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John W. Erickson
University of Michigan Law School

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RECENT DECISIONS

CONSTITUTIONAL LAW—EXPATRIATION—CRIMINAL DUE PROCESS AS PREREQUISITE TO EXPATRIATION WHEN IMPOSED AS PUNISHMENT—Respondents, native-born Americans, in two separate cases sought declaratory judgments confirming their status as United States citizens. One wanted to return to this country, and the other sought to avoid deportation as an alien. The Government claimed that respondents had lost their citizenship by operation of section 401(j) of the Nationality Act of 1940[1] and its successor, section 349(a)(10) of the Immigration and Nationality Act of 1952,[2] which automatically divest an American of his citizenship for "departing from or remaining outside the jurisdiction of the United States in time of war or . . . national emergency for the purpose of evading or avoiding training and service" in the armed forces. Both respondents had remained outside the United States during such a period, and one conceded that his purpose in doing so was to avoid his military obligations. The statutory provisions were held unconstitutional by the federal district courts.[3] In both cases direct appeal was taken to the Supreme Court, where the cases were consolidated for decision. *Held,* affirmed, four Justices dissenting. Congress cannot employ the sanction of expatriation as a punishment without providing for the procedural safeguards required by the fifth and sixth amendments. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963).

The Constitution contains no express reference to expatriation, but, beginning with an announcement in 1868 that "the right of expatriation is a natural and inherent right of all people,"[4] Congress has from time to time enacted statutes specifying certain types of conduct which will result in loss of citizenship.[5] Uncertainty arose as to whether Congress was limited to the mere enumeration of specific acts which clearly reveal a voluntary abandonment or renunciation of citizenship, thereby simply giving substance to the individual's inherent right of self-expatriation,[6] or whether Congress's power extended to the effecting of an involuntary forfeiture of citizenship where necessary to achieve a legitimate congressional objective. This uncertainty was resolved by a five-to-four decision in *Perez v. Brownell,*[7] in which it was held that Congress could compel involuntary forfeiture of citizenship for voting in a foreign political election.[8] The

1 58 Stat. 746 (added in 1944).

2 66 Stat. 268, 8 U.S.C. § 1481(a) (10) (1958).

3 Cort v. Herter, 187 F. Supp. 683 (D.D.C. 1960); Mendoza-Martinez v. Rogers, 192 F. Supp. 1 (S.D. Cal. 1960).

4 Act of July 27, 1868, REV. STAT. § 1999 (1875).

5 *E.g.,* formal written renunciation of citizenship, naturalization in a foreign country, a woman's marriage to a foreigner (since repealed), and serving in the armed forces of a foreign country.

6 No one questions the right to renounce voluntarily or abandon citizenship by words or conduct. See, *e.g.,* Perkins v. Elg, 307 U.S. 325, 334 (1939); Perez v. Brownell, 356 U.S. 44, 48-49 (1958); *id.* at 66-67 (Warren, C.J., dissenting).

7 356 U.S. 44 (1958).

8 The four dissenters in the principal case obviously agree with the *Perez* holding.

power as it now exists is, however, subject to a number of limitations, the most important of which are those of substantive due process. First, since Congress may not act arbitrarily, there must be a "rational nexus" between the use of the power of expatriation and the congressional objective sought to be achieved.[9] The means (expatriation) must be reasonably calculated to achieve a legitimate congressional end and thereby designed to further the ultimate objective.[10] Secondly, it has been held that, even though the legislative purpose is legitimate, that purpose cannot be pursued by means that broadly stifle "fundamental personal liberties" when there are "less drastic means for achieving the same basic purpose."[11] As the Court in the principal case pointed out, American citizenship is a valuable right, and its loss may result in "grave practical consequences."[12] Mr. Justice Brennan in his concurring opinion referred to expatriation as a "terrifying remedy,"[13] and the dissent characterized it a "drastic measure."[14] This would suggest the appropriateness of limiting the use of involuntary expatriation to situations where it provides a unique solution.[15] A third limitation is that expatriation, as is the case with any other legislative tool, must not, under the circumstances, be unreasonable or excessive,[16] that is, the congressional end sought must be of sufficient importance to justify the burden imposed. Fourth, loss of citizenship may be imposed only as a consequence of voluntary conduct,[17] not as the result of coercion or duress. This limitation was expressly retained when the *Perez* decision was handed down,[18] and it seems to be a link with the past[19] which suggests that the Court is unwilling to admit that the power to expatriate is unqualified.

Assuming that Mr. Justice Brennan, a member of the majority in both *Perez* and the principal case, has not changed his mind, the principal case could be considered a reaffirmance of *Perez*. However, in this connection it is interesting to note that in the principal case Mr. Justice Brennan mentions that he has some "doubts of the correctness of *Perez*." Principal case at 187. Add to this the fact that three of the dissenters in *Perez* (the Chief Justice and Justices Black and Douglas) are still on the Court, and one may well question the future of *Perez*. However, at the present time *Perez* stands.

