Michigan Law Review

Volume 51 | Issue 3

1953

CONSTITUTIONAL LAW-FIFTH AMENDMENT DUE PROCESS-VAGUE AND INDEFINITE STATUTE-RIGHT TO TRIAL ON QUESTION OF ILLEGAL PRESENCE IN UNITED STATES

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CONSTITUTIONAL LAW—FIFTH AMENDMENT DUE PROCESS—VAGUE AND INDEFINITE STATUTE—RIGHT TO TRIAL ON QUESTION OF ILLEGAL PRESENCE IN UNITED STATES—Defendant, an alien, against whom an order of deportation had been entered in 1930 by reason of his advocacy of the overthrow of the government by force and violence, was indicted for violation of section 20(c) of the Immigration Act of 1917 as amended,[1] which made it a felony for an alien against whom such an order is outstanding to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." The lower court dismissed the indictment on the ground that the statute in question was unconstitutionally vague and indefinite for failure to specify the nature of the travel documents necessary for departure and for failure to indicate to which country or to how many countries the alien

[1] Section 23 of the Internal Security Act of 1950, 64 Stat. L. 1010, 8 U.S.C. (Supp. IV, 1951) §156(c).

should make application. On appeal, *held,* reversed. The statute on its face meets the constitutional test of certainty and definiteness. The court will not decide whether the statute is unconstitutional on the ground that it afforded defendant no opportunity to have the court which tried him pass on the validity of his deportation order because the defendant did not raise, brief or argue that question. *United States v. Spector,* 343 U.S. 169, 73 S.Ct. 591 (1952).

That a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates an essential element of Fifth Amendment due process of law, is an established tenet.[2] Commonly subsumed under the "vague and indefinite" heading it is a fundamental ground used in attacks on the constitutionality of criminal statutes.[3] The term "vague and indefinite" being in itself vague and indefinite and open to subjective interpretation, the Court has in various ways sought to specify its scope. A criminal statute must have an ascertainable standard of guilt,[4] but it is not unconstitutional merely because application of it may be uncertain in exceptional cases,[5] or because it is so framed as to require a jury on occasion to determine a question of reasonableness.[6] Such a statute may still provide a practical guide to permissible conduct. The essential purpose of the "void for vagueness" doctrine is to warn individuals of the criminal consequences of their conduct.[7] The court, however, will not require an impossible standard of certainty in statutes defining crimes,[8] and difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not render a statute unconstitutionally indefinite.[9] However, the required ascertainable standard of guilt must be fixed by Congress rather than by the courts.[10] The Court in the *Spector* case held the words "timely application" were referable to

[2] Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126 (1925), annotated 70 L.Ed. 322; Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939); Champlin Ref. Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559 (1931).

[3] Williams v. United States, 341 U.S. 97, 71 S.Ct. 576 (1951); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031 (1945). But see Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703 (1951), where the Court examined a statute which did not declare certain conduct criminal but apprised aliens of deportation consequences which follow after conviction of two crimes for moral turpitude, because of the "grave nature of deportation." However, the Court appeared to do this more as a matter of judicial grace than as allowing the vagueness objection to a deportation statute the dignity of a due process objection.

[4] Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948); United States v. Cohen Grocery Co., 255 U.S. 81, 42 S.Ct. 183 (1921).

[5] Hygrade Provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141 (1924).

[6] United States v. Ragen, 314 U.S. 513, 62 S.Ct. 374 (1942).

[7] Statutes held void for uncertainty and indefiniteness: Lanzetta v. New Jersey, supra note 2; Connally v. General Construction Co., supra note 2; Stoutenburgh v. Frazier, 16 App. D.C. 229, 48 L.R.A. 220 (1900).

[8] United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538 (1947).

[9] United States v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167 (1930).

