Odd Gunnar Skagestad:

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Political Science 21 – Term Paper (2nd term, 1963-64).

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Before starting discussing this fascinating subject, we will first try to define the very term Alien, as accurately as might be necessary for the comprehensive understanding of our discussion. An alien is any individual within the jurisdiction of the USA, who is not a US national or citizen. Or to put it an other way, an alien is "one born out of the jurisdiction of the US, and who has not been naturalized under their constitution and laws".[1] Aliens may be labeled resident or non-resident, according to the nature and the length of their stay here. Distinction based upon other criteria is expressed by the terms alien friend; that is an alien whose country is at peace with the US, and alien enemy, who owes allegiance to an adverse belligerent country. When alienage is once established, it is presumed to continue until the contrary is shown by competent evidence.[2] It is the distinction between the groups of individuals under US jurisdiction that gives the term alien its meaning; the status of the aliens can scarcely be understood without being seen in relation to that of the citizens.

Although the term citizen is used already in the original US Constitution, there was at that time no uniform or effective distinction between citizens and aliens. The Constitution expressly granted Congress power – "to establish an uniform rule of naturalization" - [3]. However, prior to 1868, the terms aliens and citizens had only slight significance, except concerning the Alien and Sedition Acts of 1798, which had a relatively narrow scope. On the state level this often meant no practical distinction in civic matters like suffrage etc. The change came, as mentioned above, in 1868 with the 14th Amendment to the US Constitution, the core sentence of which is – "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside". This meant that the United States chose to define citizenship upon the principle which in international law is called *Ius Soli*; that is, the place where a person is born,

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[1] Pergler: Judicial Interpretation of International Law in the U.S. (New York 1928) p.147.
[2] Ibid.
[3] Pritchett C.H. : The American Constitution (New York 1959) p.631.

determines his citizenship.[4] Provisions for naturalization have been made relatively difficult, including among other things strict permanent residence requirements.

The very nature of the United States of America makes it obvious why the alien issue came to be of such importance just here. Firstly, this was the world's most outstanding immigration country. Secondly, the role which America has come to play in the global context in an age of increasing international intercourse, has made her receive a large number of visitors for several purposes. Thirdly, the political and social attitudes and expectations of the American people have been an important factor in handling this issue, and making it what it has been, or is. What is essential is therefore, that the United States has always had a great multitude of aliens within its borders, and has made them a target of active and sometimes controversial legislative and customary policy.

We will take a brief and incomplete look at the rights of aliens as they are prescribed in theory. The basic civil rights of aliens are those granted by the US Constitution to all persons, - therein are included aliens as well as citizens. We find them expressly enumerated in the 5th and the 14th Amendments, the 5th being a guarantee against oppression and injustice by the federal government, the 14th virtually the same principle extended to the individual states. I quote from the 5th Amendment: "…nor shall any person … be deprived of life, liberty and property without due process of law…". This is one of the central thoughts in fundamental American Philosophy on civil rights and liberties. Such basic civil rights belong to all persons, including aliens, though they do not enjoy special privileges and immunities as such.[5] As a basic right the alien does not have, the one to stay in this country should be emphasized. I will come back to this later, in other connections. It is a generally established, though not indisputed, principle of international law that a resident alien has a certain right to the protection of the laws of the country in which they reside. This principle is fully consistent with traditional and prevailing US attitude, accepting that there is an international standard of justice and responsibility in this field. The Montevideo Conference of 1933, which the US, in spite of a minor reservation, signed, stated that "Nationals and foreigners are under the same protection of law and the national authorities, and the foreigners can not claim other or more extensive than that of the nationals".[6] It should be noted that the usual rights of aliens, as the normal reciprocal relations between government and aliens in general,

[4] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.191.
[5] Ibid pp.201-202.
[6] Fenwick C.G.: International Law (New York 1962) p.278.

have validity primarily in time of peace; in wartime a new and different situation arises. It is not the general policy of the US to force naturalization on any alien who has been lawfully admitted into this country. Alien status, though in many ways disadvantageous to the individual, is respected, and the immigrant may retain it indefinitely.[7] It is often stressed that the alien status actually is no great disability. That is a matter of opinion, and I'll take it up separately later.

We will take a close and extensive look at the rights of aliens as they are interpreted, that is, exercised, granted or denied, in practice; in other words, how aliens are treated in this country.

