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Article 7

Punitive Expatriation

Recent Decision:
Punitive Expatriation

Statutes providing for a divestiture of an individual's citizenship under defined conditions have presented perplexing constitutional questions in the last decade. In a recent case, plaintiffs brought an action for a declaratory judgment establishing that they were citizens. They had been deprived of their citizenship for violating federal statutes[1] imposing such loss automatically on American citizens, when they remained outside of the United States in time of war to evade military service. In affirming the district court's judgment for plaintiffs, the Supreme Court *held* that the statute was unconstitutional since it employed expatriation as a penal sanction without the procedural requirements guaranteed by the fifth and sixth amendments to the Constitution. *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963).

At early common law, a citizen owed perpetual allegiance to the state and could not voluntarily surrender his citizenship without the consent of the sovereign.[2] However, since it was advantageous to provide immigrants arriving at our shores with a

[1] The statute involved in *Kennedy v. Mendoza-Martinez* is § 401(j) of the Nationality Act of 1940, 54 Stat. 1168, as amended, 58 Stat. 746 (1944). Its successor, § 349(a)(10) of the Immigration and Nationality Act, was in issue in *Rusk v. Cort,* decided in conjunction with the instant case. 66 Stat. 163 (1952), 8 U.S.C. § 1481(a)(10) (1958). The statutes are substantially the same except for the following presumption contained in the latter act. "From and after the effective date of this Act 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."

[2] Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830); 1 BLACKSTONE COMMENTARIES* 369 (1895).

new citizenship, Congress, in 1868,[3] recognized voluntary expatriation as an "inherent right" of all individuals. In 1907, Congress provided that the performance of certain acts[4] would constitute a renunciation of citizenship and effect a voluntary expatriation. The passage of this statute transformed the right of voluntary expatriation into a totally different concept. Expatriation, which had been the act of the citizen, was now to become that of the State.

In *Mackenzie v. Hare,*[5] a native-born American woman married a citizen of Great Britain who resided here. When she sought registration as a voter, her application was refused on the ground that she had lost her citizenship by marrying a foreigner. The Supreme Court affirmed the denial of her petition for mandamus. The Court refused to state unequivocally that citizenship could be involuntarily lost, and hence it emphasized that this was a "condition voluntarily entered into with notice of the consequences."[6] However, the idea of voluntary expatriation employed in this opinion was clearly distinguishable from that contained in the Act of 1868. It was no longer necessary to have a voluntary renunciation of citizenship. When the individual willfully performed the act designated by the statute, he automatically effected his expatriation.

Subsequently, the rationale of this case was adopted in *Savorgnan v. United States.*[7] There the Court, applying a section of the Nationality Act of 1940,[8] held that expatriation could result even though the individual did not have a specific intent to renounce his citizenship.[9] Thus, a citizen would be held to have "voluntarily" relinquished his citizenship when he freely performed the act designated by the statute.[10]

While the prior decisions had tenuously clung to the idea that the American national was voluntarily surrendering his citizenship,[11] in *Perez v. Brownell*[12] the Court decided that a citizen could be expatriated for voting in a foreign election even though he did not intend that result. The majority reasoned that the primary

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[3] REV. STAT. § 1999 (1875).

[4] 34 Stat. 1228 (1907). The acts included foreign naturalization, taking an oath to a foreign country and marriage by an American woman to an alien.

[5] 239 U.S. 299 (1915).

[6] Mackenzie v. Hare, 239 U.S. 299, 312 (1915).

[7] 338 U.S. 491 (1950).

[8] Section 2 of the Act of 1907, re-enacted in the Nationality Act of 1940, provided that an American citizen may be expatriated by "taking an oath of allegiance to a foreign state." 54 Stat. 1169 (1940), 8 U.S.C. § 801(b) (1946). Under the Nationality Act, the following acts would result in expatriation for an American citizen: foreign military service, foreign employment under certain conditions, voting in a foreign election, formal renunciation of citizenship, treason, desertion in wartime, remaining outside of the United States to avoid military service, attempt by force to overthrow or bearing arms against the United States, continuous residence abroad by a naturalized American citizen. Subsequently, most of the provisions of this act were adopted in the Immigration and Nationalization Act of 1952, 66 Stat. 267, 269-72 (1952), 8 U.S.C. §§ 1481-89 (1958).

