c)] on the grounds (1) that he had been of good moral character for the preceding five years, and (2) that his deportation would result in serious economic detriment to his wife and child, both of whom were natural born United States citizens (R. f. 14, A. f. 6).

In his written opinion the Hearing Examiner conceded that petitioner was a person of good moral character and that his deportation would result in serious economic detriment to his citizen spouse and child (A. f. 34); he nevertheless recommended denial of suspension of deportation (A. f. 34) on the stated grounds of (1) the contents

[7] Appendix to this petition. See note 1, *supra*.

of a book written by petitioner in 1937 entitled "World Revolution", which was an all-out attack upon the Soviet conspiracy and the international network of Communism (A. ff. 19-29); (2) petitioner's admitted quondam membership in the "Fourth International", to which he had at one time belonged in England because it had then represented to him the only militant opposition to the Soviet Union and the Comintern (A. f. 12); (3) petitioner's admitted quondam membership, in England, in an organization known as the "Marxist Group", which was a study group (A. f. 12); (4) petitioner's admitted attendance, in the United States, of meetings of the Socialist Workers Party (A. f. 14), and (5) petitioner's admitted "associations" and "friendships" with individuals who were members of the Socialist Workers and Workers Parties (A. f. 14).

The hearings closed on August 16, 1950 (A. f. 77). The Internal Security Act of 1950 was enacted on September 23, 1950 and became effective the same day (A. f. 77). The Hearing Examiner's opinion, however, was dated October 31, 1950 (A. f. 35).

At the hearings the petitioner was not heard on any issues raised by the Internal Security Act of 1950 (A. f. 78). This was quite natural, for the Internal Security Act was not in existence at the time the hearings closed. And petitioner, not having been advised that the evidence received by the Hearing Examiner would be considered by that official in the light of the pending but as yet unenacted legislation, was consequently disabled from introducing, and was not given the opportunity to introduce, evidence to meet any issues raised by the subsequently enacted Internal Security Act (A. f. 78).

Despite petitioner's lack of opportunity to be heard on the issues posed by the intervening legislation, the Hearing Examiner asserted that petitioner's "affiliations and

beliefs must be appraised'' (A. f. 31) in the light of said intervening legislation. Then the Hearing Examiner, ''in so appraising'', concluded that the organizations with which petitioner had allegedly been associated ''were within the scope of the McCarran [Internal Security] Act'' (A. f. 32). Thereupon the Hearing Examiner recommended denial of suspension of deportation (A. f. 33).

In an opinion dated March 26, 1951, the Commissioner of Immigration adopted the Hearing Examiner's findings of fact, conclusions of law and recommended order, and ordered that the petitioner be deported (A. ff. 35, 50).

An oral appeal was then taken to the Board of Immigration Appeals. That appeal was dismissed (A. f. 63). In the course of its opinion, the Board had this to say about the Internal Security Act, which had not become law until five weeks after the close of the hearings:

> ''In our opinion that statute does lay down a broad guide of policy which we cannot ignore in dispensing discretionary relief'' (A. f. 57).

Earlier in its opinion the Board declared that, as a matter of law, it was ''*not entitled* to grant suspension of deportation'' to aliens deportable under the Internal Security Act of 1950 (italics supplied) (A. f. 54).

The Board further stated that, although in the past it had granted relief ''to persons who had been members of the *Communist Party,* where such persons were unusually meritorious'', that power had been withdrawn from them by the Internal Security Act of 1950 (italics supplied) (A. f. 56).

In listing your petitioner's books, the Board said:

> ''It is our impression that the world revolutionary movement has been founded and led by writers—Engels, Marx, Lenin, Stalin and others'' (A. f. 59).

Pursuant to a formal demand upon his surety, your petitioner surrendered himself at Ellis Island on June 10, 1950. A writ of habeas corpus was allowed (F. ff. 4-6) and a petition filed therefor on June 11, 1952 in the District Court for the Southern District of New York (R. ff. 7-54). A return to the writ was filed on June 17, 1952 (R. ff. 55-69). No traverse was filed.

In its first opinion, dated August 28, 1952, the District Court, per Edelstein, J., said:

> ''It is apparent that the discretion of the administrative authority was guided by policy considerations of the legislation passed after the hearings had been closed, and the relator has not had a fair opportunity to meet any issues posed by the subsequent legislation.'' (R. f. 72)

The District Court thereupon sustained the writ conditionally, *i.e.*:

> ''unless within 60 days a further hearing is accorded the relator to afford him an opportunity to meet all issues raised by the subsequent statute'' (R. f. 72).

By order to show cause the Attorney General moved immediately for reargument (R. ff. 73-87).

In its second opinion, dated September 26, 1952, the District Court granted the motion for reargument and dismissed the writ (R. ff. 103-114). The District Court concluded, upon reconsideration, that the administrative officials had not, after all, indulged in ''a truly retroactive application of law'' (R. f. 105).

Having reversed itself on the issue of procedural due process (the issue to which it limited itself in the first opinion) the District Court went on to consider the substantive contentions of the original petition. These were:

I. That the officials grossly misconstrued both the language and intent of Congress by applying to a life-long militant anti-Communist the Internal Security Act of 1950, which was specifically aimed at the agents, adherents and sympathizers of the international Communist conspiracy (R. ff. 41-43).

II. That, if the Internal Security Act of 1950 be construed to sanction deportation on the ground of relator's writings, then to that extent the Act is an unconstitutional invasion of the First Amendment, because there is no clear and present danger that this relator's writings could bring about one of those substantive evils which Congress indeed has the right to prevent (R. f. 44).

III. That, if the Internal Security Act of 1950 be construed to sanction deportation of such a thoroughgoing anti-Communist and anti-totalitarian person as the relator, from whom there can be no reasonable anticipation of hurt, then to that extent the Act is so unreasonable and arbitrary as to be repugnant to the Fifth Amendment (R. ff. 45, 46).

As to the contention that the officials had denied suspension of deportation by misconstruing the anti-Communist Internal Security Act so as to apply it to an anti-Communist, the District Court reasoned as follows:

> "But if it had been determined that he was a subversive alien under that section [§137 as expanded by the 1950 Act] he would have been ineligible for discretionary relief. 8 U. S. C. 155 (d). It was conceded that he was eligible to make application" (R. f. 106).

The District Court took the view that the only remaining issue was the manner in which discretion was exercised with respect to the "concededly eligible" alien, but that this was not judicially reviewable (R. ff. 106, 108, 113).

This reasoning overlooked what actually transpired administratively. Your petitioner's central claim for the writ was that, *although he was formally declared eligible for suspension of deportation, he was actually considered, on the application, to be a subversive alien, summarily deportable as such, and therefore ineligible for suspension of deportation;* and further, that he was considered such a summarily deportable subversive alien pursuant to the supervening Internal Security Act, which was (1) retroactively invoked in violation of due process, and (2) grossly misapplied after being invoked.

The District Court, in other words, instead of piercing through the official formalism that declared your petitioner eligible for discretionary relief while treating him as ineligible therefor, rested its decision upon the formalism itself. *The District Court accepted as unreviewable exercise of discretion what was actually gross error of law.*

The District Court rejected your petitioner's Fifth Amendment argument as a "variant" of the argument that the officials had misapplied the Internal Security Act to your petitioner (R. ff. 110, 111). Likewise rejected was your petitioner's First Amendment argument, the District Court stating that the Internal Security Act was not to be read as denying or sanctioning denial of discretionary relief on the basis of your petitioner's past and reasonably anticipated utterances (R. ff. 111-113).

The Court of Appeals for the Second Circuit, per Chase, J., affirmed the District Court's dismissal of the writ of habeas corpus, by judgment filed March 11, 1953.