Within this scope, the issue of discrimination is a main one. In spite of the general civil rights mentioned somewhere above, aliens are placed under many special restrictions, the validity of which have been upheld by courts. This is especially true in cases of exclusion, deportation, or where economic interests play a role. For example, most states have laws barring aliens from certain licenced occupations and professions.[8] Restrictions of this kind make no discrimination between different sorts of aliens, and I'll treat them more specifically later, together with other disabilities of aliens. The courts have generally declined to uphold discriminatory legislation against foreigners where the legislation transgressed the bounds of legitimate classification. For example, a Pennsylvania law was held invalid, imposing on every employer of a foreign-born unnaturalized male person over 21 years a tax of 3 ¢ a day, for each day employed.[9] Generally speaking, the protection of the laws of the US also extends to foreign corporations.

Discrimination shown against nationals of particular countries, however, has been a big and dark chapter of America's policies towards her aliens, and has caused serious international controversies. In the middle of, and second half of the 19th century, Eastern Asiatics, primarily Chinese and Japanese came in, especially to the states on the west coast, and engaged extensively in economic enterprises. Now this was the main immigration epoch, and newcomers have always been regarded as a potential threat to the American Way. But these Asiatics, with a more than average foreign background, were most readily exposed, and soon the United States discovered the Yellow Threat. The first decisive legal move by Congress was the Chinese Exclusion Act of 1882. By successive acts the US undertook wholly to

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[7] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.201.
[8] Ibid.
[9] Pergler: Judicial Interpretation of International Law in the US (New York 1928) p.149.

exclude natives of other Asian countries.[10] After actually barring the entrance of Japanese through a "gentlemen's agreement" with the Japanese government, they were directly excluded by act of 1924, labeled persons "ineligible to citizenship". This term covered persons from several Asian countries, the so-called Asiatic Barred Zone. The policy thus adopted by the US was one of violation of the principle of the equality of the states, denying particular states the rights accorded to others. The present US immigration regulations are from 1952 (the Walter-McCarren Act) and apply the quota system. The effects may still be discriminatory, but in an indirect way, so as to avoid international legal dispute.[11]

Among states which have discriminated against citizens of a particular country and denied them privileges granted to other aliens, California is probably outstanding. In 1906 San Francisco undertook to segregate Japanese students in separate schools.[12] This act was protested by Japan. In a scarcely convincing language, the US defended the action, saying that the segregation had a reasonable basis, and assured Japan that it was probaly not meant to insult the character of the Japanese individuals, or the honor of Japan. A similar story is that of the California land law of 1913. This law prohibited aliens who were not "eligible to citizenship" from owning and transmitting real property, except in the case such a right was secured to them by treaty between the US and their native country. Japanese citizens were unable to become naturalized, and they were thus limited to the rights granted them by a treaty of 1911. But these rights fell short of the privileges enjoyed by other aliens. Japan protested to the US, but she was turned down again; this time by an explanation that the law was a result of local economic conditions rather than of direct racial discrimination. Additional legislation was enacted by California in 1920, Japan still protesting.[13] Among cases which arose from discriminatory laws, the most famous is probably Sei Fuji v. California in 1952, contesting the land law mentioned above.[14] Plaintiff, Sei Fuji, was an alien Japanese who was ineligible to citizenship under naturalization laws. In this case he appealed from a previous judgment which declared that land property purchased by him 1948, had escheated to the state of California. Since there was no treaty between Japan and the US giving the plaintiff the right to own land, the whole case came to be to decide the validity of the California alien land law. In his argumentation, plaintiff relied upon the US membership

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[10] Fenwick C.G.: International Law (New York 1962) p.268.
[11] Ibid p.269.
[12] Ibid p.270.
[13] Ibid p.271.
[14] Mangone G.J.: The Elements of International Law (Homewood, Ill. 1963) pp.84-86.

in the UN. He pointed that the land law was in clear conflict with certain anti-discrimination provisions in the UN Charter, which, being a treaty, is a part of the Supreme Law of the Land. The Supreme Court of California turned him down on this point on grounds of lack of self-execution in the UN Charter, but held the California land law invalid anyway, as violating the due process and equal protection clauses in the 14th Amendment to the US Constitution. Laws similar to this one by California were enacted by some other states, but nowadays the point of such legislation is lost, as the racial barriers are removed from naturalization. This was done through the Immigration and Nationality Act of 1952 (Walter-McCarren Act) which provided that "the right of a person to become a naturalized citizen of the US shall not be denied or abridged because of race…".[15]

