Wyoming Law Journal

Volume 11 | Number 1 Article 3

December 2019

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WYOMING LAW JOURNAL

VOL. 11 FALL, 1956 NO. 1

Published in the Fall, Winter, and Spring by the University of Wyoming School of Law and the Wyoming State Bar.

Subscription Price $2.00 per year; $1.00 per copy.

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NOTES

THE EX POST FACTO CLAUSE AND DEPORTATION

The United States Supreme Court has consistently held that the ex post facto clause of the Constitution[1] is not applicable to deportation.[2] For example, in a recent case,[3] an alien was convicted under the Marihuana Tax Act. Later, the Immigration and Nationality Act of 1952[4] was passed making any conviction for any offense pertaining to marihuana ground for deportation. The alien was ordered deported under authority of the act, and he argued that his conviction under the Marihuana Tax Act was not ground for deportation at the time he committed the offense, and that therefore the 1952 law was ex post facto and unconstitutional as to him. The Supreme Court held that the act was not unconstitutional.

1. U.S. Const., Art. I, Sec. 9. "No Bill of Attainder or ex post facto Law shall be passed."
2. Mahler v. Eby, 264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549 (1924), violator of Selective Service Act and Espionage Act; Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978 (1913), prostitute; Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954), member of Communist Party; Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955), narcotics law violator; Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952), member of Communist Party.
3. Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107 (1955).
4. U.S.C.A., Title 8, Sec. 1251.

The reasoning behind the holdings in the cases is simple enough. The ex post facto clause from earliest times has been applied only to criminal laws and punishments,[5] and deportation, no matter how severe its consequences, is not punishment.[6] It is simply a refusal by the government to harbor persons whom it does not want.[7]

As noted above, this reasoning is simple, but there have been many throughout our history who have not agreed with it. James Madison, in speaking of the first Alien and Sedition Act proposed in the United States, spoke in these terms:

> ". . .if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."[8]

Others since Madison—among them Justices Field, Brewer, Douglas, and Black—have been unable to reconcile the view of a majority of the Supreme Court with their own logic. Tearing a man away from his home, his family, his friends, was, to them, probably the most severe punishment that could be imagined. Justice Brandeis expressed it most succinctly when he said that deportation may deprive a man "of all that makes life worth living."[9] Justice Douglas spoke of it as "punishment in the practical sense."[10]

The ex post facto concept was known long before the Revolution.[11] The classic definition of an ex post facto law lists four categories:

> (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action, (2) every law that aggravates a crime, or makes it greater than it was when committed, (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed, (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender.[12]

Deportation would fall easily into one of these four categories were it not for the fact that the Court has held that deportation is not a punishment. It may well be argued that in order to protect our country from obvious and impending dangers in what they believed the most expedient manner, the majority has overlooked the realities. At all events, the Court has not overlooked them blindly; they have been seen, but the Court has

5. Ibid., Note 2; Calder v. Bull, 3 Dall. 386 (1798); Johannessen v. U.S., 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912).
6. Fong Yue Ting v. U.S., 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1893); Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 57 L.Ed. 978 (1913).
7. Harisiades v. Shaughnessy, 342 U.S. 580, 594, 72 S.Ct. 512, 96 L.Ed. 586 (1952).
8. As quoted in dissenting opinion of Justice Field, Fong Yue Ting v. U.S., 149 U.S. 698, 759, 13 S.Ct. 1016, 37 L.Ed. 905 (1893).
9. Ng Fung Ho v. White, 259 U.S. 276, 284, 42 S.Ct. 492, 66 L.Ed. 938 (1922).
10. Harisiades v. Shaughnessy, 342 U.S. 580, 600, 72 S.Ct. 512, 96 L.Ed. 586 (1952).
11. Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1882); State v. Kavanaugh, 32 N.M. 404, 258 Pac. 209, 53 A.L.R. 706 (1927.)
12. Calder v. Bull, 3 Dall. 386 (1798).

refused to recognize them, sometimes on the ground, which seems unimpressive that they were not "writing on a clean slate";[13] in other words, the Court felt bound by its previous decisions. It is submitted that the reluctance to write on an unclean slate should give way to the responsibility of protecting individual constitutional rights. The dissents to the view that deportation does not fall into the ex post facto classification have been eloquent, but have failed to carry the day.