In its opinion,[8] dated March 11, 1953, the Court said of your petitioner's administrative application for suspension of deportation:

> "and if his application for the suspension of the order has been *duly considered* and decision reached on an over-all evolution of the circumstances shown, this appeal must fail." (Italics supplied.)

The Court thus begged the whole question of procedural due process, for at no point in its opinion did the Court pass upon or even address itself to the issue of whether the application was in fact "duly considered" by the administrative officials, *i.e.*, whether your petitioner was denied a fair opportunity to be heard on issues raised by the subsequently enacted and retroactively invoked Internal Security Act. It was merely noted that at first the District Court had conditionally sustained the writ on this ground of procedural due process, but had then, upon reargument, reversed itself and dismissed the writ.

Throughout its opinion, the Court of Appeals characterized your petitioner as a member or adherent of "the so-called 'Trotskyite' wing of the world Communist movement."[9] But the "world Communist movement" is specifically defined and given concreteness in the Internal Security Act as a conspiracy "subservient to the most powerful existing Communist totalitarian dictatorship" [50 U. S. C. §781(1)(6)] (A. f. 73). Thus, your petitioner, even on appeal, was characterized—and stigmatized—by the very conspiracy that he had devoted his life to combatting. In the administrative stages it was this

[8] The opinion is annexed to the Transcript of Record.

[9] The Court elsewhere characterized him as an advocate of "the 'Trotskyite' brand of Communism" and as a person engaged in "Communist activities."

brute characterization of your petitioner and gross misconception of the Internal Security Act that resulted in his being treated as a subversive alien, considered actually ineligible for discretionary relief, although formally declared to be eligible.[10]

But then, after thrice characterizing your petitioner as a form of "Communist", the Court of Appeals went on to state that your petitioner "was not held to be within any of the classes" made summarily deportable, *i.e.*, "Communists", by the Internal Security Act. Thus was repeated the equivocation of the administrators and of the District Court, whereby your petitioner was formally "set up" as eligible for suspension of deportation (*i.e.*, non-subversive alien) only to be "knocked down" as summarily deportable (*i.e.*, subversive alien), hence ineligible for suspension of deportation.

It was not, as the Court surmised, the Board of Immigration Appeals' *obiter dicta* of "Seventh Proviso" situations *re* the Communist Party that "led the applicant to believe that he was denied relief" as a summarily deportable subversive alien.[11] What led the applicant to that belief was the direct statement of the Board that, as a matter of law, it was "not entitled to grant suspension of

[10] *E. g.*, the Board of Immigration Appeals baldly stated:

> "It is our opinion that the statutes as enacted by Congress including the 1917 Act, the 1918 Act and the 1950 Act, are broad enough to cover persons of Communistic philosophy, whether they call themselves Marxist, Trotskyite, Titoist, Stalinist, Leninist, Menshevist or by the appellation of any other deviationist group of the world revolution movement." (A. f. 58)

[11] All that the Board's discussion of "Seventh Proviso" relief (A. f. 56) indicated to your petitioner was its inability, or refusal, to distinguish the Communist Party and "world Communist movement" proscribed by the Internal Security Act from radical and Marxist movements having no direction whatsoever from "the most powerful existing Communist totalitarian dictatorship." 50 U. S. C. §781, Congressional Statement of Findings and Purposes (A. f. 73).

tarian dictatorship, is to repeat this pattern in the United States." (Italics supplied.)

Now, the Internal Security Act either means what it says or it does not. If it means what it says, then its legitimate targets are the members, adherents and sympathizers of said "world Communist movement". If, however, the Internal Security Act does not mean what it says, or purports to mean more than it says, so that persons who have spent their whole lives combating said "world Communist movement" can nonetheless be construed to be enmeshed within its terms, then this Court should decide whether a statute thus construed offends the First and Fifth Amendments. These important statutory constitutional questions, arising as they do under the Internal Security Act, have not been but should be settled by this Court.[15]

That the Attorney General in the instant case did indiscriminately assimilate all Marxist radicalism to that "world Communist movement" proscribed by the Internal Security Act is not open to doubt.

The Board of Immigration Appeals for example, lumps together

> "persons of *Communistic* philosophy, whether they call themselves Marxist, Trotskyite, Titoist, Stalinist, Leninist, Menshevist or by the appellation of any other 'deviationist' group of the *world revolution movement.*" (Italics supplied.) (A. f. 58)

[15] *Dunne* v. *U. S.,* 138 Fed. 2d 151 (C. A. 8th, 1943), certiorari denied 320 U. S. 790, rehearing denied 320 U. S. 814, involved the application of the Smith Act to conspirators who were members of the Socialist Workers Party. The difference is that the Smith Act proscribes conspiracies to overthrow government, without specification as to whether the conspiracy emanates from Moscow or any other place, whereas the Internal Security Act makes explicit reference to Communist conspiracies under the direction and domination of the Kremlin.

Nor is it open to doubt that the Court below sanctioned this lumping. It referred to the petitioner (1) as an adherent of the "so-called 'Trotskyite' wing of the world-Communist movement" and (2) as a person engaged in "Communist activities".

The importance of the question at hand to this country's political and intellectual freedom cannot be overestimated, because, for the first time in its history Congress made an express finding of a "clear and present danger" of a particular substantive evil which it sought to prevent. The Supreme Court has, in at least one recent case (*Carlson* v. *Landon,* 72 S. Ct. 525, 531-32), accepted as reasonable the Congressional declaration Title 50 U. S. C. 781(15) of the clear and present danger of the *Communist* conspiracy.

What cannot be lost sight of, however, is that it is the characterization of the substantive evil as a "clear and present danger" and as "substantial" that permits the inroad into the guarantees of the First Amendment. This alone entitles the restriction on free speech and press (*Bridges* v. *California,* 314 U. S. 252, 262; *Thornhill* v. *Alabama,* 310 U. S. 88, 95-96). Given the characterization, the result is the same: freedom of speech and press must defer to society's paramount interest in combating or preventing *this* substantive evil, but not *every* real or fancied evil.

That Congress itself recognized and intended the distinction is clear. The House Report[16] said:

> "Communism as an economic, social and political theory is one thing. Communism as a secret conspiracy, dedicated to subverting the interests of the United States to that of a foreign dictatorship, is

[16] See note 14, *supra.*

another. * * * If communism in the United States operated in the open, without foreign direction, and without attempting to set up a dictatorship subservient to a foreign power, legislation directed against it would neither be justified nor necessary. This, however, is not the case."

The record—and this includes all of petitioner's past writings—is clear that petitioner had never embraced advocacy or doctrine of overthrow of the government of the United States by force and violence. Indeed, he had opposed overthrow of any constitutional government by force and violence.[17] That the petitioner strongly advocated the violent overthrow of the Hitler regime, and has and now continues to advocate the violent overthrow of Soviet Russia, is not only in consonance with American policy but is also protected by law. Were the statute to mean that all aliens possessing such views or so advocating were deportable, then such deportation would be either a clear violation of Congressional intent or a requirement that was on its face unconstitutional.

B. Conflict with Applicable Decisions of this Court

Mr. Justice Jackson, for this Court, in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 72 S. Ct. 512, at 520, said:

> "'Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable. We think the First Amendment does not prevent the deportation of *these* aliens." (Italics supplied.)

[17] This Court is respectfully invited to the excerpts from the hearing, which are contained in folios 64-70 of the Appendix.