Closely connected with the issue of discrimination is that of exclusion of certain aliens. This is based upon fundamental international principles of the relation between any country and nationals of another country. It is a well-established principle that a state may forbid the entrance of aliens into its territory, or admit them only in such cases as command themselves to its judgment. In the American scope, this was formulated in the dictum of the classical case of Nishimura Ekiu v. US (1892), "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe".[16] The right to total exclusion is, of course, primarily theoretical. The US policy has been one of qualitative exclusion, emphasizing its negative aspects by gradually increasing restrictions which described only the unwelcome groups. The first approach to federal regulation of the hitherto free immigration came in 1862, penalizing traffic in coolie labor. Prostitutes and convicts were excluded from 1875, paupers, lunatics, idiots and persons likely to become public charges from 1882. Later legislation has added to the list a fairly large number of unwelcome categories, for example people suffering from tuberculosis and certain other diseases, illiterates, alcolholics, stowaways, and, above all, subversives and natives of the Asiatic Barred Zone.[17] The adminisrative finality in exclusion matters leaves great administrative discretion to be carried out by government immigration officers. The Nishimura Ekiu case

[15] Pritchett C.H.: The American Constitution (New York 1959) p.633.
[16] Fenwick C.G.: International Law (New York 1959) p.267 n.84.
[17] Whom We Shall Welcome. Report of the President's commission on immigration and naturalization (Washington 1954).

was the first important ruling on procedural issues.[18] Though the Court in the Chin Yow v. US (1908)[19] made a certain degree of judicial review possible, the prevailing view is still, "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned". Provisions directing the exclusion of aliens are applicable to aliens who have established lawful residence in the US and who are returning from a brief absence. The present law (of 1952) makes no significant distinction between exclusionary grounds applicable to aliens entering the US for permanent residence and those who are temporary visitors. Also, an alien lawfully admitted to permanent residence in any of the US oversea possessions, is again subjected to the requirements of the immigration laws when he travels to the mainland or to any other part of the USA.

Exclusion of aliens of certain countries is already discussed above, more specifically in connection with discrimination in general. This was an important feature of American exclusion policy until 1952. The exclusion of the Chinese, however, was terminated in 1943. The reasons for this exclusion policy have been touched earlier in this paper. Of major concern was organized labor's fear of a drop in wages, if cheap Asiatic labor was to continue to pour in. Another reason was the idea of trying to preserve the original American ethnic characteristics like language, race and religion. This policy also had consequences for natives of Southern & Eastern European countries, or in general, people who were supposed to be hard to assimilate, through the different immigration laws and regulations.

For reasons of national security, the United States has extensively practiced exclusion of aliens on grounds of their opinions. Generally speaking, this policy dates back to 1903, when, after McKinley's assination by a man who called himself an anarchist, Congress passed a law providing for the exclusion of certain dangerous aliens. Aliens thus excluded were anarchists, or persons believing in assassination or the overthrow of government by force and violence, or belonging to organizations teaching such doctrines.[20] These safeguards have been extended to embrace persons under certain other classifications, especially Communists (Subversive Activities Control Act of 1950). As a result of these measures, every alien who enters the US must sign a declaration that he is not, and has never been, a Communist, and that he does not enter the United States with the intention to overthrow the American government.

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[18] Pritchett C.H.: The American Constitution (New York 1959) p.642.
[19] Ibid.
[20] Ibid, p.641.

The US policy on exclusion has been heavily criticized within the US. This is especially expressed by the President's Commission in the survey of the provisions of the Walter-McCarren Act of 1952. It is said that it is difficult to reconcile the important aim of protecting the US against undesirable aliens, with the excessive punishments contained in the immigration laws, or with the attitude of suspicion and distrust which seems to motivate them. "Any objective study of the present grounds for exclusion of aliens makes it obvious that hostility to the alien is a major characteristic of the US immigration statutes".[21] It is argued that although the alien cannot claim as a matter of right the protection of the Constitution, he has a right to expect fair and just treatment by the laws and in their administration, which must be governed by a high sense of decency, tolerance and respect for the individual human being. The exclusion on grounds of previous criminal acts is wholly based upon what is considered offenses in the alien's native country, thus making foreign governments the final arbiters on American law. From 1893 to 1941 no alien, - not even a subversive – could be excluded without a hearing. Recent legislation and practices are less generous at this point.[22]

