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

Albert Trop was an American soldier stationed in North Africa during World War II. In 1944, Trop temporarily deserted his post in Casablanca, Morocco. Although he voluntarily surrendered the next day, Trop was court-martialed and received a dishonorable discharge. American law at the time held that any person who received a dishonorable discharge from military service automatically forfeited their citizenship. Trop sought to obtain a judicial ruling that this provision of the Nationality Act of 1940 was unconstitutional. After his claim was rejected by a federal district and the Court of Appeals for the Second Circuit, Trop appealed to the Supreme Court of the United States.

The Supreme Court by a 5-4 vote declared that Congress could not strip Trop of his citizenship. Chief Justice Warren held that the Eighth Amendment prohibited Congress from punishing crimes by denaturalization. In a companion case to Trop, Perez v. Brownell *(1958), the justices ruled that Congress could strip a person of citizenship who voted in a foreign election. Desertion is a far more serious offense than voting in a foreign election. How did the majority opinion nevertheless distinguish* Trop *from* Perez*? Do you find that distinction convincing? Note that all justices championed some version of living constitutionalism and all assumed that capital punishment was constitutional.*

CHIEF JUSTICE WARREN announced the judgment of the Court and delivered an opinion, in which JUSTICE BLACK, JUSTICE DOUGLAS, and JUSTICE WHITTAKER join.

. . .

. . . It is my conviction that citizenship is not subject to the general powers of the National Government, and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.

Under these principles, this petitioner has not lost his citizenship. Desertion in wartime, though it may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state. . . . This soldier committed a crime for which he should be and was punished, but he did not involve himself in any way with a foreign state. There was no dilution of his allegiance to this country. The fact that the desertion occurred on foreign soil is of no consequence. The Solicitor General acknowledged that forfeiture of citizenship would have occurred if the entire incident had transpired in this country.

Citizenship is not a license that expires upon misbehavior. The duties of citizenship are numerous, and the discharge of many of these obligations is essential to the security and wellbeing of the Nation. The citizen who fails to pay his taxes or to abide by the laws safeguarding the integrity of elections deals a dangerous blow to his country. But could a citizen be deprived of his nationality for evading these basic responsibilities of citizenship? In time of war, the citizen's duties include not only the military defense of the Nation, but also full participation in the manifold activities of the civilian ranks. Failure to perform any of these obligations may cause the Nation serious injury, and, in appropriate circumstances, the punishing power is available to deal with derelictions of duty. But citizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship, and this

Copyright OUP 2013

petitioner has done neither, I believe his fundamental right of citizenship is secure. On this ground alone, the judgment in this case should be reversed.

Since a majority of the Court concluded in *Perez v. Brownell* (1958) that citizenship may be divested in the exercise of some governmental power, I deem it appropriate to state additionally why the action taken in this case exceeds constitutional limits. . . .

. . . [T]he Government contends that this statute does not impose a penalty, and that constitutional limitations on the power of Congress to punish are therefore inapplicable. . . .

. . .

This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder v. Bull*. . . . In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability not to punish, but to accomplish some other legitimate governmental purpose. . . .

. . . The purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve. Denationalization in this case is not even claimed to be a means of solving international problems. . . . Here, the purpose is punishment, and therefore the statute is a penal law.

. . .

. . . If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment. Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. . . . This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States*. . . . The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

. . . [U]se of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited

OXFORD UNIVERSITY PRESS

Copyright OUP 2013

rights of an alien, no country need do so, because he is stateless. . . . In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

. . .

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

JUSTICE BLACK, whom JUSTICE DOUGLAS joins, concurring.

. . . Even if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities. If desertion or other misconduct is to be a basis for forfeiting citizenship, guilt should be determined in a civilian court of justice, where all the protections of the Bill of Rights guard the fairness of the outcome. Such forfeiture should not rest on the findings of a military tribunal. . . .

. . .

JUSTICE BRENNAN, concurring.

In *Perez v. Brownell* (1958), . . . I agreed with the Court that there was no constitutional infirmity [with a federal law that] expatriates the citizen who votes in a foreign political election. I reach a different conclusion in this case, however, because I believe that [federal laws] which expatriates the wartime deserter who is dishonorably discharged after conviction by court-martial, lies beyond Congress' power to enact. It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war. The loss of citizenship may have as ominous significance for the individual in the one case as in the other. Why then does not the Constitution prevent the expatriation of the voter, as well as the deserter?

Here, as in *Perez v. Brownell*, we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution. The Court there held that such a relevant connection exists between the power to maintain relations with other sovereign nations and the power to expatriate the American who votes in a foreign election. (1) Within the power granted to Congress to regulate the conduct of foreign affairs lies the power to deal with evils which might obstruct or embarrass our diplomatic interests. Among these evils, Congress might believe, is that of voting by American citizens in political elections of other nations. Whatever the realities of the situation, many foreign nations may well view political activity on the part of Americans, even if lawful, as either expressions of official American positions or else as improper meddling in affairs not their own. . . . (2) Finding that this was an evil which Congress was empowered to prevent, the Court concluded that expatriation was a means reasonably calculated to achieve this end. . . . Harsh as the consequences may be to the individual concerned, Congress has ordained the loss of citizenship simultaneously with the act of voting because Congress might reasonably believe that, in these circumstances, there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations.