But in the face of this holding and in the face of the clear and present danger of the "world-wide Communist conspiracy" specifically declared in the Internal Security Act of 1950, how can there be any justification or rule of reason in curtailing *this* alien's freedom of expression through deportation? Your petitioner participated in no "world-wide Communist conspiracy" declared to be the target of the Act; there exists no danger to the United States from any coalescence of his beliefs or opinions with those of Soviet Russia; there exists no danger whatsoever from his past or anticipated writings, lectures or teachings.

Mr. Justice Reed, for this Court, in *Carlson* v. *Landon*, 342 U. S. 524, 72 S. Ct. 525, at 542, said:

> "There is no denial of the due process of the Fifth Amendment under circumstances where there is *reasonable apprehension of hurt* from aliens charged with the philosophy of violence against this government." (Italics supplied.)

Certainly there may be "reasonable apprehension of hurt" from the Communist conspiracy. If there were not, then the Internal Security Act of 1950 could not be upheld as constitutional. By the same token, to save the Act's constitutionality, the attempt on the part of officialdom to turn it against a person or a class of persons from whom there is no "reasonable apprehension of hurt" must be stricken down.

POINT II

In sanctioning the Attorney General's determination of an alien's application for discretionary relief in the light of legislation enacted subsequent to the close of the hearings, thereby offending procedural due process by depriving the alien of opportunity to meet issues raised by said subsequently enacted legislation, the Court of Appeals for the Second Circuit has decided a federal constitutional question in a way probably in conflict with the applicable decisions of this Court.

In its first opinion the District Court acknowledged that the Attorney General decided petitioner's application for suspension of deportation on the basis of legislation that intervened between the close of the hearings and the date of administrative decision, and that such constituted a denial of due process. (See *supra*, page 9, and R. f. 72.)

In its second opinion, the District Court reversed itself on this point, contending that the administrative references to the subsequently enacted Internal Security Act were more in the nature of commentary upon argument rather than "a truly retroactive application of the law" (R. f. 105).[18]

[18] The following references by the Board of Immigration Appeals to the Internal Security Act of 1950 can hardly be classified as mere comment upon argument:

(1) "In our opinion that statute does lay down a broad guide or policy which we cannot ignore in dispensing relief." (A. f. 57)

(2) "We are not entitled to grant suspension of deportation to persons who fall under the Internal Security Act, *i. e.*, via 8 U. S. C. 155(d)."

(Footnote continued on following page)

The Court then stated that "the case will be decided on its merits" (R. f. 105).[19]

The Court of Appeals did not pass upon the District Court's self-reversal on this point of procedural due process, except to note that it had taken place.

Conflict with Applicable Decisions of this Court

Mr. Justice Burton, for this Court, in *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 73 S. Ct. 472, at 478, said:

> "At the present stage of the instant case, the issue is not one of exclusion, expulsion or deportation. It is one of legislative construction and of procedural due process."

The closest applicable decision of this Court on the question of procedural due process with respect to law supervening after the close of hearings, was that in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 677, 50 S. Ct. 451, a case involving precisely the instant procedural situation, except that there, the supervening change of law was by court decision. Mr. Justice Brandeis, speaking for the Court, at page 453, said the plaintiff

> "asserted, in addition to its claims on the merits, that, in applying the new construction of Article 4

The following references of the Hearing Examiner to the Internal Security Act of 1950 can hardly be classified as mere comment upon argument:

(1) That in considering the application for discretionary relief, "respondent's affiliations and beliefs must be appraised." (A. f. 31)

(2) That such appraisal found respondent's affiliations and beliefs "within the scope of the McCarran Act." (A. f. 32)

[19] But it is idle to speak of deciding the "merits" when a party has been precluded from giving evidence bearing on what subsequently is made the guiding light of the decision.

of Chapter 119 to the case at bar, and in refusing relief because of the newly-found powers of the commission, the Court transgressed the due process clause of the Fourteenth Amendment. * * * We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff 'due process of law'—using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

Mr. Justice Jackson, for the Court, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 70 S. Ct. 445, at 454, said:

"It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally."

It is submitted that if an antecedent deportation statute requires a hearing, then a deportation statute enacted subsequent to a hearing must, at the very least, require a *re*hearing.

Mr. Justice Jackson, speaking for the Court, in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 72 S. Ct. 512, in rejecting the appellants' claim that they had been denied the benefits of the Administrative Procedure Act, said, at page 516, footnote 4:

"The proceedings against Harisiades and Coleman were instituted before the effective date of the Act."

Questions of the present applicability of the Administrative Procedure Act aside,[20] it is submitted that, as a

[20] *Heikkila* v. *Barber*, ... U. S. ....., 73 S. Ct. 603.

matter of general law, if an alien cannot take advantage of subsequent legislation inuring to his benefit, then by the same principle he should not be disadvantaged by subsequent legislation inuring to his detriment, unless a further hearing is granted him.

Prayer for Relief

WHEREFORE, your petitioner prays that a writ of certiorari be directed to the United States Court of Appeals for the Second Circuit to review its judgment filed the 11th day of March, 1953.

Respectfully submitted,

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APPENDIX A

Hearing Examiner's Opinion, Dated October 31, 1950, Findings of Fact, Conclusions of Law, and Recommended Order

The respondent herein, subject of a warrant of arrest dated December 17, 1947 was accorded a hearing before me on August 16, 1950 at 70 Columbus Avenue, New York City under Title 8, Part 151 of the Code of Federal Regulations.

In the course of hearing the respondent, his counsel and the Examining Officer entered into a stipulation whereby it was agreed that previous records of hearing accorded the respondent on November 1, November 15 and November 21, 1949 and January 3, 1950, including all exhibits therein were to be made a part of the instant hearing with the same force and effect as if the testimony contained therein were adduced in the instant hearing and the exhibits were presented in the instant hearing. The stipulation is now in evidence as *GOVERNMENT'S EXHIBIT #3* and there is attached thereto the aforementioned record of hearing of 1949 and 1950 appropriately identified and containing exhibits in those hearings.

The evidence adduced establishes that the respondent is a married male alien, born on January 4, 1901 in Trinidad, British West Indies and that he is a subject of Great Britain. He entered the United States on only two occasions, the first entry being at New York in October of 1938 at which time he was admitted as a visitor for approximately a six month period. He departed to Mexico and thereafter returned to the United States on the SS Tegucigalpa being admitted at the port of New Orleans, Louisiana on May 3, 1939 as a visitor under Section 3(2) of the Immigration Act of 1924 for a five month period. He has never received an extension of his temporary stay; has never been in possession of an immigration visa for permanent residence and has, of course, never been

admitted to the United States for permanent residence. He indicated that his last foreign residence was England and further stated that he had been admitted to England for permanent residence in 1932. In view of the foregoing it must be held the charge contained in the warrant of arrest has been sustained. I therefore propose the following findings of fact and conclusions of law on the issue of deportability.

PROPOSED FINDINGS OF FACT—AS TO DEPORTABILITY:

1) That the respondent is an alien, a native of the British West Indies, a subject of Great Britain;

2) The respondent last entered the United States at the port of New Orleans, La., on the SS Tegucigalpa on May 3, 1939 and was admitted under Section 3(2) of the Immigration Act of May 26, 1924 for a five month period;

3) The respondent has not received an extension of his temporary stay;

4) The respondent was not in possession of an immigration visa and has never been admitted to the United States for permanent residence.

PROPOSED CONCLUSIONS OF LAW—AS TO DEPORTABILITY:

1) That the respondent is subject to deportation under Sections 14 and 15 of the Immigration Act of May 26, 1924 on the charge that, after admission as a visitor he has remained in the United States for a longer time than permitted under said Act or regulations made thereunder.

In the course of hearing the respondent made application for the privilege of suspension of deportation based upon serious economic detriment to a citizen spouse and citizen minor child.