[9] Savorgnan v. United States, 338 U.S. 491, 502 (1950). The courts have been inconsistent in the application of the doctrine that subjective intent to renounce citizenship is not a requirement for expatriation. *Compare* Kawakita v. United States, 343 U.S. 717 (1952), *with* United States v. Esperdy, 203 F. Supp. 380 (1962).

[10] For a discussion of the subject of duress in expatriation law, see Note, 54 COLUM. L. REV. 932 (1954).

[11] See, *e.g.,* Perkins v. Elg, 307 U.S. 325, 334 (1939), where the Court defined expatriation as "the voluntary renunciation or abandonment of nationality and allegiance."

[12] 356 U.S. 44 (1958).

limitation on the congressional power to regulate in the area of foreign affairs was the requirement that it act reasonably. When a rational nexus existed between expatriation and the object of a congressional power, the government could deprive a man of his citizenship.[13] Mr. Chief Justice Warren, in dissenting, maintained that Congress had no constitutional power to divest an individual of his citizenship. The congressional role in this area was limited to providing rules for determing when an individual had expatriated himself. Voting in a foreign election was not such an unequivocal act that it clearly indicated a "voluntary abandonment of American citizenship."[14]

In *Trop v. Dulles,*[15] decided the same day, the Court determined that the statute[16] imposing expatriation for wartime desertion was unconstitutional. Chief Justice Warren repeated his contention that Congress could not expatriate an individual against his will. He added a second argument that the use of expatriation as a penalty for a crime violated the eighth amendment which prohibits cruel and unusual punishment.[17] Mr. Justice Brennan distinguished this case from the *Perez* decision, explaining what, at first glance, would seem to be a reversal of position on the constitutionality of expatriation. In the *Trop* case, he found no reasonable relation between expatriation and an asserted congressional power. Therefore, since the deprivation of citizenship was a severe penalty, the alternative penal remedies, rather than expatriation, should be employed.[18]

In the present case, there is an automatic loss of citizenship when the "statutory set of facts develop."[19] There are no provisions for judicial safeguards. Thus, when Mr. Justice Goldberg concluded that the legislative history of the act revealed a penal purpose, it followed that the statute was unconstitutional since the procedural requirements of a criminal prosecution were absent. Justice Goldberg expressed no opinion on the question of whether the use of expatriation as a punishment was unconstitutional per se.[20] Justice Brennan, in a concurring opinion, expands upon the view he had previously expressed in the *Trop* case. Recognizing that any reasonable relation to a congressional power is lacking in this case, he concluded that the statute was penal. There is a strong denial of any constitutional right of Congress to employ expatriation merely as a penal sanction where inappropriate to the congressional power. Deprivation of citizenship will be allowed only "where some affirmative and unique relationships to policy are apparent."[21] The four dissenting justices maintained that the purpose of the statute was not penal but regulatory in that it was designed to promote the morale of the troops. They further concluded that there was a reasonable relation between the statutory imposition of expatriation and the congressional war power.

The statute in this case would appear to be punitive rather than regulatory. It is only by consoling the armed forces with the

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[13] Perez v. Brownell, 356 U.S. 44, 58 (1958).
[14] *Id.* at 78 (dissenting opinion of Warren, C. J.).
[15] 356 U.S. 86 (1958).
[16] 54 Stat. 1168, 1169 (1940), as amended, 58 Stat. 4 (1944).
[17] Trop v. Dulles, 356 U.S. 86, 99-104 (1958).
[18] *Id.* at 105-14 (concurring opinion of Brennan, J.).
[19] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167 (1963).
[20] *Id.* at 186 n.43.
[21] *Id.* at 188 (concurring opinion of Brennan, J.).

knowledge that draft evaders will be *punished* with loss of citizenship that the asserted policy objective can be achieved, and this is clearly a deterrent and retributive approach. A statute designed to deter is penal in nature.[22]

In addition, there does not exist a reasonable necessity for any employment of expatriation in the present situation. In the *Perez* case, expatriation was perhaps the only effective means of regulating the participation of our nationals in the elections of other countries. Under the facts in the present case, had the individual voluntarily remained abroad, the imposition of expatriation would fail to achieve the retribution it was designed to effect. On the other hand, if the individual returns to this country, the available penal sanction[23] would afford an adequate remedy and the additional infliction of expatriation would appear to make the punishment disproportionate to the crime.

