Michigan Law Review

Volume 56 | Issue 5

1958

Aliens - Deportation - Activity Consituting Membership in Communist Party

Mark Shaevsky
University of Michigan Law School

RECENT DECISIONS

ALIENS—DEPORTATION—ACTIVITY CONSTITUTING MEMBERSHIP IN COMMUNIST PARTY—Petitioner, an alien who had resided in the United States since 1914, joined the Communist Party in 1935 and during that year paid dues, attended meetings, and worked briefly at an official outlet for communist literature. He terminated his relationship with the party after approximately one year. At a hearing to consider his possible deportation, the petitioner disclaimed that he had held any belief in the forcible overthrow of government, stating that he had regarded the Communist Party solely as an instrument for securing economic necessities. The Board of Immigration Appeals upheld the hearing officer's finding that petitioner had been a member of the Communist Party, a deportable class of aliens under the Internal Security Act of 1950,[1] as amended in 1951.[2] Upon application for a writ of habeas corpus, the district court and the Court of Appeals for the Eighth Circuit both sustained the finding and denied the writ.[3] On certiorari to the Supreme Court, *held,* reversed, four justices dissenting.[4] The record did not support the deportation order, as petitioner's activities failed to establish the "meaningful association" required by the alleviating amendment of 1951 and motivation for affiliation with the Communist Party appeared to lack " 'political' implications." *Rowoldt v. Perfetto,* 355 U.S. 115 (1957).

Congress derives its power to exclude aliens from the United States from the commerce clause,[5] authority over naturalization,[6] and the sovereignty of the national government in national security and foreign affairs.[7] Power over deportation is a necessary corollary to Congress'

1 64 Stat. 1006, 1008 (1950): "[Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States: . . . (2) Aliens who, at any time, shall be or shall have been members of any of the following classes: . . . (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States. . . . Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall . . . be . . . deported. . . ." The substance of this provision was incorporated in the Immigration and Nationality Act, 66 Stat. 205 (1952), 8 U.S.C. (1952) §1251(a)(6)(C). See 66 HARV. L. REV. 643 (1953), for a discussion of the development and operation of immigration laws.

2 65 Stat. 28 (1951): ". . . the terms 'members of' and 'affiliated with' . . . shall include only membership or affiliation which is or was voluntary, and shall not include membership or affiliation which is or was solely (a) when under sixteen years of age, (b) by operation of law, or (c) for purposes of obtaining employment, food rations, or other essentials of living, and where necessary for such purposes." See note 16 infra.

3 Rowoldt v. Perfetto, (8th Cir. 1955) 228 F. (2d) 109.

4 Justice Harlan, joined by Justices Burton, Clark, and Whittaker.

5 U.S. CONST., art. I, §8.

6 Ibid.

7 The Chinese Exclusion Case, 130 U.S. 581 (1889).

admission policies.[8] The Supreme Court regards the immigration program of Congress as a political question, immune from judicial interference.[9] On this basis, the Court in *Galvan v. Press*[10] upheld the constitutionality of the deportation provisions of the Internal Security Act as there applied to a former member of the Communist Party. Since the Court on somewhat similar facts sustained the deportation order in the *Galvan* case but set aside such order in the principal case, the problem of reconciling the results arises.[11] As the Court in the *Galvan.* decision held that knowledge of the Communist Party's true purposes was not a prerequisite for deportation if the alien of his own free will joined the party, aware that it was a distinct political organization, the presence or absence of such knowledge was immaterial in the principal case.[12] It would seem that the only possible interpretation of the holding in the principal case is that the alien's participation, so far as disclosed by the record, was insufficient to constitute membership in the Communist Party within the meaning of the deportation statute. It does appear that the alien's communist activities in the *Galvan* case were of a somewhat more substantial and significant nature than the petitioner's in the principal case.[13] This qualitative difference indicates that the definition of membership in the Communist Party for deportation proceedings requires active participation in party affairs, while paying dues and attending meetings constitute merely nominal association. The majority in the principal case considers this view, which is consistent with some language in the *Galvan*

[8] Fong Yue Ting v. United States, 149 U.S. 698 (1893). See Boudin, "The Settler Within Our Gates," 26 N.Y. UNIV. L. REV. 266, 451, 634 (1951), for a critical re-examination of the early deportation cases.

[9] Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

[10] 347 U.S. 522 (1954).

[11] In the Galvan case, petitioner was a member of the Communist Party from 1944 to 1946. He indicated that the distinction between the Communist Party and other groups was clear in his mind. He refrained from applying for citizenship because he feared his party membership would become known to the authorities. Petitioner offered to make amends by rejoining the party as an undercover agent for the government. In addition there was testimony that the petitioner had been an active member and an officer of the Spanish Speaking Club, an alleged Communist Party unit. It should be noted that the majority opinions in both cases were written by Justice Frankfurter.