The respondent married on two occasions. He first married in Trinidad in about 1929 or 1930. He married the woman with whom he is presently living as man and wife on May 21, 1947. Prior to this second marriage he secured what is commonly known as a Mexican mail order divorce in 1946. However, the validity of this second marriage having been questioned by this Service because of the apparent invalidity of the Mexican divorce from his first wife, he again divorced his first wife and secured such divorce in Reno, Nevada in 1948. Following this he remarried Constance Webb, his present wife, on November 24, 1948. Constance herself had been married twice before her marriage to the respondent and had been divorced from her prior husbands on June 5, 1940 and March 23, 1946. It is therefore apparent that the respondent is legally married. By his wife Constance the respondent has had a child born April 4, 1949 in the City of New York. Constance herself was born in this country. The record contains documentary evidence of the aforementioned births, marriages and divorces. In view of the fact that the respondent stated that he believed his Mexican divorce to be a valid one and entered into marital relationship with Constance following marriage in 1947, because of that belief and in view further of the fact that the respondent adjusted his marital status when he became aware of the invalidity of his Mexican divorce it cannot be held that the respondent's moral character has been in any way impeached because of the fact that he lived with Constance following his marriage with her in 1947 until his remarriage to her in 1948.

The respondent and his wife do not have any appreciable assets. As a matter of fact the respondent at this time is indebted to various persons for monies lent to him to be repaid upon the sale of a book or books that he is writing. The respondent's wife has testified that she and the child are completely dependent upon the respondent for support and would suffer serious economic detriment

if he were to be deported. Since the respondent's wife has not been employed for several years, she last having been employed some short time after marriage to the respondent, I believe that the record sustains the respondent's contention that his deportation would result in a serious economic detriment to his citizen spouse and citizen minor child. Although the respondent is indebted and I believe it is a fairly common practice for an author to seek and obtain advances of money prior to publication of his works, the respondent has maintained himself for many many years as an author, lecturer and translator and in spite of the fact that he is suffering from ulcers and is on occasion incapacitated thereby, I believe that he can in the future be expected to maintain his family group more or less adequately.

Affidavits of witnesses, police records, etc., have established that the respondent has been a person of good moral character for at least the past five years. Insofar therefore as economic detriment and good moral character is concerned the respondent has met those requirements of Section 19(c)(2) of the Immigration Act of February 5, 1917 in his application for suspension of deportation. However, a serious question is left to discuss.

The respondent was questioned at great length regarding his affiliations with various political groups both in and outside of the United States and was also questioned as to his own political beliefs. The respondent testified that he had been, prior to coming to the United States a member of the Fourth International. I quote from page 11 of record of hearing of August 16, 1950:

> "Q. Have you ever been a member of the Fourth International? A. Yes."

The respondent also testified that he was a member of the Marxist Group in England and a member of the Independent Labor Party in that country. He stated that the Marxist Group was a Trotskyite organization and that

he had been a member of that organization for about two years. He further testified that for a time he had been the "leader" of the group. Testimony as to this is contained on pages 31 and 32 of the record of hearing of November 21, 1949 (Stipulated Exhibit C herein). He did not terminate his affiliation with this Marxist Group. His affiliation rather "lapsed", in that he left England in about 1938.

His testimony was that in the United States he had maintained his associations at one time with the members of the Workers Party and at another time with the Socialist Workers Party. He said, "they were my friends and still are." Testimony as to this is also contained in page 33 of the aforementioned record of hearing. He indicated that he had attended many meetings of the Socialist Workers Party. Some of these meetings were open to the general public and some of these meetings were not open to the general public. He attended meetings of the Socialist Workers Party and the Workers Party at which all the other persons present were members of these organizations. Page 3 of the stipulated Exhibit C should be noted as to this. He explained that the reason he was permitted to attend these meetings, although he was not a member of the organizations mentioned, was that he was known to have written sympathetically and to have been a member of the Marxist Group in England.

The volume which he wrote, which was purported to be "sympathetic" was World Revolution by C. L. R. James which is in evidence herein and to which volume I will refer hereafter. Although he denied that he had been a member of the Workers Party or of the Socialist Workers Party his association with these groups must have been a very close one, certainly close enough so that it might be said that he was affiliated at least with the groups if not a member of them, for he testified that he was a "leader" of one of the groups which broke away from the Workers Party; that this faction of the Workers Party was re-

ferred to as the Johnson-Forest faction. The name Johnson referred to the respondent. He further testified that a great many members of this faction joined the Socialist Workers Party and he testified that since the immigration proceedings started he kept away to a great degree from "that sort of thing", referring obviously to political activity. I might note at this time that counsel objected to the questioning concerning the respondent's political activities and his beliefs, this objection being contained on page 35 of stipulate Exhibit C, a record of hearing dated January 3, 1950. The objection and motion to strike prior testimony was based upon the fact that it was beyond the scope of the warrant charge. I find the objection without merit in that even if not precisely within the scope of the warrant charge it is certainly relevant in considering the advisability of granting the discretionary relief which the respondent has asked for. Since counsel was given adequate opportunity to prepare a defense to any charges which might materialize because of the questioning his objection was without merit. I will therefore not discuss further the propriety of sustaining or overruling counsel's objection if application for suspension of deportation had not been made.

The book World Revolution, written by the respondent and first published in 1937 and dedicated to the Marxist Group, expresses the respondent's opinions and beliefs as of that time. The respondent has stated that if he were to write that volume today it would not be written in precisely the same fashion as it was written. He has not stated in what way he would deviate. However, I have read this volume and find certain matters contained therein worthy of being quoted for a proper consideration of respondent's application for discretionary relief. It must be borne in mind the respondent has stated that he was a member of the Fourth International. The volume itself a criticism of the Third International, otherwise known as the Comintern, which has been epitomized by Soviet

Russia. The volume is a criticism of the revolutionary movement as it has developed in Soviet Russia and as that country has in turn attempted to develop it in other countries. So that the respondent on page 406 of World Revolution said:

> "But the Soviet bureaucracy made the fight for a *democratic* (emphasis my own) Spain a condition of assistance; and the bureaucracy and its agents, though active against Franco, are now preventing Spanish workers and peasants from doing the very things that created Soviet Russia. They want no change in Europe. The Third International pushes yet another revolution to disaster."

Page 407 contains the following:

> "Not content with using all their force to keep the revolution within the bounds of bourgeois democracy, they are and will henceforth be the implacable enemies of the Socialist revolution and all those who fight for it. The masses in Spain may push them further but they will resist and hamper and impede the progress of the revolution, and that today is their role in Europe."

and following on the same page there appears:

> "But Trotsky, the man of October, and his Fourth International bar the way. The Stalinists want him silenced. He may be murdered in Mexico. And once he is out of action the Stalinist struggle for the League of Nations and collective security calculates on being able to ignore the Fourth International, the workers can be led into the coming war for democracy and the defense of the U. S. S. R., and colonial revolts, the sign-manual of the counter-revolution."

22 Page 408 has:

> "But as the workers turn to the Left, instead of meeting a revolutionary party, firm and uncompromising in doctrine, clear in theory, but fighting for the clarification of ever greater masses of the workers on the common experiences of the United Front, they meet the Third International backed by all the resources of the Soviet State and the revolutionary traditions of October, driving them back to collective security, back to democracy, back to the illusions of Socialism through the Social Democracy. It is the crying shame and tragedy of our age. Only
23 at the moment of violent repudiation of the Stalinist bureaucracy by the bourgeoisie will the policy of the International undergo any change. But that moment will be chosen by the Imperialist bourgeoisie who will use Stalinism or discard it at their will. It is to this that the Stalinist bureaucracy has led the Third International, in its time the greatest revolutionary force that history has ever seen."

and the following on page 409:

> "But if all this is so, does there remain any justification for the theory of the Permanent Revolution
24 which this book maintains? Under the ablest Marxist leadership would the position of international Socialism have been much better? Has the Revolution on the world-scale justified itself?