The reasoning that deportation is not punishment is no respecter of persons; it has been used indiscriminately to send across the oceans both the dangerous alien and the penitent sinner. A look at the Immigration and Nationality Act of 1952[14] indicates that once an alien has "stubbed his toe," he is subject to deportation. The act states that:

> Any alien in the United States shall, upon the order of the Attorney General, be deported who . . . (4) is convicted of a crime involving moral turpitude committed within five years after entry and sentenced to confinement or confined therefore in a prison or corrective institution for a year or more . . . (6) is or at any time has been, after entry, a member of any of the following classes of aliens: . . . (c) aliens who are members of or affiliated with the Community Party.[15]

But if the fairness of this philosophy is questionable, is it not still worse to apply the 1952 Act retroactively to pre-1952 activities of aliens which were non-deportable offenses when they took place?

Assuming that an alien who has been convicted of a crime involving moral turpitude is an unreformed criminal, or assuming that one who became a communist – before or after 1952 – is still an ardent and dangerous believer in the principles of the Communist Party, even the most liberal of Americans would applaud his deportation. Our country's leaders and legislators have the right and the duty to protect our country from dangerous enemy aliens. But let us assume that the alien is a youth of tender years when he commits the act which puts him in the deportable class of aliens, and that his mistake—either the crime or the joining of the Communist Party—has been atoned for. Suppose he has served his sentence for his offense or has rejected the Communist doctrine and for a number of years has led an honorable and worthy life. The present immigration law makes no provision for forgiveness; he becomes automatically deportable. It is even more severe than its predecessors, which made the criminal conviction or membership in the Communist Party mere counters to be weighed by administrative officials in determining whether the alien was an "undesirable resident" and therefore to be deported.[16]

By supporting the 1952 Act the Supreme Court is agreeing with Con-

13. Valvan v. Press, 347 U.S. 522, 530, 74 S.Ct. 737, 98 L.Ed. 911 (1954).
14. U.S.C.A., Title 8, Sec. 1251.
15. Ibid., Note 14.
16. Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 766, 99 L.Ed. 1107 (1955).

gress that "once a sinner, always a sinners." This view, as pointed out by Mr. Justice Douglas, is foreign to our philosophy.[17] The principles of forgiveness and redemption are too firmly embedded in our democratic philosophy for us to admit that there is no return for those who have erred.[18]

There is one argument, especially applicable to aliens who have entered the United States since 1920, which would take the deportation laws not only out of the class of ex post facto legislation, but entirely out of the class of retrospective laws.[19] The argument proceeds along this line: An impression of retroactivity results from reading as a new and isolated enactment what is actually a continuation of prior legislation. Congress has, it is said, during all the years since 1920, maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization which advocates the overthrow of the United States government by force. This seems to be a rather forceful argument. But viewing the 1952 Act in the light of past acts, it can readily be seen that the "punishment" has been increased. As pointed out above, under prior acts, convictions or joining the Communist Party after entry were mere factors to be considered and could possibly be offset by evidence of reformation to convince the administrative official that the alien is not an "undesirable residents." Under the 1952 Act, if the alien has fallen into one of the deportable classifications, he is conclusively presumed to be undesirable, and must be deported.

In summary, it is submitted that, for all practical purposes, deportation is punishment and should fall within the prohibition of the ex post facto clause. It is clear that our laws must be strong and effective to enable our leaders to protect our government and institutions from dangerous aliens. At the same time, we must be careful lest, in an effort to safeguard our institutions and principles, we do not blindly destroy them. We can pass laws which do not take on the character of ex post facto legislation but which are nevertheless strong enough to accomplish the purpose. We should punish man for what he presently is, not for what he once was, or what he once believed in.[20]

The constitution places a ban upon all ex post facto laws. There are no exceptions or qualifications.[21] The prohibition is not restricted to citizens—it includes both citizens and aliens.[22] In this respect it is the Constitution of the alien as well as of the citizen.

BILL STOKES

17. Harisiades v. Shaughnessy, 342 U.S. 580, 598, 72 S.Ct. 512, 96 L.Ed. 586 (1952).
18. Harisiades v. Shaughnessy, 342 U.S. 580, 601, 72 S.Ct. 512, 96 L.Ed. 586 (1952).
19. Harisiades v. Shaughnessy, 342 U.S. 580, 593, 72 S.Ct. 512, 96 L.Ed. 586 (1952).
20. Galvan v. Press, 347 U.S. 522, 534, 74 S.Ct. 737, 98 L.Ed. 911 (1954).
21. Marcello v. Bonds, 349 U.S. 302, 75 S.Ct. 757, 766, 99 L.Ed. 1107 (1955).
22. Ibid.