North Dakota Law Review

Volume 41 | Number 1 Article 6

1964

Citizens - Expatriation - Denationalization of Naturalized Citizens for Continuous Foreign Residence

Peter A. Quist

to appellate review and an application for a parole inconsistent. The former is an appeal for a review of the merits of the conviction, the latter a simple application for the grace of the state. How can a court of any conscience justify a refusal of the right of appeal on the ground that defendant has already requested mercy? It is the opinion of this writer that a court is unjustified in refusing a defendant the right of appeal merely because he has applied for parole.

EDWIN ODLAND

CITIZENS—EXPATRIATION[1]—DENATIONALIZATION OF NATURALIZED CITIZENS FOR CONTINUOUS FOREIGN RESIDENCE—Appellant, a German national by birth, emigrated to the United States with her parents in 1939 and became a citizen of the United States derivatively through the naturalization of her mother in 1950. After receiving a baccalaureate degree from Smith College in 1954, appellant accepted a scholarship for postgraduate study in Europe.[2] While in Paris, she became engaged to a German national whom she married in 1956. Since that time, except for two brief visits to the United States, appellant has resided in Germany.[3] In 1959 the United States Consulate in Dusseldorf refused to grant appellant an extension of her passport, declaring that she had lost her United States citizenship under the terms of section 352(a)(1) of the Immigration and Nationality Act of 1952.[4] The Board of Review on the Loss of Nationality in the State Department affirmed the Consulate's decision, and appellant challenged this ruling. Upon appeal the United States Supreme Court *held*, that section 352(a)(1)

---

1. Expatriation has been defined as the voluntary renunciation or abandonment of nationality and allegiance. Perkins v. Elg, 307 U.S. 325, 334 (1939). Denationalization, on the other hand, denotes involuntary forfeiture of citizenship imposed by the sovereign. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 119 (1956). Many courts have used the terms interchangeably, and as a result, much confusion exists in the area. No attempt has been made to distinguish between the two concepts in this comment. For further discussion, see WEIS, *supra* at 119-122.

2. Brief for Appellant, p. 5, Schneider v. Ruck, 84 Sup. Ct. 1187 (1964).

3. Appellant is the mother of four sons, two of whom were born prior to the commencement of denationalization proceedings and are deemed native born, Immigration and Nationality Act § 301(a)(7), (b), 66 Stat. 235 (1952), 8 U.S.C. § 1401(a)(7), (b) (1958), but unless they come to the United States before attaining the age of twenty-three and reside here continuously for five years, they will lose their citizenship. The subsequent loss of their mother's citizenship does not affect their status provided they take up permanent residence in the United States before attaining th age of twenty-five. Section 355, 66 Stat. 272 (1952), 8 U.S.C. § 1487 (1958). The status of the two sons born subsequent to the commencement of these proceedings was dependent upon a favorable decision in this case. Brief for Appellant, *supra* note 2, at 6.

4. 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958): "(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title. . . ." The exceptions comprised in section 353 relate, *inter alia*, to study abroad, ill health, and employment by the Government. See also Immigration and Nationality Act of 1952 § 352(a)(2), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(2) (1958) which provides that a naturalized citizen may be expatriated for residing in any foreign state for a period of five years. In Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860 (1949), § 404(c) of the Nationality Act of 1940, 54 Stat. 1170, the predecessor of § 352(a)(2), was upheld. In view of the present decision, § 352(a)(2) appears clearly unconstitutional.

of the Immigration and Nationality Act of 1952 providing for denationalization of naturalized citizens residing continuously for three years in the country of birth constituted discrimination so unjustifiable as to be violative of due process. Mr. Justice Clark, with whom Mr. Justice White and Mr. Justice Harlan concurred,[5] dissented, observing that the Constitution itself draws distinctions between native-born and naturalized citizens,[6] and the classification employed by Congress was reasonably devised to meet a demonstrated need.[7] *Schneider v. Rusk*, 84 Sup. Ct. 1187 (1964).