Page 419 has this:

> "The economy of the Soviet Union is based on collective ownership and therefore, despite Stalinism, the Soviet Union must be defended. It is a basis for the international State, for the abolition of war, for possibilities of existence as yet undreamed of. Alone in the world to-day it is a force for peace."

Page 419 also contains: 25

> "But a proletarian revolution, in Germany for instance, will at once remove another great country out of the imperialist scramble, broaden the basis of Socialism, drive the economy of both countries forward, relieve the internal tension, and strengthen the force for peace. Permanent Revolution or permanent slaughter, Trotsky has written. What other prospect is there? The Tories accept the permanent slaughter. The international Socialists accept the Permanent Revolution."

Page 420 contains this: 26

> "Despite Stalinism, despite everything, the Russian workers still love their revolution, and will fight for it and the revolution in the West or the East. Neutrality in the Spanish struggle was not the policy of the Russian proletariat but the policy of the Stalinist bureaucracy. As in the beginning so it is to-day."

> "The Russian Revolution depends on the revolution in Western Europe."

At the bottom of page 420 and page 421 there is con- 27
tained the following:

> "Stalin may try to discipline the Russian proletariat and the Russian army to fight with this or that bourgeoisie. But the peril of war will imperil the bureaucracy. It will fight as the leader of a revolutionary people or it will go under. And the possibilities are that after months or years of war, Europe will have the unprecedented phenomenon of an army of a million highly-trained men, equipped with arms, trained in a revolutionary tradition, offering their help to the armies on the opposite side to wipe Capitalism off the face of Europe. The

will and courage of a few men will make history within the given circumstances, but the people will be ready. If the ideological basis of the new International is so quickly ready it is due not only to the objective circumstances, but to the energy and determination and courage of one man who has given his life to the movement. But it would have come all the same.—But the proletariat will have to lift itself, as the Italian proletariat is already lifting itself to-day. It is a sea of blood and strife that faces us all, and shrinking from it only makes it worse. Turn the imperialist war into civil war. Abolish capitalism. Build international Socialism. These are the slogans under which the working-class movement and the colonial peoples will safeguard the precious beginning in Russia, put an end to imperialist barbarity, and once more give some hope in living to all overshadowed humanity."

Much ado was made in the course of hearing of the fact that the respondent for many many years has opposed Soviet Russia. It is obvious that he has opposed Soviet Russia but not because of its theory of revolution but because the respondent and the Fourth International apparently were of the belief that the policies of Soviet Russia were too soft and that this policy did not advocate a World Revolution today. The Trotskyite movement, if anything, would appear to be a more extreme movement than the Third International and it must be borne in mind that the respondent has admitted prior to coming to the United States that he was a member of the Fourth International. It must further be borne in mind that the respondent in the United States has been associated with the Workers Party and the Socialist Workers Party, both organizations being Trotskyite organizations. I believe that the respondent's associations can legally be considered to be affiliations and perhaps even a membership

and I further believe that if a charge were lodged under the Act of October 16, 1918, as recently amended, that the respondent might well be deportable under that Act. However, no such charge was lodged and I will therefore discuss this no further. Whether or not a charge has been lodged, the respondent has asked for the privilege of suspension of deportation which is discretionary and considering the advisability of granting this privilege, the respondent's affiliations and beliefs must be appraised. In so appraising it should be noted that both the Socialist Workers Party and the Workers Party are organizations which the Attorney General of the United States has designated as Communist organizations and certainly, therefore, within the scope of the McCarran Act. The Marxist Group to which the respondent stated he belonged in England and which he designated as a Trotskyite Group, as well as the Fourth International, are equally within the scope of that Act.

Although the respondent has proven that he has been a person of good moral character for the past five years and although his deportation would result in serious economic detriment to his citizen spouse and child, on consideration of all the facts hereinbefore set forth, I believe that suspension of deportation should be denied to the respondent. I therefore propose the following findings of fact and conclusions of law on the issue of discretionary relief.

PROPOSED FINDINGS OF FACT—AS TO DISCRETIONARY RELIEF:

1) That the respondent has been a person of good moral character for the past five years;

2) That the respondent's deportation would result in serious economic detriment to his citizen spouse and citizen minor child.

34 PROPOSED CONCLUSIONS OF LAW—AS TO DISCRETIONARY RELIEF:

1) That under Section 19(c)(2) of the Immigration Act of February 5, 1917, the respondent is eligible for the privilege of suspension of deportation.

RECOMMENDED ORDER:

That the respondent be deported pursuant to law on the charge stated in the warrant of arrest.

Wm Fliegelman

WF/lt WILLIAM FLIEGELMAN, *Hearing Examiner*

35 R: 10/31/50

APPENDIX B

Commissioner of Immigration's Opinion and Order

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Hearing Examiner and served upon the alien's attorney and examining officer on October 31, 1950, are hereby adopted.

36

DISCUSSION: The record relates to a 50-year-old male, native of the British West Indies, subject of Great Britain, who last entered the United States at the port of New Orleans, Louisiana as a passenger on the SS "Tegucigalpa" on May 3, 1939 at which time he was admitted as a temporary visitor for a period of five months.

There is no issue of alienage or deportability here; they have been conceded by counsel. The sole issue presented is whether or not the Attorney General's discretion should be exercised in behalf of the respondent.

We agree with the Hearing Examiner that the respondent has been a person of good moral character for

the preceding five years, and that his deportation will result in a serious economic detriment to his citizen spouse and minor citizen child. However, certain conditions concerned with the public safety of our citizenry and the continuance of our democratic form of government make it necessary in the exercise of discretionary relief to consider as a factor whether this alien's continued residence in this country is desirable from the standpoint of the best interests of the United States. See *Matter of M—*, A-5754521 (BIA, December 1, 1949). 37

The alien is an author, lecturer, journalist and translator. He testified that prior to his admission into the United States he was a member of the Fourth International until 1938 (p. 11, Hrg. 8-17-50); that for about two years prior to his admission into the United States in October 1938, he held membership in the Marxist Group in England, an organization which he termed as "trotskyite" (p. 31); that for a while he was the "head" of this group but not all of the time (pp. 31-32) and that "in the United States I had maintained my association at one time with members of the Workers Party, and another time with the Socialist Workers Party. They were my friends and still are". The respondent disclaimed membership in either the Workers Party or the Socialist Party but admitted that he attended "many meetings" of the Socialist Workers Party including those to which the general public was not invited. He testified that he was permitted to attend such closed meetings because "I was known to have written sympathetically, and to have been a member of the Marxist Group in England; that I was opposed to Stalinism and all that it stood for; and that I was friendly • • •". 38 39

The respondent further acknowledged that in the Fall of 1947 the Workers Party split into various factions; that under the name of Johnson, he was one of the leaders of the Johnson-Forest Group which split with the Workers Party; that a good many members of the Johnson-Forest faction thereafter joined the Socialist Workers Party. "I

did not because I could not. I don't join anything in the United States. The question of my joining anything in the United States never arose and does not arise. Since the immigration proceedings started, I have kept myself away, to a great degree, from that sort of thing" (pp. 31-36 of Hrg., November 21, 1949). As to the respondent's sympathies with the aims of the Socialist Workers Party, he stated:

> "I may mention that I would like to say something I said the last time. I am a writer, known as such, of historical and theoretical themes—philosophical also. The real party leaders are men of organizational politics. They run an organization. I am not in the same status as they are. I disagree with lots of things they do, etc. Inside the Party, of all these Parties, there are lots of differences, etc. By and large, I think there is a great deal in the Socialist Workers Party which makes it a useful organization for Socialism. I won't deny that. That I agree with everything connected with —no! That is about all" (p. 36; Hrg., November 21, 1949).