9 Perez v. Brownell, 356 U.S. 44, 58 (1958).

10 At present the only clues as to how clear this connection must be are in the *Perez* case (rational nexus with power to regulate foreign affairs existed because expatriation for voting in foreign election prevented potential political embarrassment to our government), and in Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for military desertion had no rational nexus with war power).

11 Shelton v. Tucker, 364 U.S. 479, 488 (1960); *accord*, Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961).

12 Principal case at 160.

13 *Id.* at 187.

14 *Id.* at 214.

15 Mr. Justice Brennan would impose just such a "unique solution" limitation. See principal case at 188.

16 Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 347-48 n.5 (1935); Nebbia v. New York, 291 U.S. 502, 525 (1934). See also Davidson v. New Orleans, 96 U.S. 97, 107 (1877) (Bradley, J., concurring).

17 Nishikawa v. Dulles, 356 U.S. 129, 133 (1958); Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

18 356 U.S. 44, 61 (1958).

19 In *Perez* the Court claimed to be following precedent, not making new law. One

The basis for decision in the principal case—that expatriation when used as a punishment cannot constitutionally be imposed except following a criminal trial and conviction—now supplies an additional limitation on congressional power. The determinative issue of the principal case was whether Congress intended expatriation by means of section 401(j) primarily as punishment. The majority felt that the legislative history was conclusive evidence of a punitive purpose, while the dissent found the primary purpose to be the boosting of wartime morale by permanent exclusion of unpatriotic persons and felt that this was a valid exercise of the war power. The available legislative history of section 401(j) is brief,[20] and no specific purpose is expressly stated therein. The majority also relied on the purposes of similar statutes passed in 1865[21] and 1912,[22] which the dissent challenged as being irrelevant, noting that section 401(j) was "the product of a totally different environment—the experience of a nation engaged in a global war,"[23] and implying that purposes behind identical statutes may change with altered circumstances. At any rate, the legislative history seems to be weak evidence in relation to the judgment it must support—a declaration of unconstitutionality.[24]

Aside from the relatively narrow issue of legislative history interpretation, this case is notable for the important constitutional issues that it raises but does not decide.[25] Assuming the requisite procedural due process had been provided, would expatriation be within the powers of Congress to apply as a criminal sanction? If Congress had expressed reasons other than punitive for inflicting loss of nationality, would expatriation be within the powers of Congress as part of a regulatory, as distinguished from a prohibitory, scheme? The latter would be aimed at achieving a desired result by proscribing a certain act, and the means employed would be a criminal sanction, or "punishment," as a deterrent; whereas the former would be aimed at achieving a desired result not by prohibiting the act but by providing for an adjustment to neutralize the effect of the act if it should occur. Such an "adjustment," although it may be a burden, is not legally termed a "punishment." Of course regulation in its broader sense would include certain ancillary prohibitions, but, since penal and

of the cases the Court relied on heavily was Mackenzie v. Hare, 239 U.S. 299 (1915), in which it was said that "a change of citizenship cannot be . . . imposed without the concurrence of the citizen." *Id.* at 311. Thus, retention of the "voluntary conduct" doctrine was essential if the Court did not want to overrule *Mackenzie.*

20 See H.R. REP. No. 1229, 78th Cong., 2d Sess. (1944); S. REP. No. 1075, 78th Cong., 2d Sess. (1944); 90 CONG. REC. 3256-63, 7628-29 (1944).

21 Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490.

22 Act of August 22, 1912, ch. 336, 37 Stat. 356.

23 Principal case at 204.

24 This seeming willingness to accept equivocal evidence in the face of the "delicate task" of constitutional adjudication might possibly be a symptom of a general dissatisfaction with the doctrine of involuntary expatriation coupled with an unwillingness to face the expatriation issue squarely at the present time. See note 8 *supra.*

25 Principal case at 186 n.43.

non-penal means are subject to different constitutional limitations, it is desirable to treat them separately. If expatriation is used as part of a regulatory scheme, the "rational nexus" requirement would seem to limit its use to facilitation of only two congressional powers—the war power or the power to regulate foreign affairs. The *Perez* case is an example of the utilization of the device of expatriation as part of a regulatory scheme. Although in the regulatory scheme context the procedural requirements of the sixth amendment are inapplicable, the procedure provided for the protection of individual rights must still comply with the fifth amendment's requirement of due process. The fifth amendment guarantees no particular form of procedure,[26] and procedural due process was not discussed in the *Perez* case. Of course the procedure provided in that case must have been sufficient since loss of nationality was upheld. The procedural statute there involved[27] provided for a suit for a declaration of nationality in a district court by anyone denied a right or privilege of citizenship by a government agency. This statute has since been replaced by another[28] which differs somewhat in terms. But under recent Supreme Court interpretation,[29] the type of relief available under the Perez statute is still available, and thus there should be no procedural due process problem when expatriation is used as part of a regulatory scheme.[30]

