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Overruling Recognized by [Chike v. I.N.S.](#), 5th Cir., December 18, 1991

44 S.Ct. 54

Supreme Court of the United States.

UNITED STATES ex rel. BILOKUMSKY

v.

TOD, Commissioner of Immigration
at the Port of New York, et al.

No. 92.

Argued Oct. 19, 1923.

Decided Nov. 12, 1923.

Synopsis

Appeal from the District Court of the United States for the Southern District of New York.

Habeas corpus proceeding by the United States, on the relation of Michael Bilokumsky, against Robert E. Tod, Commissioner of Immigration at the Port of New York, and others. From a dismissal of the writ, relator appeals. Affirmed.

West Headnotes (12)

[1] Witnesses

[Proceedings to which privilege applies](#)

Deportation proceedings are civil in their nature, and, though the ground of deportation involved acts which, under Criminal Code, § 6, 18 U.S.C.A. § 6, might have been the basis of seditious conspiracy, defendant may be compelled to testify whether he is an alien, or the inference that he is an alien may be drawn from his silence.

[107 Cases that cite this headnote](#)

[2] Aliens, Immigration, and Citizenship

[Effect of unlawful arrest or search](#)



[21 Cases that cite this headnote](#)

[3] Aliens, Immigration, and Citizenship

[Hearing](#)

A hearing does not cease to be fair merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive.

[39 Cases that cite this headnote](#)

[4] Aliens, Immigration, and Citizenship

[Hearing](#)



[34 Cases that cite this headnote](#)

[5] Aliens, Immigration, and Citizenship

[Administrative Procedure](#)



[6 Cases that cite this headnote](#)

[6] Aliens, Immigration, and Citizenship

[Presumptions and burden of proof](#)



[24 Cases that cite this headnote](#)

[7] Aliens, Immigration, and Citizenship

Informing alien of rights in general

Aliens, Immigration, and Citizenship

Conduct of hearing; fairness in general

Aliens, Immigration, and Citizenship

Admissibility

[Redacted]

29 Cases that cite this headnote

[8] **Aliens, Immigration, and Citizenship**

Admissibility

Evidence

Evidence wrongfully obtained

[Redacted]

18 Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship**

Right of review or intervention; standing

[Redacted]

17 Cases that cite this headnote

[10] **Criminal Law**

Custody

[Redacted]

23 Cases that cite this headnote

[11] **Habeas Corpus**

Arrest; pretrial detention and presentation to magistrate

[Redacted]

17 Cases that cite this headnote

[12] **Habeas Corpus**

Aliens

[Redacted]

15 Cases that cite this headnote

Attorneys and Law Firms

**55 *150 Mr. Walter Nelles, of New York City, for appellant.

Mr. George Ross Hull, of Washington, D. C., for appellees.

Opinion

Mr. Justice BRANDEIS delivered the opinion of the Court.

Bilokumsky is said to have entered the United States in 1912. In May, 1921, he was arrested in deportation proceedings upon a warrant of the Secretary of Labor as being an alien within the United States in violation of law. The specific ground was having in his possession for the purpose of distribution printed matter which advocated the overthrow of the government of the United States by force or violence. Act Oct. 16, 1918, c. 186, §§ 1, 2, 40 Stat. 1012, as amended by Act June 5, 1920, c. 251, 41 Stat. 1008. After a hearing, granted to enable him to show cause why he should not be deported, a warrant of deportation issued. While in the custody of the *151 Commissioner of Immigration at the Port of New York, he filed in the federal court his petition for a writ of habeas corpus. That court heard the case upon the



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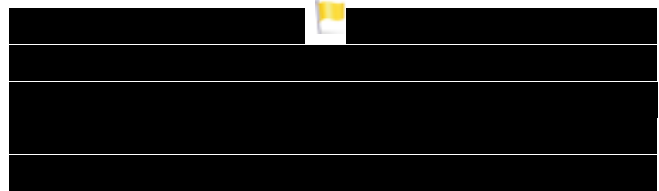
return and a traverse thereto, dismissed the writ, remanded the relator to the custody of the Commissioner, allowed an appeal, and stayed deportation until further order. The case is here under section 238 of the Judicial Code (Comp. St. § 1215), the claim being that the relator was denied rights guaranteed by the Fourth and Fifth Amendments to the federal Constitution.

Prior to the application for the warrant of arrest in the deportation proceedings, Bilokumsky was confined to Moyamensing Prison, Philadelphia, on charges made by city authorities that he had violated the state sedition law. While there he was sworn and interrogated by an immigration inspector, who took a stenographic report of the examination. In answer to questions so put, he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. There is nothing in the examination which suggests that Bilokumsky made his statement because of threats or promises of favor, and there was no evidence that the statement was an involuntary one, unless compulsion is to be inferred from the fact that he was at the time in custody, that city and federal authorities were then co-operating 'with a view to ridding this country of undesirables,' that the prosecution under the state law was dropped soon after the institution of the deportation proceedings, that he was not then represented by counsel, and that he was not apprised by the inspector, either that he was entitled to be so represented or that he was not obliged to answer.