Legally, no alien has any right to stay in this country, and the United States has the right to expel any alien at any time. In practice, any alien lawfully admitted is permitted to stay as long as he observes the conditions laid down by Congress. However, the deportation power is an actual and real one, and complements the power to exclude. The first American deportation statutes were the notorious Alien and Sedition Acts of 1798.[23] The Naturalization Act raised residence requirements for naturalization from 5 to 14 years; Alien Enemies Act (which is still in force) authorized the President in time of war or threatened invasion to seize secure or remove from the country all resident aliens who were citizens of the enemy nation; Alien Act authorized the President for a two-year period to expel from the country any alien whom he considered dangerous to the public peace or safety, or whom he believed to be plotting against the country. There was no further extension of the deportation laws for almost a century, until the policy of Chinese exclusion was adopted. Deportation was at first conceived of only as a method of expelling aliens who had entered the country illegally, but was soon employed to remove aliens who had entered the country legally, but had subsequently violated a condition attached to continued residence. Deportation for several reasons is provided for in the Immigration Act of 1917, the Alien Registration Act of 1940

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[21] Whom Shall We Welcome. Report of the President's commission on immigration and naturalization (Washington 1954) p.175.
[22] Ibid p.229.
[23] Pritchett C.H.: The American Constitution (New York 1959) pp.644-45.

and the Immigration and Nationality Act of 1952. The Internal Security Act of 1950 codified the various grounds for deportation of aliens. Subject to deportation are those aliens who (1) Have entered the country unlawfully, (2) Were admitted for a special time or purpose and who subsequently violated the condition for their admission, (3) Have entered the country lawfully, but have proved themselves to be undesirable residents through criminal, immoral or subversive acts.[24] Deportation proceedings are handled by The Immigration and Naturalization Service, and in individual cases they are subject to review by a Board of Immigration Appeals. Most deportation cases are such trivial matters as catching up with stowaways or violators who have stolen across the borders, mainly Mexicans. Difficult deportation cases are those involving aliens who have been members of the Communist Party "at time of entering the US" or "at any time thereafter".[25]

Aliens whose deportation is sought are usually released on bail during the proceedings. But according to the Internal Security Act of 1950 and the Immigration and Naturalization Act of 1952, the Attorney General can hold aliens against whom charges have been brought in custody without bail at his discretion. Afte the final order of deportation is issued, the Attorney General can, in order to "Effect the alien's departure", retain him in custody for an additional 6 months. During this period the alien is under the supervision of the Attorney General, and may be required "to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such information, whether or not related to the foregoing, as the Attorney General may deem fit and proper".[26] In subversion cases, the Attorney General has almost unlimited discretion.[27] However, in the case of US v. Witkovich (1957) the Court held invalid an attempt by the Attorney General to compel an alien under "supervision" to answer questions concerning Communist connections, because the 1952 Statute should authorize only questions "reasonably calculated to keep the Attorney General advised regarding the continued availability for departure of aliens whose deportation is overdue".[28] Any determination by the Attorney General concerning detention, release on bond, or parole, may be submitted to court review. Final order of deportation is decided through formal proceedings, which are directed by a special inquiry officer. The alien has a right to be informed about the charges against him, to be represented by counsel of his own

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[24] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.202.
[25] Ibid.
[26] Pritchett C.H.: The American Constitution (New York 1959) p.648.
[27] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.202.
[28] Pritchett C.H.: The American Constitution (New York 1959) pp.648-49.

choice, to examine evidence against him, to present evidence on his own behalf and to cross-examine government witnesses. The decision of deportability must be based upon "reasonable, substantial and probative evidence".[29] Though judicial review may be possible, the Supreme Court has declined to question the constitutionality of deportation so far. Generally, the adminstrative fact-finding has been upheld. For example, the Court has upheld the right of Congress to deport an alien for past membership in the Communist Party without requiring further proof that he advocated the overthrow of the American government.[30]