In the hearing last accorded the respondent on August 17, 1950, he testified that since January he has attended "maybe eight or ten" meetings of the Socialist Workers Party (p. 20).

The Hearing Examiner has quoted copiously from a book entitled, "World Revolution, 1917-1936, The Rise and Fall of the Communist International". This book was written by the respondent and first published in London, England in 1937, and bears a dedication "To the Marxist Group" (Ex. 12). In connection therewith, the respondent testified that his book "aimed at the exposure of the totalitarian and blood-thirsty terror of the Stalinist Regime in Russia and the Communist Parties in various parts of the world which supported the regime." The book

advocated socialism as the ultimate cure for the problems of the world. There are many things in the book that "were I to write the book today, I would not write that way. I was new; I had just begun. That's about all I can say about the book, for the time being" (p. 35 Hrg., November 21, 1949).

In his brief, counsel, who states that he has read the entire book, indicates that the book is "nothing more than the theories and predictions of a politico-historical scholar". Counsel acknowledges that "the writings have a definite orientation. They are, without question, defensive of the revolutionary doctrines of Marx, Engels and Lenin * * *". Counsel further indicates that the book is predominantly a violent attack upon Stalinism "not only as constituting a betrayal of Lenin's revolution, but also as a virulent evil eating away at the innards of Western Democracy".

Counsel has submitted an extensive brief which, in essence, urges that the respondent be not expelled solely because of his political beliefs and affiliations; that although a Marxist, the respondent has indicated an unswerving opposition to Stalin; that the respondent, unlike the Communists who have carried out their policies and thoughts into action, is merely a political theorist who has never translated his opinions into action. Counsel urges that to deny discretionary relief solely on what are purported to be respondent's political beliefs would be such an abuse of discretion and such an arbitrary exercise of office as fairly to be construed as a denial of due process under the Fifth Amendment of the United States Constitution.

The facts in this case establish that since his admission into the United States the respondent has been closely associated with the Workers Party and the Socialist Workers Party. Although the respondent has disclaimed membership therein, he has intimated that he did not join these organizations because of its possible effect upon his immigration status. Both the Workers Party and the

Socialist Workers Party are listed as subversive by the Attorney General pursuant to Executive Order No. 9835 of March 21, 1947 (12 F. R. 1935, March 25, 1947). They have been characterized by the Attorney General as organizations "which seek to alter the form of Government of the United States by unconstitutional means". Relief from deportation has been held to be permissive and not mandatory under Section 19(c) of the Immigration Act of 1917, as amended. Matter of V—, A-4373751 (BIA, June 24, 1949); Matter of Y—, A-5515510 (BIA, June 24, 1949). In the case of *U. S. ex rel. Weddeke* v. *Watkins*, 166 F. (2nd) 369 (C. C. A., 2, February 4, 1948) the court held that the Attorney General need not suspend deportation even if he finds that an alien has been of good moral character and his deportation would cause serious economic detriment to his family. In the *Matter of Y—*, *supra*, suspension of deportation based upon serious economic detriment to an alien spouse, was denied when it was found that the respondent there had been a secretary in the International Workers Order and a second delegate to the American Slav Congress, both organizations having been listed as subversive by the Attorney General.

In summation, we have noted that the respondent is the author of a book which his counsel has characterized as being a defense of the revolutionary doctrines of Marx, Engels and Lenin. In addition, the respondent has admitted that he was a member of the Fourth International as well as the Marxist Group in England, an organization which he has characterized as "Trotskyite". The latter term of course refers to Leon Trotsky, who, according to a bulletin entitled "A B C of Marxism", published by the Socialist Workers Party on February 1, 1941 was the "greatest living exponent of Marxism". This bulletin further proclaimed that it was Trotsky who organized the Fourth International to guide the workers to victory; and that such victory could not be achieved without "revolutionary leadership". See *Dunne* v. *United States*, 138 F. 2nd 151 (C. C. A. 8, 1943); cert. denied 320 U. S. 790; rehearing denied 320 U. S. 814. The Court concluded in the cited case that force was the ultimate means to be used by the Socialist Workers Party in the overthrow of the government by the "proletariat". This respondent has testified that he is in substantial agreement with most of the tenets of the Socialist Workers Party; and that he participates in both open and closed meetings of the Socialist Workers Party. The Socialist Workers Party has been named as subversive by the Attorney General and also described by that officer as an organization which seeks to alter the form of the government of the United States by unconstitutional means.

Upon careful consideration of the entire record, we conclude that the respondent's continued residence in this country is not desirable from the standpoint of the best interest of the United States. Accordingly, we shall deny his application for suspension of deportation and direct his deportation from the United States.

ORDER: It is ordered that the application for suspension of deportation be denied.

IT IS FURTHER ORDERED that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

Acting Assistant Commissioner
Adjudications Division

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APPENDIX C

Board of Immigration Appeal's Opinion and Order Dismissing Appeal

Respondent is fifty years old, a native of the British West Indies, subject of Great Britain, who last entered the United States at New Orleans on May 3, 1939, at which time he was admitted as a temporary visitor for a period of five months. He has remained in the United States at all times since that entry. Counsel concedes that respondent is deportable on the charge stated in the warrant of arrest.

53 Respondent is married to a United States citizen, and they are the parents of a child born April 4, 1949. At the time of the hearing, respondent was living with his wife and child and constituted their sole support. The hearing examiner found that his deportation would result in serious economic detriment to them. Respondent attempts to maintain himself as an author, lecturer, and journalist. He makes small amounts of money from time to time at these pursuits but testified that he is in debt. However, his wife has not been employed for some time. We agree with the finding that respondent's deportation would result in economic detriment to his wife and child.

54 The only issue before us is whether or not we should exercise our discretionary authority to grant respondent suspension of deportation. The hearing examiner and the Assistant Commissioner concluded that on the basis of the entire record, respondent's continuous residence in this country is not desirable from the standpoint of the best interest of the United States, because of his long record of affiliation with Marxist and "Trotskyite" groups, both in the United States and abroad.

A grant of suspension of deportation is purely discretionary with the Attorney General. Establishment of eligibility under Section 19(c) of the 1917 Act, as amended, in no way entitles an alien to discretionary relief. We are not entitled to grant suspension of deportation to persons

who fall under Section 19(d) of that Act. Section 19(d) 55
provides that the provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918, entitled "An act to exclude and expel from the United States aliens who are members of the anarchist and similar classes", as amended; * * * "(4) any of the provisions of so much of subsection (a) of this section as related to * * * anarchist and similar classes."

It is true that in the past we have granted relief under the Seventh Proviso to Section 3 of the Immigration Act of February 5, 1917, as amended, to persons who had been members of the Communist Party, where such persons 56
were unusually meritorious. In such cases, the alien had usually been a Party member many years ago, for a brief period, had had no subversive connections in many years and had family connections in this country. Since the passage of the Internal Security Act of 1950, we no longer have the authority to grant Seventh Proviso relief in such cases. This power was withdrawn from the Attorney General by Section 22, Section 6(a) of the Internal Security Act. This fact apparently escaped the notice of counsel, who stated in his argument before this Board, "Congress did not in that statute (referring to the Internal Security Act of 1950) lay down any standard for exercising discretion for suspension of deportation." 57
In our opinion that statute does lay down a broad guide or policy which we cannot ignore in dispensing discretionary relief.