At the hearing under the warrant of the Secretary of Labor all facts necessary to establish that Bilokumsky had in his possession for purpose of distribution printed matter which advocated the overthrow of the government *152 were proved by evidence to which there was no objection. To prove alienage the inspector called Bilokumsky as a witness. He was sworn, but, when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name. After his refusal to answer, the report of his examination in Moyamensing Prison was introduced, although duly objected to by counsel. He did not testify on his own behalf; nor did he, or his counsel, make the claim, at the hearing, that he is a citizen of the United States. The rules then in force dealing with the conduct of such hearings are copied in the margin.¹ So far as appears these were fully complied with. It is conceded that, if the fact of alienage was legally established, there was both probable cause for issuing the original warrant of arrest and ample evidence at the hearing to justify a finding that relator was within the United States

in violation of law. The contention is that there was no legal evidence of alienage.

[1] If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *153 [Ng Fung Ho v. White, 259 U. S. 276, 281, 42 Sup. Ct. 492, 66 L. Ed. 938](#). But he made no such claim at that time; nor does he now contend, by allegation in his petition for habeas corpus, or otherwise, that he is a citizen of the United States. He rests his claim to relief on an entirely different ground. He asserts that, because of the manner in which the evidence of alienage was procured, the warrant of deportation is a nullity. He argues that alienage is essential to jurisdiction; that the government has the burden of establishing the fact; that it can be established only by legal evidence; that his examination while in prison is the only evidence introduced for that purpose; that its procurement involved both an unlawful search and seizure and a violation of the **56 rules of the Department; that since it was illegally procured it was not legal evidence; and, hence, that the order is void. Its nullity is urged on three grounds. Because the order is unsupported by legal evidence; because the hearing was unfair; and because the original warrant issued without probable cause.



But it is not true that, if the report of Bilokumsky's examination be eliminated there was no evidence of alienage at the hearing. Conduct which forms a basis for inference is evidence. Silence *154 is often evidence of the most persuasive character. [Runkle v.](#)



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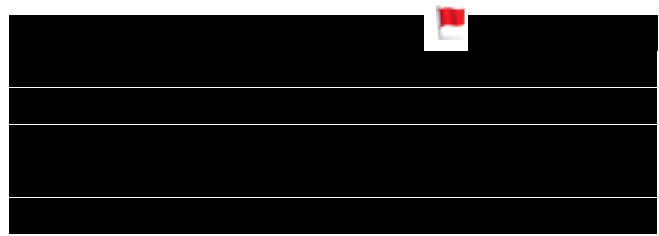
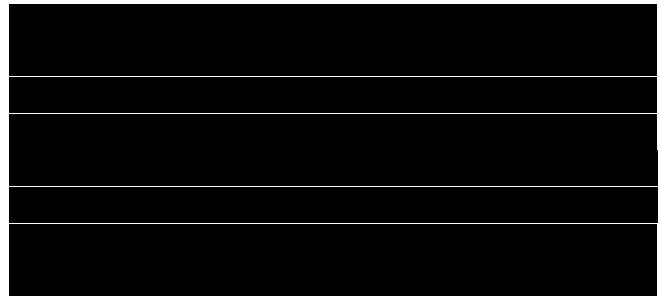
[Burnham](#), 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; [Kirby v. Tallmadge](#), 160 U. S. 379, 383, 16 Sup. Ct. 349, 40 L.

Ed. 463. Compare [Quock Ting v. United States](#), 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, [35 L. Ed. 501](#). Bilokumsky was present at the hearing, personally and by counsel. The ground for deportation involved a charge of acts which might have been made the basis of a serious criminal prosecution. Criminal Code, § 6 (Comp. St. § 10, 170). If Bilokumsky was a citizen, inquiry into the facts was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien.

Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak.

Deportation proceedings are civil in their nature. [Fong Yue Ting v. United States](#), 149 U. S. 698, 730, 13 Sup. Ct. 1016, 37 L. Ed. 905; [Bugajewitz v. Adams](#), 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978. Neither statute nor rule requires that matter alleged in the warrant of arrest shall, in the absence of an express admission, be taken to be denied. A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute. It is not unreasonable to assume that one who may wish to challenge the executive's jurisdiction in the *155 courts will not refrain from asserting in the proceedings before the executive the facts on which he relies. To defeat deportation it is not always enough for the person arrested to stand mute at the hearing and put the government upon its proof. Compare [United States v. Sing Tuck](#), 194 U. S. 161, 169, 24 Sup. Ct. 621, 48 L. Ed. 917. Since the proceeding was not a criminal one, Bilokumsky might have been compelled by legal process

to testify whether or not he was an alien.² The government was not obliged to adopt that course.




[7] [8] [9] [10] It is urged that the admission of Bilokumsky's examination renders the hearing unfair because it is inconsistent with fundamental principles of justice embraced within the conception of due process of law. The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in

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fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here there was no denial of alienage; and a landing certificate was introduced by the government which, when connected with the statement in Bilokumsky's *157 examination, tended in some respects to corroborate it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. The mere fact that it was given while he was in confinement would not make it so.⁵ And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. [Newhall v. Jenkins, 2 Gray \(Mass.\) 562](#). Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received.⁶ [Tang Tun v. Edsell, 223 U. S. 673, 681, 32 Sup. Ct. 359, 56 L. Ed. 606](#). To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. [Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369](#).  [Kwock Jan Fat v. White, 253 U. S. 454, 459, 40 Sup. Ct. 566, 64 L.](#)

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Affirmed.

All Citations

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