AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Criminal Justice/Due Process and Habeas Corpus

**Wong Wing v. United States, 163 U.S. 228** (1896)

*The Chinese Exclusion Act of 1882 barred any further immigration of Chinese into the United States. Subsequent statutes provided for removal of Chinese aliens found unlawfully in the country. The Geary Act of 1892 extended that exclusion and authorized removal of Chinese aliens who were found within the country and had not received a certificate of residence from the federal government. It further made it a criminal offense for the Chinese to remain in the country unlawfully and authorized the imprisonment at hard labor for up to a year before deportation.*

*Wong Wing was a Chinese subject and detained in Detroit, Michigan in 1892 on the grounds that he was unlawfully present in the United States. He was sentenced to imprisonment and hard labor for a period of sixty days and scheduled for deportation at the end of that term. He petitioned a federal district court for a hearing to determine the lawfulness of his arrest and sentence. The district court held that the arrest warrant issued by a U.S. commissioner (an officer of the federal court) was a sufficient legal basis for Wong Wing’s detention and removal. Wong Wing appealed to the U.S. Supreme Court, which unanimously reversed the lower court. The justices held that although detention and removal of unlawful aliens required only executive action, imprisonment in a house of corrections constitutionally required a judicial trial.*

JUSTICE SHIRAS delivered the opinion of the Court.

. . . .

[I]t was contended that, whatever might be true as to the power of the United States to exclude aliens, yet there was no power to banish such aliens who had been permitted to become residents, and that, if such power did exist, it was in the nature of a punishment, and could only be lawfully exercised after a judicial trial.

But this court held, in the case of *Fong Yue Ting* v. *United States* (1893), that the right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation; that the power of Congress to expel, like the power to exclude, aliens or any class of aliens from the country may be exercised entirely through executive officers. . . .

. . . .

The present appeal presents a different question from those heretofore determined. It is claimed that, even if it be competent for Congress to prevent aliens from coming into the country, or to provide for the deportation of those unlawfully within its borders, and to submit the enforcement of the provisions of such laws to executive officers, yet the fourth section of the act of 1892, which provides that "any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United States," inflicts an infamous punishment, and hence conflicts with the Fifth and Sixth Amendments of the Constitution. . .

. . . .

We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial.

. . . .

Our views, upon the question thus specifically pressed upon our attention, may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

. . . .

[I]n the case of *Yick Wo* v. *Hopkins* (1886), it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: `Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

. . . .

*Reversed*.

JUSTICE BREWER took no part in the decision.

JUSTICE FIELD, concurring.

The majority of the justices, in this case, hold that whatever might be true as to the power of the United States to exclude aliens, yet there was no power to punish such aliens who had been permitted to become residents, and that, if such power did exist, it could only be lawfully exercised after a judicial trial, and therefore that the accused were entitled to be discharged from their arrest and imprisonment. To that extent their opinion is concurred in.

But I do not concur, but dissent entirely from what seemed to me to be harsh and illegal assertions, made by counsel of the Government, on the argument of this case, as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them.

. . . .

It does not follow that, because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment. If the imprisonment of a human being at hard labor in a penitentiary for any misconduct or offence is not punishment, it is difficult to understand how anything short of the infliction of the death penalty for such misconduct or offence is punishment. It would seem to be not only punishment, but punishment infamous in its character, which, under the provisions of the Constitution of the United States, can only be inflicted upon a person after his due conviction of crime pursuant to the forms and provisions of law.

. . . .

The provisions of the Fifth, Sixth and Thirteenth Amendments of the Constitution apply as well to Chinese persons who are aliens as to American citizens.

The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.

This has been decided so often that the point does not require argument. *Yick Wo v. Hopkins* (1886). . . .

The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar — in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws. . . .

It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our republican institutions and laws a vain and idle proceeding.

. . . .