The doctrine of perpetual and indefeasible allegiance characterized early common law vis-a-vis expatriation.[8] In the United States, however, the right of expatriation received prompt recognition,[9] although authorities differed as to whether expatriation were permissible without governmental sanction.[10] By 1868 Congress had resolved any vestiges of doubt in favor of unilateral expatriation.[11] Nevertheless, the first definitive legislation enunciating the procedure for accomplishing expatriation did not appear until 1907.[12] Paradoxically, the 1907 enactment also embraced a proviso asserting involuntary expatriation of naturalized citizens for foreign residence,[13] although such residence constituted a rebuttable presumption which could be easily overcome;[14] and as interpreted by the Attorney

5. Mr. Justice Brennan took no part in the decision of this case.

6. Schneider v. Rusk, 84 Sup. Ct. 1187, 1194 (1964) (dissenting opinion).

7. Protection of naturalized citizens today is a sensitive matter in a number of countries—particularly Belgium, Greece, France, Iran, Israel, Switzerland, and Turkey—which refuse to recognize the expatriation of their nationals who acquire American citizenship. Conscription in the armed services appears to pose the most serious threat to amicable foreign relations with these countries. Brief for Appellee, pp. 45-46, Schneider v. Rusk, 84 Sup. Ct. 1187 (1964).

8. In Calvin's Case, 7 Co. Rep. 1(a), 13(a), 77 Eng. Rep. 377, 392 (Ex. 1608) immutability of allegiance took this form: "Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away. . . ." Over a century and a quarter later, the doctrine enunciated in Calvin's Case was corroborated in Rex v. Macdonald, 18 How. St. Tr. 858, 859 (1747): "It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince by naturalizing and employing a subject of Great Britain to dissolve the bond of allegiance between the subject and the crown." See generally TSIANG, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907, at 11-24 (1942).

9. TSIANG, *op. cit, supra* note 8, at 25.

10. "In this country, expatriation is conceived to be a fundamental right. As far as the principles maintained, and the practice adopted by the government of the United States is evidence of its existence, it is fully recognized. It is constantly exercised, and has never in any way been restrained." Juando v. Taylor, 13 Fed. Cas. 1179, 1181 (No. 7558) (S.D.N.Y. 1818). *Contra*, Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830) wherein the Court asserted: "The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens."

11. "[T]he right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. . . ." Act of July 27, 1868, ch. 249, 15 Stat. 223.

12. Act of March 2, 1907, ch. 2534, 34 Stat. 1228.

13. Section 2 provided: "When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemd his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe. . . ." This act also provided that any American citizen would be presumed to have expatriated himself by being naturalized in a foreign state or by taking an oath of allegiance to a foreign state. In addition, the citizenship of any American woman who married a foreigner was suspended during coverture. In Mackenzie v. Hare, 239 U.S. 299 (1915), the latter provision was upheld as a valid exercise of congressional authority.

14. United States v. Gay, 264 U.S. 353, 358 (1924).

General, withdrew governmental protection, not citizenship.[15] Dissatisfaction with administrative difficulties encountered under the 1907 act[16] led to the enactment of the Nationality Act of 1940[17] which made foreign residence by naturalized citizens grounds for automatic forfeiture of citizenship.[18] With but slight modification,[19] this provision was incorporated into the Immigration and Nationality Act of 1952.[20]

While the Constitution nowhere expressly authorizes Congress to expatriate either native-born or naturalized citizens, such power has been adduced on the bases of the attributes of sovereignty,[21] the inherent power of Congress to regulate foreign affairs,[22] and the war power.[23] Conversely, there are formidable dicta which categorically deny the existence of congressional expatriatory authority.[24] However, in view of the recent Supreme Court decision in *Perez v. Brownell*,[25] that Congress may provide for expatriation under carefully circumscribed conditions is no longer moot.