. . . [T]he section with which we are now concerned . . . draws upon the power of Congress to raise and maintain military forces to wage war. No pretense can here be made that expatriation of the deserter in any way relates to the conduct of foreign affairs, for this statute is not limited in its effects to

OXFORD UNIVERSITY PRESS
Copyright OUP 2013

those who desert in a foreign country or who flee to another land. Nor is this statute limited in its application to the deserter whose conduct imports "elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." . . . . There can be no serious question that included in Congress' power to maintain armies is the power to deal with the problem of desertion, an act plainly destructive not only of the military establishment as such, but, more importantly, of the Nation's ability to wage war effectively. But granting that Congress is authorized to deal with the evil of desertion, we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end, and thereby designed to further the ultimate congressional objective—the successful waging of war.

. . .

. . . It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. . . . Therefore, if expatriation is made a consequence of desertion, it must stand together with death and imprisonment—as a form of punishment.

To characterize expatriation as punishment is, of course, but the beginning of critical inquiry. As punishment, it may be extremely harsh, but the crime of desertion may be grave indeed. However, the harshness of the punishment may be an important consideration where the asserted power to expatriate has only a slight or tenuous relation to the granted power. . . . [I]t cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment. . . .

. . .

What, then, is the relationship of the punishment of expatriation to the[] ends of the penal law? It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society, it excommunicates him and makes him, literally, an outcast. . . . Similarly, it must be questioned whether expatriation can really achieve the other effects sought by society in punitive devices. Certainly it will not insulate society from the deserter, for, unless coupled with banishment, the sanction leaves the offender at large. And, as a deterrent device, this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation. . . .

. . . [T]he Government argues that the necessary nexus to the granted power is to be found in the idea that legislative withdrawal of citizenship is justified in this case because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms in a time of desperate national peril. . . .

. . . It seems to me that nothing is solved by the uncritical reference to service in the armed forces as the "ultimate duty of American citizenship." Indeed, it is very difficult to imagine, on this theory of power, why Congress cannot impose expatriation as punishment for any crime at all—for tax evasion, for bank robbery, for narcotics offenses. As citizens, we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power.

I therefore must conclude that [this federal law] is beyond the power of Congress to enact. . . . [T]he requisite rational relation between this statute and the war power does not appear—for, in this relation, the statute is not "really calculated to effect any of the objects entrusted to the government . . . ,"

JUSTICE FRANKFURTER, whom JUSTICE BURTON, JUSTICE CLARK and JUSTICE HARLAN join, dissenting.

. . .

OXFORD UNIVERSITY PRESS

Copyright OUP 2013

One of the principal purposes in establishing the Constitution was to "provide for the common defence." To that end, the States granted to Congress the several powers of Article I, Section 8, clauses 11 to 14 and 18, compendiously described as the "war power." Although these specific grants of power do not specifically enumerate every factor relevant to the power to conduct war, there is no limitation upon it (other than what the Due Process Clause commands). . . .

Just as Congress may be convinced of the necessity for conscription for the effective conduct of war, . . . Congress may justifiably be of the view that stern measures—what to some may seem overly stern—are needed in order that control may be had over evasions of military duty when the armed forces are committed to the Nation's defense, and that the deleterious effects of those evasions may be kept to the minimum. Clearly Congress may deal severely with the problem of desertion from the armed forces in wartime; it is equally clear—from the face of the legislation and from the circumstances in which it was passed—that Congress was calling upon its war powers when it made such desertion an act of expatriation. . . .

Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations, of which the most indispensable may well be "to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.@ Harsh as this may sound, it is no more so than the actualities to which it responds. Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship? Congress may well have thought that making loss of citizenship a consequence of wartime desertion would affect the ability of the military authorities to control the forces with which they were expected to fight and win a major world conflict. It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.

. . .

. . . Petitioner contends that loss of citizenship is an unconstitutionally disproportionate "punishment" for desertion, and that it constitutes "cruel and unusual punishment" within the scope of the Eighth Amendment. Loss of citizenship entails undoubtedly severe—and, in particular situations, even tragic—consequences. Divestment of citizenship by the Government has been characterized, in the context of denaturalization, as "more serious than a taking of one's property, or the imposition of a fine or other penalty." . . . However, . . . expatriation under the Nationality Act of 1940 is not "punishment" in any valid constitutional sense. . . . The process of denationalization, as devised by the expert Cabinet Committee on which Congress quite properly and responsibly relied and as established by Congress in the legislation before the Court, was related to the authority of Congress, pursuant to its constitutional powers, to regulate conduct free from restrictions that pertain to legislation in the field technically described as criminal justice. Since there are legislative ends within the scope of Congress' war power that are wholly consistent with a "non-penal" purpose to regulate the military forces, and since there is nothing on the face of this legislation or in its history to indicate that Congress had a contrary purpose, there is no warrant for this Court's labeling the disability imposed by [Section] 401(g) as a "punishment."

Even assuming, *arguendo*, that [Section] 401(g) can be said to impose "punishment," to insist that denationalization is "cruel and unusual" punishment is to stretch that concept beyond the breaking point. It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offense that is capital and has been so from the first year of Independence. . . . Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death? The seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance.

Many civilized nations impose loss of citizenship for indulgence in designated prohibited activities. . . . Some countries have made wartime desertion result in loss of citizenship—native-born or naturalized. . . . If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner, and thus certainly not "cruel and unusual," it seems more than incongruous that such loss should be thought "cruel and unusual" when it is the consequence of conduct that is also a crime. In short, denationalization, when attached to the offense of wartime desertion, cannot justifiably be

OXFORD UNIVERSITY PRESS
Copyright OUP 2013

deemed so at variance with enlightened concepts of "humane justice," see *Weems v. United States*, as to be beyond the power of Congress, because constituting a "cruel and unusual" punishment within the meaning of the Eighth Amendment.

OXFORD
UNIVERSITY PRESS

Copyright OUP 2013