Michigan Law Review

Volume 59 | Issue 6

1961

Constitutional Law - Citizenship - Draft -Avoidance Statute Declared Unconstitutional

Ralph L. Wright
University of Michigan Law School

CONSTITUTIONAL LAW — CITIZENSHIP — DRAFT-AVOIDANCE STATUTE DECLARED UNCONSTITUTIONAL — In 1951 plaintiff, a native-born American citizen, went to England for temporary work, as a physician and research physiologist. In 1953 his draft board ordered him to report for induction but he failed to comply with the order. The State Department then issued an administrative order expatriating plaintiff for remaining outside the United States for the purpose of avoiding service in the armed forces in violation of section 349 (a) (10) of the Immigration and Nationality Act of 1952.[1] In a declaratory judgment suit before a three-judge court, *held,* section 349 (a) (10) is unconstitutional. Expatriation of United States citizens for draft avoidance is a cruel and unusual punishment which violates the eighth amendment.[2] *Cort v. Herter,* 187 F. Supp. 683 (D.D.C. 1960), *jurisdictional question postponed,* 365 U.S. 808 (1961).

In 1868[3] Congress declared it to be the inherent right of any person to

[1] "(a) . . . a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by: . . . (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States." 66 Stat. 163, 267-68 (1952), 8 U.S.C. § 1481 (a) (10) (1958).

[2] The court felt itself bound to follow Trop v. Dulles, 356 U.S. 86 (1958), which declared the statutory provision [66 Stat. 163, 267-68 (1952), 8 U.S.C. § 1481 (a) (8) (1958)] expatriating citizens for desertion in time of war unconstitutional because expatriation was a cruel and unusual punishment prohibited by the eighth amendment.

[3] Prior to 1868 American courts generally followed the English rule that a citizen could not voluntarily expatriate himself. Shanks v. Dupont, 28 U.S. (3 Pet.) 242 (1830). The executive department, however, generally held otherwise and recognized a right of voluntary expatriation in the individual. 3 MOORE, DIGEST OF INTERNATIONAL LAW § 434, at 562 (1906). See also Justice Iredell's opinion in Talbot v. Jansen, 3 U.S. (3 Dall.) 133,

separate his allegiance from one nation and transfer it to another,[4] and in 1915 the power of Congress to enact legislation depriving individuals of their American citizenship was upheld by the Supreme Court in *Mackenzie v. Hare*.[5] The Nationality Act of 1940[6] codified the expatriation statutes scattered throughout the statute books. The federal courts, in applying expatriating legislation, have consistently held that acts which result in loss of nationality must be voluntarily performed[7] with an intent to do the act which constitutes expatriation.[8] Once this intent is found the citizen is bound by the legal consequences of his act. That he did not intend to effect expatriation by these acts or did not know that expatriation would follow is irrelevant.[9] This position was recently reaffirmed by *Perez v. Brownell*[10] in which the Supreme Court held that Congress has the power to divest citizenship if a "rational nexus" exists between the exercise of a specific congressional power and divestiture of citizenship, provided the action of Congress is not expressly prohibited by the Constitution. The Court concluded that Congress' power in the area of foreign affairs authorized it to control the voting of American citizens in foreign elections and that expatriation was a proper method by which to exercise this power. Such voting was thought to be potentially embarrassing to the American Government and to increase the possibility of embroiling this country in disputes with other nations. In a vigorous dissent Mr. Chief Justice Warren stated that Congress has power only to declare acts to be expatriating which clearly show lack of allegiance to the United States. The Chief Justice reiterated this view in his majority opinion in *Trop v. Dulles*.[11]

160-65 (1795). For a discussion of the early history of denationalization, see generally Flournoy, *Dual Nationality and Election* (pts. 1 & 2), 30 YALE L.J. 545, 693 (1921); Flournoy, *Naturalization and Expatriation* (pts. 1 & 2), 31 YALE L.J. 702, 848 (1922); Nielsen, *Some Vexatious Questions Relating to Nationality*, 20 COLUM. L. REV. 840 (1920).

4 REV. STAT. § 1999 (1875); 8 U.S.C. § 1481 (1958).

5 239 U.S. 299 (1915).

6 54 Stat. 1137 (1940).

