

CONSTITUTIONAL LAW-NATIONALITY ACT of 1940-Loss OF CITIZENSHIP UPON CONVICTION OF WARTIME DESERTION

Trop v. Dulles (U.S. 1958)

During World War II, petitioner, a private in the United States Army, escaped from a stockade in French Morocco where he was being held for a breach of discipline. After being gone for a day, he decided to return to the stockade and was subsequently turned over to the military police. Upon conviction of desertion¹ by a general court-martial, petitioner was sentenced, *inter alia*, to a dishonorable discharge. In 1952, petitioner applied for a passport and his application was refused on the ground that he had lost his citizenship under section 401 (g) of the Nationality Act of 1940 which provides for loss of citizenship upon conviction of wartime desertion and subsequent dishonorable discharge.² Petitioner, a native born American citizen, then brought this action in the United States district court for a judgment declaring him to be a citizen of the United States. The action was summarily dismissed, and petitioner appealed to the court of appeals which held that under the Nationality Act of 1940, expatriation would follow upon a dishonorable discharge for conviction of wartime desertion. The Supreme Court reversed *holding* section 401 (g) of the Nationality Act of 1940 to be unconstitutional as beyond the war power of Congress, and, therefore, that: the imposition of expatriation for wartime desertion was cruel and unusual punishment. *Trop v. Dulles*, 356 U.S. 86 (1958).³

At common law, the doctrine of perpetual allegiance prevailed and one could not change his allegiance without the consent of the sovereign .⁴ Congress, however, passed an act acknowledging expatriation to be a

¹ Any member of the armed forces who - (1) without authority goes or remains absent from his unit, organization or place of duty with intent to remain away therefrom permanently is guilty of desertion." 64 STAT. 135 (1950), 50 U.S.C. § 679 (1952).

² 54 STAT. 1169 (1940), 8 U.S.C. § 1481 (a) (8) (1952).

³ *Trop v. Dulles*, 356 U.S. 86 (1958)

⁴ *Inglis v. Sailors Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830) ; *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830).

natural and inherent right of all people, exercisable without the consent of the sovereign.⁵ Moreover, the Supreme Court has held that a mere voluntary performance of the expatriating act itself, and not an expressed renunciation of citizenship, is all that is necessary to result in expatriation;⁶ it is not a requisite that one intend to lose his citizenship.⁷ Loss of the rights of citizenship, has been upheld as a valid penalty for desertion and draft avoidance,⁸ but previous to the decision in the instant case, loss of citizenship, *i.e.*, expatriation, has never been declared a penalty. A penalty has been defined as an exaction imposed by statute as punishment for an unlawful act.⁹ An exercise of one of the enumerated powers of the constitution, however, will not be considered a penalty where there is a reasonable relation between the action taken and the power exercised.¹⁰ In all cases, cruelty inherent in the method of punishment is prohibited as being cruel and unusual punishment.¹¹ Recently, expatriation for voting in a foreign election was held to be constitutionally imposed as a necessary and proper means in the execution of the foreign affairs power.¹² The Court reasoned that the imposition of expatriation prevents embarrassment of the United States in international relations, resulting from Americans voting in foreign elections and having their views interpreted as those of the government, by disassociating those individuals from the United States. In the instant case, the Court held that expatriation was not a means necessary and proper to the execution of the war powers because there was no rational connection between involuntary expatriation and the legitimate exercise of the war powers. It held that expatriation was a cruel and unusual

⁵ Rev. STAT. 1999, 2001 (1875), 8 U.S.C. 1482, 1483 (1952).

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

⁷ Acheson v. Wohlmuth, 196 F.2d 866 (D.C. Cir. 1952).

⁸ Kurtz v. Moffitt, 115 U.S. 487 (1885) .

⁹ United States v. La Franca, 282 U.S. 568 (1931) .

¹⁰ United States v. Sanchez, 340 U.S. 42 (1959).

¹¹ Louisiana v. Resweber, 329 U.S. 459 (1947).

¹² Perez v. Brownell, 356 U.S. 44 (1958).

punishment for desertion because it created statelessness.¹³

In the instant case, it would appear that expatriation for wartime desertion bears little relation to the exercise of the war powers by Congress, in that it is related to the waging of war only by virtue of its being a punishment for a military offense. Further, the imposition of expatriation here has slight relation to the exercise of what the Court referred to as the foreign affairs power¹⁴ since, by taking citizenship away for desertion, Congress is in no way regulating the foreign affairs of the nation. Similarly, expatriation for treason, violation of the Smith Act and draft avoidance, seem to be on doubtful constitutional grounds, as being more in the nature of punishment for the offenses committed. However, service in a foreign army, employment by a foreign government, or, as in

Perez v. Brownell,¹⁵ voting in a foreign election, are acts which by their nature tend to cause friction in international relations, and Congress may therefore impose expatriation as a necessary and proper means for the prevention of such friction. This exercise of the power to regulate foreign affairs, though not unconstitutional, is nevertheless harsh, particularly when the expatriate has acted in the best interest of his country. It seems incongruous that, under the power to regulate foreign affairs, the United States should expatriate an individual who might have voted in a foreign election for policies friendly to this country, fought in a foreign army against a power soon to attack the United States, or been employed by an ally of the United States, and yet forbid the imposition of expatriation in cases of treason, draft evasion, sedition, or wartime desertion, as being cruel and

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For the effect of statelessness see *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, where an alien who lived in this country for twenty-five years went to Europe to see his dying mother. Upon returning to this country in 1950 after an absence of almost two years he was refused entrance and detained on Ellis Island. Since he was refused entry by all other countries he could not be deported. After three years the Court denied relief and he was doomed to a life on Ellis Island. He was released some months thereafter, only after a Presidential decree.

¹⁴ U.S. CONST. Art. VI, cl. 2.

¹⁵ 356 U.S. 44 (1958)

unusual punishment. This country could just as easily show its dissatisfaction with the expatriating act by the imposition of some legally accepted penalty. Expatriation could be added in the case of dual nationals committing the expatriating act in the jurisdiction of their other nationality,¹⁶ because by such act, they would be evidencing an intent to choose some other citizenship than that of the United States. Expatriation in this instance would be a necessary and proper means for preventing the international complications attendant upon the status of dual nationality.¹⁷

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This would include one who acquired dual nationality by the commission of the expatriating act but not a dual national who acts in a third jurisdiction and does not acquire that nationality e.g. A, a jus sanguinis citizen of the United States and a jus soli citizen of Great Britain, votes in a foreign election in Brazil but does not acquire that nationality. He should not be subject to expatriation since if Great Britain had a similar statute he would become a stateless being.

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Some of the difficulties which might arise as a result of dual nationality are: whether the United States is under an obligation to press for the release of a dual national from a foreign army after his term of enlistment is up; whether it is under a duty to insist on the right of a dual national to leave a foreign country upon termination of a job in that country's government which entailed handling security information; or, if it should press for the release of a dual national who are arrested for voting in a foreign election because he was a citizen of another country (i.e., the United States.