Whether or not Congress can employ expatriation as punishment would appear to be an open question. As is suggested in the principal case, expatriation and banishment (the practical result of expatriation in many cases) have throughout history been used as punishment.[31] In 1800 the Court held that "the right to . . . banish, in the case of an offending citizen, must belong to every government."[32] In the principal case the question was expressly avoided by the majority,[33] and simply not considered by the dissent. The question has been before the Court only once. In *Trop v. Dulles*,[34] decided on the same day as *Perez*, the Court in a five-to-four decision denied resort to expatriation when used as punishment for desertion from the armed forces. Four Justices, three of whom are still on the bench (Warren, Black and Douglas), felt that expatriation as punishment is "cruel and unusual" per se, and thus a violation of the eighth amendment. Mr. Justice Brennan concurred in a separate opinion, impliedly rejecting the "cruel and unusual" per se doctrine. The dissent, in which Justices Harlan and Clark joined, also rejected the "cruel and unusual" per se doctrine, pointing out that, since the death penalty could

26 NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 351 (1938).
27 Nationality Act of 1940, ch. 876, § 503, 54 Stat. 1171.
28 Immigration and Nationality Act of 1952, § 360, 66 Stat. 273, 8 U.S.C. § 1503 (1958).
29 Rusk v. Cort, 369 U.S. 367 (1962).
30 A future congressional attempt to limit this scope of relief might raise constitutional problems. See Rusk v. Cort, *supra* note 29, at 380-82 (Brennan, J., concurring).
31 Principal case at 168 n. 23.
32 Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 20 (1800) (opinion of Cushing, J.).
33 Principal case at 186 n.43.
34 356 U.S. 86 (1958).

have been imposed for desertion, expatriation was not "cruel and unusual." Thus, at the present time there are three Justices who would call expatriation employed as punishment a per se violation of the eighth amendment, three Justices who would not condemn it as such out of hand, and three Justices who have yet to be heard from. Mr. Justice Brennan's concurring opinion in *Trop* laid down a requirement that the penalty must be "rationally directed to achieve the legitimate ends of punishment,"[35] and concluded that this requirement had not been met.

The ends of punishment toward which expatriation might conceivably be directed are deterrence, insulation of society from dangerous individuals, and retribution. Here one peculiar characteristic of expatriation should be noted. Its effects and full ramifications cannot be known in advance. The expatriate may become stateless, a situation the consequences of which may be very harsh and which in any event cannot be accurately predicted. Or he may be a dual national, thereby still retaining the citizenship of another country to which he might be perfectly happy to retreat. Or, even if stateless, he might later acquire the citizenship of a friendly country. And if expatriation is not coupled with deportation he may remain in the United States and continue to enjoy most of the benefits of citizenship. The point is that it is difficult to determine whether the penalty is "rationally directed to achieve the legitimate ends of punishment" when it is not known what results the penalty in question will achieve.[36] Its deterrent effect is most difficult to predict, and the amount of retribution may range from slight inconveniences to a forced life of wandering as a stateless individual. And only a small part of society (the expatriating country) could be insulated from the individual. Even if these ends of punishment are to some degree achieved by expatriation, it is only in a most haphazard fashion. It seems difficult to say that such an inefficient method is "rational."[37] Another argument might be made in opposition to the imposition of expatriation as punishment. Even assuming that expatriation might achieve the ends of punishment, are there not "less drastic means" available, such as fines and imprisonment, to accomplish the same ends? It seems that the traditional modes of punishment can achieve equally well, if not better, any of the ends of punishment to which expatriation might be directed. If one is willing to concede that these traditional modes are "less drastic" than expatriation, the chances of expatriation being constitutionally imposed as punishment disappear. It should be noted that, outside of the provisions struck down in the prin-

[35] *Id.* at 111. This of course is simply the "rational nexus" test applied specifically to Congress's power to set penalties for violations of federal law. See note 9 *supra* and accompanying text.

[36] "[I]t must be questioned whether expatriation can really achieve the . . . effects sought by society in punitive devices." Trop v. Dulles, 356 U.S. 86, 111-12 (1958) (Brennan, J., concurring).

[37] Availability of more efficient and less objectionable alternative methods was one of the reasons for Mr. Justice Brennan's concurrence in Trop v. Dulles, *supra* note 36, at 114.

cipal case and in *Trop*, there are no other statutory provisions relating to expatriation which evince a primary purpose of punishment.[38]

It seems settled that Congress has the power, at least for some purposes, to effect involuntary expatriation. However, that power is fenced in by many limitations. The requirement that "less drastic means" be used if available will probably limit its use to situations wherein it is a unique solution. The uncertainty of the effects of expatriation on an individual and the availability of more efficient alternatives would suggest the inappropriateness of its use as a punishment.

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38 See § 349(a) of the Immigration and Nationality Act of 1952, 66 Stat. 267-68, as amended, 68 Stat. 1146 (1954), 8 U.S.C. § 1481(a) (1958). Section 349(a)(9) provides for expatriation upon conviction for treason or upon conviction for conspiracy to overthrow the government by force. This may appear to be punishment, but it can easily be construed to show lack of allegiance and thus be considered a voluntary abandonment of citizenship. See Note, 44 CORNELL L.Q. 593, 598-99 (1959).