7 Savorgnan v. United States, 338 U.S. 491, 499-501 (1950); Perkins v. Elg, 307 U.S. 325, 334 (1939); Mackenzie v. Hare, 239 U.S. 299 (1915); Perri v. Dulles, 206 F.2d 586, 590-91 (3d Cir. 1953); Acheson v. Wohlmuth, 196 F.2d 866, 871 (D.C. Cir. 1952).

8 Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915).

9 For discussion of the requisite state of mind see Hepburn, *Expatriation Through Inadvertance*, 3 ALA. L. REV. 1 (1950); Comment, 49 MICH. L. REV. 595, 603 (1951). One mitigating element has been the willingness of the courts to find duress in the citizen's performance of the act on the barest evidence when in fact there is no allegiance shown to a foreign nation. See generally, Roche, *The Loss of American Nationality — The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950); Comment, 54 COLUM. L. REV. 932 (1954).

10 356 U.S. 44 (1958). This case deals with a dual national of the United States and Mexico who was born in Texas, but resided in Mexico after age 10. He sought to return to the United States but was refused admission on the ground that he had lost his citizenship by voting in a Mexican political election. The Supreme Court upheld this administrative ruling. See Comments, 56 MICH. L. REV. 1142 (1958); 107 U. PA. L. REV. 118 (1958).

11 356 U.S. 86 (1958). See note 2 *supra*.

The *Trop* case held unconstitutional section 349 (a) (8) of the Immigration and Nationality Act of 1952[12] which expatriates any citizen convicted by a court martial of desertion and given a dishonorable discharge. Mr. Chief Justice Warren realized that a majority of the Court favored the *Perez* rule. Thus, although he thought the case ought to be decided according to the views he promulgated in his *Perez* dissent, he held that even if citizenship may be divested in the exercise of some governmental power, the statute in question specified a cruel and unusual punishment in violation of the eighth amendment. The cases clearly indicate a split on the Supreme Court with regard to the basic philosophy of expatriation legislation. Chief Justice Warren and Justices Black and Douglas apparently view the question from the standpoint of individual liberties and adhere to the rule that there is no congressional power to declare that acts will result in expatriation unless such acts clearly manifest the actor's lack of allegiance to the United States.[13] Moreover, these three Justices regard expatriation legislation as punishment and thus will always inquire whether it violates the eighth amendment.[14] Justices Frankfurter, Clark, Harlan, and Brennan are inclined toward a power approach and adhere to the rational nexus rule of the *Perez* case,[15] but feel that such legislation does not prescribe "punishment."[16] The position of Mr. Justice Whittaker is more difficult to determine. Apparently he follows the general approach of the majority in *Perez,* but would require that the proscribed acts have a substantial effect in an area in which Congress has power to legislate.[17] Mr. Justice Stewart has not had the opportunity to express his views on this question.

The principal case should be compared with *Mendoza-Martinez v. Mackey,*[18] apparently the only other case to examine extensively the constitutionality of section 349 (a) (10). There the district court first held that section 349 (a) (10) was constitutional, but the Supreme Court vacated the judgment[19] and directed the district court to rehear the case in the light of *Trop v. Dulles.* The district court then held the act unconstitutional[20] because there was no rational nexus between either the war powers or the foreign affairs power and section 349 (a) (10); the court did not discuss the

12 66 Stat. 163, 267-68 (1952), 8 U.S.C. § 1481 (a) (8) (1958). See note 2 *supra.*

13 See Perez v. Brownell, 356 U.S. 44, 62 (1958) (dissenting opinion).

14 Trop v. Dulles, 356 U.S. 86, 96-99 (1958).

15 See Perez v. Brownell, 356 U.S. 44 (1958). See also Trop v. Dulles, 356 U.S. 86, 114 (1958) (dissenting opinion).

16 Trop v. Dulles, 356 U.S. 86, 124 (1958).

17 Mr. Justice Whittaker's beliefs are expressed in his memorandum opinion in Perez v. Brownell, 356 U.S. 44, 84-85 (1958).

18 Civil No. 1314-ND, S.D. Cal., Sept. 22, 1955, *aff'd,* 238 F.2d 239 (9th Cir. 1956), *judgment vacated and remanded,* 356 U.S. 258 (1958). For authority upholding constitutionality of § 349 (a) (10) or its predecessor without extensive discussion, see Gonzales v. Landon, 215 F.2d 955 (9th Cir. 1954), *rev'd on other grounds,* 350 U.S. 920 (1955); Vidales v. Brownell, 217 F.2d 136 (9th Cir. 1954).