Counsel states further that the respondent's views have undergone a tremendous change since certain writings of his were published fifteen years ago. It is our opinion judging from the entire record, including his more recent writings, activities, and associations, it is highly doubtful that there has been any basic change in his political philosophy over the past fifteen years. Counsel believes that because respondent has associated himself with Marxist rather than Stalinist groups that this means that he is not a person who advocates, or who is affiliated with groups

or associations that advocate the overthrow of organized Government. It is our opinion that the statutes as enacted by Congress including the 1917 Act, the 1918 Act and the 1950 Act, are broad enough to cover persons of Communistic philosophy, whether they call themselves Marxist, Trotskyite, Titoist, Stalinist, Leninist, Menshevist or by the appellation of any other "deviationist" group of the world revolution movement. Counsel argues that because respondent has consistently written against and spoken against the Stalinist branch of the Communist movement that this means we should permit him to remain in this country, that he will be helpful to the United States as an enemy of Stalin. The dislike of the splinter groups for Stalin is based more on the fact that he was successful and they have been unsuccessful in capturing the revolutionary movement in Russia rather than on basic doctrinal differences, so far as we can discover.

Counsel claims that respondent is not an actionist, merely a writer and philosopher. It is our impression that the world revolutionary movement has been founded and led by writers—Engles, Marx, Lenin, Stalin, and others. The books and articles respondent admits to have written or worked on are

1. *"World Revolution"* 1916-1936 (pub. 1937), Exhibit 12 in the record;
2. *A History of Negro Revolution from 1700 to 1937,* published in England in 1938 by a magazine called "Fact";
3. A translation from French into English of a book on the French revolution by a French author named Daniel Guerin;
4. *"Black Jacobins"*, a biography of Toussaint L'Ouverture and the story of the negro revolution in Haiti;
5. A work not yet published at the time of the hearings on Herman Melville;

In addition, the Hearing Examiner asked respondent whether he was the author of a number of magazine or newspaper articles written under various pseudonyms, but respondent denied the authorship and the use of those particular names (p. 37).

"World Revolution" appears to be respondent's longest effort. It was published in 1937 in England. He declares that it contains many statements he would not make if he were writing the book at the present time. He does not, however, reject the main theme of the book which is that Stalin truly represents the bourgeoisie rather than the proletariat, that not Stalin but Trotsky is the man to fill Lenin's place and that Lenin had so intended, that Trotsky is world revolution's only hope.

Counsel protests statements by the Hearing Examiner and the Assistant Commissioner that the Socialist Workers Party and the International Workers' Order, to which respondent has been attached, were organizations that have been listed as subversive by the Attorney General. We do not base our denial of suspension of deportation in any way on the Attorney General's listing of these organizations as subversive. We base our holding on respondent's own statements and other evidence of record.

In any event, the case of the *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. (Apr. 30, 1951) does not stand for the propositions for which counsel cited it in oral argument before this Board. That group of cases went to the Supreme Court on a motion to dismiss. The Court decided only that the Attorney General's motion to dismiss must be denied because a justiciable issue was presented. The cases were remanded to the District Court, and the question as to whether the organizations involved are in fact Communistic was reserved.

It is our conclusion that on this record we cannot grant suspension of deportation.

ORDER: It is ordered that the appeal be and hereby is dismissed.

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APPENDIX D

Excerpt from Hearing of August 16, 1950

Q. Do you believe in or advocate the overthrow of the Government of the United States, by force or violence? A. No.

Q. Do you believe in or advocate any change whatever in the present form of government existing in the United State?

By Counsel: I object to that as being completely vague,
65 as it stands, inasmuch as it would seem to exclude the possibility of belief in amendments to the Constitution.

By Presiding Inspector: Objection overruled.

By Respondent:

A. In Britain they have changed. They have now a government by the old British Constitution and by means of the Constitution, they have changed and they have monarchy and parliament and democracy and nationalization of property, etc., and they are all perfectly satisfied. As far as I know, Mr. Churchill says that he does not like
66 what is going on, but if everybody is agreeable, he is satisfied and will accept it. Now, is a regular constitutional procedure and change contained in that question? Do you mean that what the people think can be changed when they please it? Is that involved in your question to me?

Q. Do you believe in any unlawful change in the present form of government which exists in the United States? A. No. I don't. I would like to add something to that. I don't advocate anything in the United States, and I draw only a reference to what took place in England. But at the same time, I cannot answer a question in a way that would make me look ridiculous and feel absurd.

Q. Do you believe in or advocate the overthrow of any 67
organized government by force or violence? A. Yes, sir; I do.

Q. Will you explain that? A. When the Hitlerite government was in Germany, I considered that government a menace to society and a criminal imposition upon the German people and I, along with a good many others whom I need not mention, advocated that that organized government be overthrown by any means possible. That is the type of organized government which I think, in general—and I can't be too precise as to how and when—should be overthrown by violence. Those are my ideas, more or less. I also believe that, in general, totalitarian 68
governments should be overthrown by violence.

Q. Do you believe in or advocate the overthrow by force or violence of any organized government existing today? A. You are getting me tangled up into politics. I have for years believed that the Russian government, for example, is a menace to the people of Russia and to the whole of society and could not be overthrown, except by violence, which I advocate in that specific case.

Q. Do you believe in or advocate the overthrow of any other presently organized government? A. I will mention one more: the government, for instance, in Czechoslovakia. I believe that is a tyranny imposed upon the 69
people.

Q. Do you believe in or advocate the overthrow by force or violence of any other government, except those commonly construed to be behind the Iron Curtain set up by Russia, recognized as the satellite states of Russia? A. I would like to say this: it is impossible for me to sit here and give, under these circumstances with any precision, a list of governments which I believe should be overthrown by force or violence. I take great interest in politics, but it is impossible for me to say precisely whether the governments in Burma, or Afganistan, or Brazil or some other governments should be overthrown.

70 The totalitarian tyrannies should be overthrown, and I would like to add, if this would help, I will go straight to the issue that is involved here. To advocate the overthrow of the government of President Truman or Major Atlee in Britain, which governments are supported by the large majority or a substantial number of the people, is ridiculous! If that is what you are after, I will tell you in advance.

APPENDIX E

71 **Excerpts from Internal Security Act of 1950**

"Sec. 781 . . . As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

"(1) There exists a world Communist movement . . . whose purpose it is, by treachery, deceit, infiltration, . . . espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world . . .

"(4) The direction and control of the world Communist movement is vested in and exercised by the Com-
72 munist dictatorship of a foreign country.

"(5) The Communist dictatorships of such foreign country . . . establishes or causes the establishment of, and utilizes, in various countries, action organizations which are . . . controlled, directed and subject to the discipline of the Communist dictatorship of such foreign country.

"(6) The Communist action organizations . . . acting under such control, direction and discipline, endeavor to (Bring) about the overthrow of existing governments by any available means, including force if necessary, and (to

set) up Communist totalitarian dictatorships which will 73
be subservient to the most powerful existing Communist totalitarian dictatorship. . . .

"(7) . . . such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent . . . through . . . 'Communist fronts' . . .

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested 74
the direction and control of the world Communist movement.

"(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

"(15) The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature 75
and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress . . . enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

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APPENDIX F

Title 8, U. S. C. §137, "Subversive Aliens" (as amended by Internal Security Act of 1950, 64 Stat. 1006)

Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

(1) Aliens who seek to enter the United States whether solely, principally, or incidentally, to engage in activities which would be prejudicial to the public interest, or would endanger the welfare or safety of the United States;

77

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

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(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the economic and governmental doctrines of any other form

of totalitarianism, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism, or the economic and governmental doctrines of any other form of totalitarianism, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of such organization;

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(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization which is registered or required to be registered under section 786 of Title 50, unless such aliens establish that they did not know or have reason to believe at the time they became members of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered acquire such knowledge or belief) that such organization was a Communist organization.