There is some question about the limitations upon criminal jurisdiction over aliens, namely, whether jurisdiction can be exercised with regard to an alien for an act committed abroad when such alien happens to come subsequently within the territorial jurisdiction of a state. Acts of aliens not directly injurious to the state or to its citizens may be excluded from consideration, but in other cases there might be a point here.[31]

An alien who applies for naturalization must be "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States".[32] Getting American citizenship, he renounces allegiance to the country of which he has been a citizen, and promises to bear allegiance to the United States. Allegiance is considered to be the legal crux of differentiation between the citizen and the alien. The citizen is required to defend his country and to support its constitutional principles; he must be loyal. But this does not leave the alien without any responsibility. Protection and allegiance are reciprocal.[33] The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence. This makes the alien subject to certain duties towards the country. As well as the American citizen, the alien is supposed to obey the laws, to be loyal in wartime etc. Aliens are subject to taxation, though under special rules. Taxation of aliens requires distinction between resident and non-resident aliens. Resident aliens are under the jurisdiction of a local district director of internal revenue and not the Director of Internal Operations in Washington D.C. Taxation of a non-resident alien depends on whether he is engaged in trade or business in the United States. If so, he is subject to tax in respect to all taxable income derived from US sources. He might, however, be eligible for certain tax-treaty benefits, if there is a treaty on this matter between the US and

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[29] Schuschnigg K. von: International Law (Milwaukee 1959) p.210.
[30] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.203.
[31] Fenwick C.G.: International Law (New York 1962) p.271.
[32] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.204.
[33] Pergler: Judicial Interpretation of International Law in the U.S. (New York 1928) p.150.

his home country. If not engaged in trade or business in the US, he is only subject to tax on gross income derived from US sources. Before departing from the United States, most aliens, resident or non-resident, must obtain a certificate of compliance, or "sailing permit".[34] This document declares that the departing alien has satisfied all US income tax obligations. Aliens not required to obtain the sailing permit are visitors and tourists staying for shorter periods, and usually, residents of Canada and Mexico.

According to the Smith Act of 1940, all aliens are required to be registered and fingerprinted.[35] In 1952 Congress provided that Justice Department maintain a central register of information on all US aliens. Thus aliens must notify the Justice Department on any change of address. Also, all aliens must file certain information with the Attorney General each year, by forms which are supposed to be obtainable at every Post Office in the country.

No doubt the status of alien is one of certain disabilities. As earlier mentioned, the courts have upheld many special restrictions on us, especially in the economic field. However, the Supreme Court has ruled that no state may go so far as to bar aliens from all opportunities to make a living.[36] For instance, in the case Truax v. Raich (1915), it was held that a law of Arizona discriminating against aliens in respect to job opportunities was in violation of the 14th Amendment.[37] Also, many unfavorable restrictions have been rendered inoperative by treaties entered into by the US with other countries. In the case Jordan v. Tashiro (1928) it was held that a treaty between the US and Japan should be interpreted liberally so as to secure the Japanese respondent the right to construct and operate a hospital. Some states deny aliens a share in welfare benefits, as old-age assistance and workmen's compensation. All states now prohibit aliens from the exercise of the right of suffrage, and from holding a public office. Aliens are ineligible for most positions in the federal welfare service.[38] Discrimination against aliens has been frequently sustained by applying the doctrine of police power for what have been deemed reasons of public welfare. It has, for example, been held a valid exercise of the police power to refuse liquor licences to aliens; while granting them to citizens.[39] As a rule aliens are disqualified for jury service, and states may bar aliens from the

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[34] U.S. Tax Guide for Aliens. U.S. Treasury Department publication No.433 (2-60) Washington 1960.
[35] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.201.
[36] Ibid p.202.
[37] Hackworth G.H.: Digest of International Law, vol.3 (Washington 1942) pp.612-613.
[38] Irish & Prothro: The Politics of American Democracy (N.J. 1963) p.202.
[39] Pergler: Judicial Interpretation of International Law in the U.S. (New York 1928) p.152.

practice of law on grounds of allegiance only. A state my bar aliens from holding stocks in corporations organized under its laws, or impose upon them such conditions as it considers proper. An alien voluntarily enlisted in the US Army cannot claim his discharge on account of being non-citizen.[40]

This paper has been a brief outline on the rights and duties of aliens in theory and practice in the United States of America. There has been no attempt to exceed the 20 pages suggested by the instructor.

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[40] Ibid pp.152-153.