In the instant case, Schneider premised her principal argument upon the ground that section 352(a)(1) of the Immigration and Nationality Act of 1952[26] deprived her of citizenship without due process of law, contrary to the Fifth Amendment, in that this section subjected her to consequences not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.[27] Distinctions between citizens solely because of their ancestry have been regarded as odious in a free society.[28] While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."[29] However, not every instance of

15. 28 OPS. ATT'Y GEN. 504, 510 (1910).
16. UNITED STATES COMMITTEE TO REVIEW THE NATIONALITY LAWS, 76TH CONG., 1ST SESS., NATIONALITY LAWS OF THE UNITED STATES at 70-71 (Comm. Print 1939).
17. 54 Stat. 1137 (1940).
18. Section 404(b) provided that a person who had become a national by naturalization should lose his nationality by "residing continously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated. . . ."
19. Section 101(a)(33), 66 Stat, 166, 8 U.S.C.S. § 1101(a)(33) defines residence as continuous where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state.
20. Section 352(a)(1), 66 Stat. 269 (1952), 8 U.S.C. § 1484(a)(1) (1958).
21. Mackenzie v. Hare, 239 U.S. 299 (1915).
22. Perez v. Brownell, 356 U.S. 44 (1958).
23. Trop v. Dulles, 356 U.S. 86, 120 (1958) (dissenting opinion).
24. United States v. Wong Kim Ark, 169 U.S. 649 (1897). In Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824), Chief Justice Marshall stated: "A naturalized citizen is, indeed, made a citizen under an act of congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."
25. See note 22 *supra*.
26. See note 20 *supra*.
27. Appellant also contended that section 352(a)(1) violated the Eighth Amendment in that it imposed a cruel and unusual punishment, and that section 352(a)(1) was unconstitutional because it imposed punishment or other sanctions without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. Brief for Appellant, *supra* note 2, at 2.
28. Hirabayashi v. United States, 320 U.S. 81 (1943).
29. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

discrimination transcends the requirements of due process.[30] To incur censure under the Fifth Amendment, the legislative classification must be arbitrary and unreasonably discriminatory.[31] The reasonableness test espoused in *Perez*[32] and postulated in *Schneider*[33] is, "Is the means, withdrawal of citizenship, reasonably calculated to affect [sic] the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . .?" Mr. Justice Douglas, speaking for the majority, answered in the negative, observing that the statute proceeds upon the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native-born,[34] and the legislative intent did not demonstrate a valid exercise of congressional authority.[35]

Considering the present membership of the Supreme Court, there appears little doubt but that denationalization legislation will encounter rigorous opposition. Three Justices are committed to the position that congressional authority to denationalize is nonexistent absent expatriation by the voluntary renunciation of nationality and allegiance.[36] It may well be anticipated that this minority will muster the requisite support to defeat attempted denationalization from the veritable arsenal available in the Fifth, Sixth, and Eighth Amendments to the Constitution which have been successfully pressed in recent decisions.[37]

PETER A. QUIST

CRIMINAL LAW—RAPE—MISTAKE OF AGE AS A DEFENSE—The defendant was charged with statutory rape of a minor seventeen years and nine months of age. The defendant offered evidence to show his lack of criminal intent due to a reasonable and substantial belief that she was eighteen years of age or older, the age of legal consent. This evidence was not admitted and the defendant was found guilty in Superior Court. On appeal, the Supreme Court of California *held*, the defendant's reasonable belief that the prosecutrix

30. Korematsu v. United States, 323 U.S. 214 (1944). *Accord,* Hirabayashi v. United States, *supra* note 28.
31. Nebbia v. New York, 291 U.S. 502 (1934).
32. 356 U.S. 44, 58 (1958).
33. 84 Sup. Ct. 1187, 1189 (1964).
34. *Id.* at 1190.
35. *Id.* at 1189.
36. See Mr. Chief Justice Warren's dissent in *Perez* at 68-69; Mr. Justice Douglas' dissent in *Perez* at 83-84; and Mr. Justice Black's concurring opinion in Nishikawa v. Dulles, 356 U.S. 129 (1958) at 138-39.
37. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Court struck down a provision which asserted automatic expatriation for evading military service, declaring that it was penal in nature and would inflict severe punishment without due process of law and without the safeguards which must attend a criminal prosecution under the Fifth and Sixth Amendments. And in Trop v. Dulles, 356 U.S. 86 (1958), a denationalization provision for desertion was found penal and violative of the Eighth Amendment's prohibition against cruel and unusual punishment.