19 356 U.S. 258 (1958).

20 Civil No. 1314-ND, S.D. Cal., Sept. 24, 1958, *remanded,* 362 U.S. 384 (1960).

element of punishment. Unfortunately, the court in the principal case gave virtually no reason for following the *Trop* decision although some language indicates the court felt that section 349 (a) (10) violated the cruel and unusual punishment prohibition of the eighth amendment. On the other hand, the court might have believed that there was no rational nexus between draft-avoidance and expatriation—the view of the *Mendoza-Martinez* court. The court did not even discuss certain other considerations relating to the *Trop* case. *Trop* involved a military determination of desertion in time of war. The deserting party was absent less than twenty-four hours and returned voluntarily; at no time did he show any allegiance to the enemy. In the principal case the plaintiff remained abroad after he learned that he had been summoned for induction; his conduct evidenced a greater lack of allegiance to the United States. Moreover, the court apparently accorded little significance to the fact that plaintiff's citizenship had been divested by an administrative order instead of by a judicial tribunal. In the *Trop* case, a military tribunal determined whether the soldier had in fact deserted and thereby committed the necessary expatriating act under section 349 (a) (8). In his majority opinion in *Trop* Mr. Chief Justice Warren commented on the undesirability of having military officials decide the fate of a citizen's nationality, intimating that the military court was an improper tribunal.[21] More significantly, the Chief Justice stated in dictum that "section 401 (j) [now 349 (a) (10)] decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed. . . ."[22] Thus if one basis for the refusal to allow expatriation to be imposed for desertion is the undesirability of a military adjudication of facts which might affect one's citizenship, there is much greater reason to disallow a a statutory provision such as 349 (a) (10) which provides for a determination of such facts without *any* hearing. Surely these considerations deserved attention in the principal case.

The court in the principal case should not have felt constrained to depend on the eighth amendment's cruel and unusual punishment provision to invalidate the expatriation statute for draft-avoidance. Even if the rule of the *Perez* case is to be applied, there does not seem to be the same effect on American foreign policy by citizens leaving the country merely to evade the draft as there does when American citizens vote in politically significant foreign elections. The plaintiff's remaining in Europe for the purpose of evading training and service in the armed forces is to be condemned; such conduct, however, does not show a renunciation of his citizenship or an allegiance to a foreign country. It is difficult to find any rational relationship between the power of Congress to regulate foreign affairs and section 349 (a) (10). Nor is there any compelling connection be-

[21] Trop v. Dulles, 356 U.S. 86, 90 (1958).
[22] *Id.* at 93-94.

tween the congressional war powers and the expatriation of draft-dodgers as a "necessary and proper" sanction.[23] If expatriation of draft-avoiders is to serve as a deterrent, it would seem that the more ordinary form of criminal punishment would be a sufficient deterrent.

Moreover, even if the section in question is rationally related either to the war power or foreign affairs power of Congress, the effect on the individual should not be overlooked. This underlies the present split on the Supreme Court. The policy behind the point of view expressed by Mr. Chief Justice Warren deserves close attention. Since the government derives its powers from the consent of the governed, it can be argued that it has no power to destroy the relationship which gives rise to its existence. Rather, the government only has power to give formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship. At present, there are at least four Justices who share this point of view. Although the effects of the loss of citizenship are speculative since Congress has not legislated specifically on the status of such denationalized persons, the loss of such citizenship does result in the loss of certain economic and political rights such as the right to engage in some professions and other types of employment, and the right to vote and hold public office. Moreover, expatriation represents a loss of the right to have rights—loss of membership in any organized community capable of guaranteeing any rights. The individual becomes a stateless person; any nation can at will expel him or prevent his departure. Neither the governments of individual states nor the international organizations are considered to have legal standing to intervene in his behalf. He exists at the mercy of the state in which he resides.[24] These effects seem harsh enough to demand a reassessment of the propriety of treating the individual right of citizenship as a mere *means* for effectuating congressional power manipulated within the broad confines of the "necessary and proper" clause.

Ralph L. Wright

[23] Mendoza-Martinez v. Mackey, Civil No. 1314-ND, S.D. Cal., Sept. 24, 1958, *remanded*, 362 U.S. 384 (1960).

[24] See generally Comment, 64 YALE L.J. 1164, 1189-94 (1955).