[12] This does not appear to be disputed, as the majority opinion in no way intimates a change of sentiment from the views expressed in the Galvan case. The dissent in the principal case considers the lack of a showing of such knowledge as one possible interpretation of the majority's holding, but states that it would be indefensible in light of the Galvan holding.

[13] The petitioner in the principal case, aside from the brief period of employment in the bookstore, remained passive toward party affairs, while in the Galvan case the alien appeared to be an active member and officer of an alleged Communist Party unit. Moreover, in the Galvan case the alien's intellectual attitude, demonstrated by failure to apply for citizenship because of the requirement of disclosure of party membership to immigration authorities and his awareness of the distinction between the Communist Party and other groups, seemed to indicate a closer association with party activities than did the alien's association in the principal case.

case,[14] as the necessary implication and spirit of the 1951 amendment.[15] The dissenting justices, however, regard the 1951 amendment as pertaining only to *admission* requirements,[16] thus not affecting the purpose of the Internal Security Act in strengthening *deportation* policies relating to subversives.[17] The principal case, although perhaps consistent with the *Galvan* opinion, severely restricts the scope of that decision and also represents a different judicial approach toward immigration policies. The majority opinion acknowledges Congress' plenary power over immigration but then narrowly construes the membership provision as a basis for deportation—an indication that the Court is considering the social results of an interpretation that would sanction deportation for trivial activities.[18] If the principal case is followed in the future there will be a greater tendency for the courts, in determining the degree of participation in the

[14] Galvan v. Press, note 10 supra, at 527-529: "This memorandum [by Senator McCarran, see note 15 infra] . . . indicates that Congress did not provide that the three types of situations it enumerated in the 1951 corrective statute should be the only instances where membership is so nominal as to keep an alien out of the deportable class. . . . And even if petitioner was unaware of the Party's advocacy of violence . . . the record does not show a relationship to the Party so nominal as not to make him a 'member' within the terms of the Act."

[15] Senator Ferguson, one of the sponsors of the amendment stated: ". . . the amendment would exclude those who were Communists by conviction, what we might call mentally Communist. But it would not exclude those who really, in effect, never have been what I call mentally Communist—those whose Communist affiliation was nominal or involuntary." 97 CONG. REC. 2368 (1951). See also remarks by Senator McCarran, 97 CONG. REC. 2370 (1951). For the elements of membership before the 1950 act, see Colyer v. Skeffington, (D.C. Mass. 1920) 265 F. 17 (one of the attorneys on the brief as amicus curiae was Felix Frankfurter). Although designed for a slightly different purpose, the Communist Control Act of 1954, 68 Stat. 775 (1954), 50 U.S.C. (Supp. IV, 1957) §844, lists thirteen factors that could constitute membership. This could indicate that Congress intended uniform criteria in determining Communist Party membership in the statutes concerning subversives, and was so considered in Fisher v. United States, (9th Cir. 1956) 231 F. (2d) 99.

[16] S. Rep. 111, 82d Cong., 1st sess., p. 1 (1951), and H. Rep. 118, 82d Cong., 1st sess., p. 2 (1951), both indicate that the amendment was to apply only to persons wishing to enter the United States but who in the past had been involuntary members of communist or fascist organizations in Europe. When the Immigration and Nationality Act was enacted this 1951 amendment was not included in the deportation, but only in the admission provisions. 66 Stat. 186 (1952), 8 U.S.C. (1952) §1182(a)(28)(I).

[17] "The Immigration and Naturalization Systems of the United States," S. Rep. 1515, 81st Cong., 2d sess., pp. 796-801 (1950), an exhaustive report on the United States immigration systems, recommended strengthening of policies concerning aliens. This report formed the basis for S. Rep. 2230, 81st Cong., 2d sess., pp. 24-28 (1950), and H. Rep. 3112, 81st Cong., 2d sess., p. 54 (1950), the latter report stating: "Sec. 22 . . . rewrites the Act of October 16, 1918 . . . in order to strengthen the provisions of such act which relate to the exclusion and deportation from the United States of subversive aliens."

[18] Perhaps activities by an alien would be insufficient to constitute membership but might be affiliation under the Immigration and Nationality Act, 66 Stat. 172 (1952), 8 U.S.C. (1952) §1101(e)(2). However, in view of the cases of Bridges v. Wixon, 326 U.S. 135 (1945) and United States ex rel. Kettunen v. Reimer, (2d Cir. 1935) 79 F. (2d) 315, it is likely that establishing affiliation would present even greater difficulties than showing membership in the Communist Party.

Communist Party sufficient to warrant deportation, to balance the consequences to the alien of deportation with the congressional standard of individual suitability for residence in the United States.

Mark Shaevsky