ever, the Court intimated that a hearing before a tribunal that did not meet the standards of impartiality embodied in the Administrative Procedure Act [465] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process that may be corrected on *habeas corpus*.[466] In contrast with the decision in *United States v. Ju Toy* [467] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to his day in court if he denies that he is an alien.[468] Because aliens within the United States are protected to some extent by due process, Congress must give "clear indication" of an intent to authorize *indefinite* detention of illegal aliens, and probably must also cite "special justification," as, for example, for "suspected terrorists." [469] In *Demore v. Kim*,[470] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress's broad powers over aliens. "[W]hen the government deals with deportable aliens, the Due Process Clause does not require it to employ the

---

questions as to Communist Party membership and contended that the burden of proving such affiliation was on the government, it was incumbent on the alien to supply the information, as the government had no statutory discretion to suspend deportation of a Communist. Justices Douglas, Black, Brennan, and Chief Justice Warren dissented on the ground that exercise of the privilege is a neutral act, supporting neither innocence nor guilt and may not be used as evidence of dubious character. Justice Brennan also thought the government was requiring the alien to prove non-membership when no one had intimated that he was a Communist.

[465] 5 U.S.C. §§ 551 *et seq*.

[466] Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). *See also* Mahler v. Eby, 264 U.S. 32, 41 (1924). Although, in Heikkila v. Barber, 345 U.S. 229 (1953), the Court held that a deportation order under the Immigration Act of 1917 might be challenged only by habeas corpus, in Shaughnessy v. Pedreiro, 349 U.S. 48 (1955), it established that, under the Immigration Act of 1952, 8 U.S.C. § 1101, the validity of a deportation order also may be contested in an action for declaratory judgment and injunctive relief. Also, a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order has been denied. United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[467] 198 U.S. 253 (1905).

[468] Ng Fung Ho v. White, 259 U.S. 276, 281 (1922).

[469] Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (construing a statute so as to avoid a "serious constitutional problem," id. at 699, and recognizing a "presumptively reasonable" detention period of six months for removable aliens).

[470] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.