80

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;

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(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation,

82 publication, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating (i) the overthrow by force or violence or other unconstitutional means of the Government of the United States or of all forms of law; or (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage; or (v) the economic, international, and governmental doctrines of world communism or the eco-
83 nomic and governmental doctrines of any other form of totalitarianism.

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subparagraph (G) of this paragraph.

(3) Aliens with respect to whom there is reason to be-
84 lieve that such aliens would, after entry, be likely to (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security; (B) engage in any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unconstitutional means; or (C) organize, join, affiliate with, or participate in the activities of any organization which is registered or required to be registered under section 786 of Title 50. Oct. 16, 1918, c. 186, §1, 40 Stat. 1012; June 5, 1920, c. 251, 41 Stat. 1008; June 28, 1940, c. 439, Title II, §23(a), 54 Stat. 673; May 25, 1948, c. 338, 62 Stat. 268; Sept. 23, 1950, c. 1024, Title I, §22, 64 Stat. 1006.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 176—October Term, 1952.

(Argued February 4, 1953 Decided March 11, 1953.)

Docket No. 22579

THE UNITED STATES OF AMERICA *ex rel.*
CYRIL LIONEL ROBERT JAMES,

Relator-Appellant,

—against—

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service of the Port of New York,

Respondent-Appellee.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York dismissing a writ of habeas corpus. Edelstein, *Judge*. Affirmed.

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130 **Stipulation as to Record**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA *ex rel.*
CYRIL LIONEL ROBERT JAMES,
Relator,

against

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EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization Service of the Port of New York,
Respondent.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties, except for the administrative file, the printing of which has been dispensed with by prior stipulation between the parties, and which is to be handed to the Court 1.2 at time of argument.

Dated: New York, N. Y., December ....., 1952.

MARKEWICH, ROSENHAUS & MARKEWICH,
Attorneys for Relator-Appellant.

MYLES J. LANE,
Attorney for Respondent-Appellee.

133 **Clerk's Certificate**

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of this said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 31 day of December, in the year of our Lord one thousand 134 nine hundred and fifty-two, and the independence of the United States the one hundred seventy-seventh.

WILLIAM V. CONNELL,
Clerk.

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MYLES J. LANE, United States Attorney for the Southern District of New York, *Attorney for Respondent-Appellee.*

WILLIAM J. SEXTON, Assistant United States Attorney.

LOUIS STEINBERG, District Counsel, Immigration and Naturalization Service;

LESTER FRIEDMAN, Attorney, Immigration and Naturalization Service;

MAX BLAU, Attorney, Immigration and Naturalization Service, of Counsel.

MARKEWICH, ROSENHAUS & MARKEWICH, *Attorneys for Relator-Appellant;* Robert Markewich, Of Counsel.

CHASE, *Circuit Judge*:

The appellant is an alien, a British subject, who came to this country in 1939, and was then lawfully admitted as a temporary visitor for a period of five months under the provisions of Title 8 U. S. C. §203(2). He has continuously resided in the United States since his entry, and he has been ordered deported on the ground that he overstayed his leave. Title 8 U. S. C. §214.

He is married to a native citizen of the United States and has a child who was born in this country. While the proceedings for his deportation were pending, he applied, pursuant to Title 8 U. S. C. §155(c), to the Attorney General for suspension of deportation and complied with all the statutory conditions to entitle him to have his application given the discretionary consideration the statute requires. The application was denied and he now claims that its denial was not the result of an actual exercise of dis-

cretion but of an unlawful refusal to exercise it. If he is right the writ should have been sustained, at least conditionally, to enable him to obtain the discretionary decision which he of right may demand. *Mastrapasqua* v. *Shaughnessy,* 2 Cir., 180 F. 2d 999. At first the judge was of the opinion that the writ should be sustained to that extent and so held; but upon rehearing, having reached the conclusion that discretion had actually been exercised, ordered it dismissed. The relator has appealed.

The appellant does not now raise any question as to the deportation order itself. Admittedly he is deportable on the ground above stated; and if his application for the suspension of the order has been duly considered and decision reached on an over-all evaluation of the circumstances shown, this appeal must fail. *United States ex rel. Weddeke* v. *Watkins,* 2 Cir., 166 F. 2d 369, 373, cert. denied 333 U. S. 876; *United States ex rel. Walther* v. *District Director,* 2 Cir., 175 F. 2d 693; *Sleddens* v. *Shaughnessy,* 2 Cir., 177 F. 2d 363.

As is usual when the Attorney General is asked to suspend deportation, the original hearing was held before a trial examiner. He proposed findings to the effect that the alien had been a person of good moral character during the past five years and that his deportation "would result in serious economic detriment to his citizen spouse and citizen minor child." His proposed conclusion of law was that "under Section 19(c)(2) of the Immigration Act of February 5, 1917, the respondent is eligible for the privilege of suspension of deportation." Nevertheless, he recommended that "The respondent be deported pursuant to law on the charge stated in the warrant of arrest."

This recommended order followed the presentation of evidence which showed that the appellant was, and for years had been, both while he had unlawfully remained in this country and before he came here, an active worker, lecturer

and writer in furthering the aims of the so-called "Trotskyite" wing of the world communist movement and a member of the Fourth International which advocated the overthrow of "capitalist" forms of government by "revolutionary leadership." He was opposed, however, to "Stalinism."

The Commissioner of Immigration then considered the entire record, noted the appellant's advocacy of the "Trotskyite" brand of communism, and denied suspension of deportation.

The Board of Immigration Appeals dismissed an appeal from the Commissioner's order after reviewing the entire record. In its opinion reference was made to the Internal Security Act of 1950 as laying down "a broad guide or policy which we cannot ignore in dispensing discretionary relief," but this was in connection with the statement that in the past relief had been granted "under the Seventh Proviso to Section 3 of the Immigration Act of February 5, 1917, as amended, to persons who had been members of the Communist Party, where such persons were unusually meritorious" and that such proviso was made inapplicable by Section 22 Sec. 6(a) of the Internal Security Act of 1950. It was obviously not a holding that the Attorney General was precluded by the last mentioned statute from granting discretionary relief to this applicant. It was merely to distinguish his situation from that of others to whom discretionary suspension of deportation had been granted when the proviso, 39 Stat. 875, which permitted, in the exercise of administrative discretion, the admission of any alien returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years upon such conditions as might be prescribed, was still relevant.

Apparently, however, this had led the applicant to believe that he was denied relief because he was found on irrelevant grounds to be within the provisions of §19(d) of

the 1917 Act, as amended, 8 U. S. C. §155(d) and therefore a person as to whom the Attorney General had no power to suspend deportation. And from this premise he further argues that since his communist activities were in the field of speech and writing his constitutional rights under the First Amendment have been contravened and he has also been denied due process in violation of the Fifth Amendment.

Since he was not held to be within any of the classes mentioned in §19(d) of the 1917 Act, 8 U. S. C. §155(d), the premise on which his constitutional argument is based is unsound and we do not reach on any constitutional question on this record. On the contrary, it is abundantly clear that he has been given administrative consideration of his application on the basis of individual merit, or the lack of it, with recognition of his right to make the application. As the opinion of the Board of Appeals disclosed, its decision was an actual exercise of discretion in the light of "respondent's own statements and other evidence of record."

Affirmed.