[10] Screws v. United States, supra note 3; United States v. Cohen Grocery Co., supra note 4. Close construction of an act, however, may save it from a vagueness that is fatal, Screws v. United States, supra.

a prior-mentioned six-month period and were sufficiently definite.[11] As against the dissent's observation that aliens are not necessarily sophisticated world travelers with a knowledge of which documents are necessary for departure from one country and entrance into another, the Court held that any possible statutory trap for the uninitiate in present-day governmental red tape is obviated by emphasizing the statute's reference to "good faith application." In reference to the latter one may wonder, as did the dissent by inference, whether a statute can be saved from an attack as vague by emphasis on another phrase equally vague and even more subjective. However, it is submitted, that if "reasonable" is an unobjectionable standard, "good faith" should also qualify.

The ground most vigorously urged by the dissent for the unconstitutionality of this section of the act was not vagueness. The dissenters assert that the fact that an alien could be imprisoned up to ten years for violation of a deportation order without a trial on the legality of his presence in the United States (which underlay that order) violated Fifth Amendment due process. That aliens as well as citizens are entitled to protection of the Fifth Amendment as regards procedure in a criminal trial is clear.[12] This right does not extend to deportation proceedings[13] which Congress may entrust to executive officers with no provision for a judicial hearing on the grounds for deportation.[14] However, if infamous punishment such as imprisonment is to be added to deportation, Fifth Amendment due process is applicable and all safeguards of a criminal trial must be adhered to.[15] The *Spector* case falls between the above holdings in that punishment is not for illegal presence in the United States per se but for failure to comply with a deportation order. However, the basis of that deportation order is illegal presence in the United States. The dissent felt that illegal pres-

[11] Section 20(c) of the act provides that any alien against whom a specified order of deportation is outstanding "who shall willfully fail or refuse to depart from the United States within a period of six months from the date of such order of deportation, or from September 23, 1950 [date of the enactment of the Subversive Activities Control Act], whichever is the later, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure . . . shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years. . . ."

[12] Wong Wing v. United States, 163 U.S. 228, 16 S.Ct. 977 (1895); at least as to friendly aliens if not alien enemies, Russian Volunteer Fleet v. United States, 282 U.S. 481, 51 S.Ct. 229 (1930). Extensive annotation as to constitutional rights of aliens in the United States, 68 L.Ed. 262 et seq. (1923); United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1941).

[13] Li Sing v. United States, 180 U.S. 486, 21 S.Ct. 449 (1900); Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201 (1908); but if person substantiates a claim to citizenship by probative evidence sufficient to establish the fact, he is entitled to a judicial hearing, Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492 (1922).

[14] A limit to the power entrusted to an executive officer in these deportation proceedings is that there is a denial of due process if the alien is deported without a hearing or on charges unsupported by any evidence. United States ex rel. Vajtauer v. Comm. of Immigration, 273 U.S. 103, 47 S.Ct. 302 (1926); United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 44 S.Ct. 54 (1923); annotation 16 Ann. Cas. 1069.

[15] Wong Wing v. United States, supra note 12; United States v. Wong Dep Ken, (D.C. Cal. 1893) 57 F. 206.

ence was the crucial element of the crime and it necessitated a judicial hearing to be consonant with prior adjudications as to due process requirements.[16] Severance of the question of illegal presence from the question of non-compliance with a deportation order was regarded as a subversion of prior holdings. The majority, while not rejecting the dissenting view, refused to consider it on the ground that the Court will not decide important constitutional questions which the parties have not presented, briefed or argued.[17]

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[16] Note 15 supra.

[17] Flournoy v. Wiener, 321 U.S. 253, 64 S.Ct. 548 (1944). If, as the dissenters suggested, reargument should have been ordered and the issue raised as to unconstitutionality on the latter issue, a divided court might have resulted, upholding the lower court's determination. Of the eight justices who sat on the case, three specifically agreed on the latter point, and the dissenting opinion implies that if the point were properly raised they (the dissent) might be joined by the writer of the majority opinion.