Indeed, to the extent that the severity of the punishment is an indication of the punitive purpose of the statute,[24] the act in question appears to be penal. Deprivation of citizenship has been characterized by the Court as an "extraordinarily severe penalty"[25] and "more serious than the taking of one's property or the imposition of a fine or other penalty."[26] While it is true that expatriation may to a dual national cause but a slight inconvenience, it can have a severe effect when the individual has but one nationality and the loss of citizenship would create statelessness.[27] The stateless individual may lose the right to have recourse to any courts if he is mistreated by a state.[28] Indeed, he may lose all rights under contemporary international law.

Thus, there is a frank recognition by the majority in the instant case of the position, taken with somewhat less clarity in *Trop v. Dulles*,[29] that when a statutory purpose is clearly punitive, it will be classified as such rather than as a regulatory measure or as a "voluntary" act of expatriation. The import of this decision casts some doubt on the constitutionality of the Expatriation Act of 1954.[30] This act provides for a loss of citizenship when a person is convicted of certain crimes, including rebellion, insurrection, seditious conspiracy and advocating the overthrow of the government in the manner proscribed by the Smith Act. Notwithstanding its classification as voluntary expatriation, the basic purpose of this statute is the imposition of loss of citizenship as an added punishment for a crime.[31] However, since the procedural safeguards incident to a criminal prosecution are pro-

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[22] Klubock, *Expatriation—Its Origin and Meaning*, 38 NOTRE DAME LAW. 1, 21 (1962).

[23] 62 Stat. 622 (1948), 50 U.S.C. App. § 462(a) (1958).
The maximum punishment for draft evaders under this statute is five years imprisonment and $10,000 fine.

[24] See United States v. Lovett, 328 U.S. 303, 316 (1946).

[25] Klapprott v. United States, 335 U.S. 601, 612 (1949).

[26] Schneiderman v. United States, 320 U.S. 118, 122 (1942).

[27] Shaughnessy v. Meyers, 345 U.S. 206 (1953). In this case, an alien who had resided in this country from 1923 to 1948 was barred from re-entering after a visit to Hungary and no country would grant him citizenship. He was detained on Ellis Island as a "security risk" and the Supreme Court denied relief. After four years of "imprisonment," an executive remedy was finally granted.

[28] 1 OPPENHEIM, INTERNATIONAL LAW § 291 (8th ed. 1955).

[29] 356 U.S. 86 (1958).

[30] 68 Stat. 1146 (1954), 8 U.S.C. § 1481(a)(9) (1958).

[31] Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1181 (1955).

vided, the Court will be faced again with the issue of whether the use of expatriation as a punishment is constitutional.

Three methods of approach are available to the Court. First, the statute may be construed as only regulatory in purpose, and the imposition of expatriation found reasonably related to a congressional power. Secondly, a distinction in degree might be drawn between subversive crimes, with expatriation being allowed only in those cases where the acts done are inherently reflective of a voluntary renunciation of citizenship. Thirdly, the use of expatriation as a penalty for a crime could be condemned as cruel and unusual punishment and the section declared unconstitutional.

If there is a discernible trend in this area, it is away from any use of expatriation as punishment. This attitude has been urged by most commentators and international organizations.[32] The legitimate purposes of congressional legislation in this area are the establishment of methods by which an individual may voluntarily relinquish his citizenship if he so desires, and the reduction and regulation of individuals holding dual nationality.[33] The use of expatriation as punishment has, in the past, been confined to primitive societies and dictatorial states.[34] Considering the inherent value of American citizenship and the disabilities attached to the condition of statelessness, the use of expatriation merely as punishment is sufficiently arbitrary and capricious to be classified as cruel and unusual punishment. The restriction of the use of expatriation to situations where it is uniquely necessary to avoid international tensions would be more in accord with recent developments of the law, and the tenets of a democratic society which has traditionally recognized the dignity of man.

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[32] See United Nations Universal Declaration of Human Rights, art. 15; Maxey, *Loss of Nationality*, 26 ALBANY L. REV. 151 (1962); Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 70 (1950).

[33] The primary purpose of the Nationality Act of 1940 was the reduction of dual nationals, a group which has frequently caused international friction. See Maxey, *supra* note 32, at 181-83.

[34] ARENDT, THE ORIGINS OF TOTALITARIANISM 277 (1951).