Nebraska Law Review

Volume 35 | Issue 1 Article 14

1955

Constitutional Law—Ex Post Facto Clause—Deportation of Aliens

Deryl F. Hamann
University of Nebraska College of Law

CONSTITUTIONAL LAW—EX POST FACTO CLAUSE—DEPORTATION OF ALIENS

In 1938, petitioner, an alien, was convicted of violating the Marihuana Tax Act.[1] In 1952, Congress authorized the deportation of all such violators,[2] including those convicted before passage of the 1952 act.[3] Petitioner was ordered deported by an officer of the Immigration and Naturalization Service, and brought a writ of habeas corpus to review the Board of Immigration Appeal's affirmation of the deportation order, claiming a violation of the ex post facto clause of the Federal Constitution.[4] The district court and the court of appeals denied review, and the United States Supreme Court affirmed.[5] The Court, declining to consider petitioner's contention in detail, merely cited two prior decisions, and refused to change the position there stated.[6]

An early decision, *Calder v. Bull*, held that the ex post facto clause applied only to penal legislation.[7] This decision has been severely criticized,[8] but it is still followed.[9] Such interpretation was contrary to that of contemporary state supreme courts,[10] and to previous statements made by two members of the Court.[11] The reports of the Constitutional Convention tend to indicate that ex post facto meant simply retrospective.[12] The Court, in *Calder*

[1] 50 Stat. 553 (1937), 26 U.S.C. § 2591 (1940).

[2] 66 Stat. 204 (1952), 8 U.S.C. § 1251 (1952).

[3] 66 Stat. 209 (1952), 8 U.S.C. § 1251 (d) (1952).

[4] The issue whether provisions of the Administrative Procedure Act. 60 Stat. 237 (1946), 5 U.S.C. § 1001 et seq. (1952), were violated is not dealt with in this note.

[5] Marcello v. Bonds, 349 U.S. 302 (1955).

[6] Id. at 314.

[7] 1-7 U.S. (3 Dall.) 172 (1798).

[8] Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416 (dissenting opinion), appendix to dissenting opinion, 681 (1829); cf. I Crosskey, Politics and the Constitution, c. XI, 324 (1953).

[9] Accord. Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Johannesen v. United States, 225 U.S. 227, 242 (1912); Kring v. Missouri, 107 U.S. 221, 228 (1883).

[10] See Stoddart v. Smith. 5 Binn. 355, 370 (Pa. 1812); Lessee of Joy v. Cossart. 1 Yeates 50, 54 (Pa. 1791); Helm's Lessee v. Howard, 2 H. & McH. 57, 85, 96 (Md. 1784).

[11] See Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 319 (Cir. Ct., Pa. Dist. 1795); IV Elliot, The Debates in the Several State Conventions 184-5 (2d ed. Iredell 1866); cf. I Crosskey, op. cit. supra note 8, at 337, 341, 342.

[12] See II Farrand, The Records of the Federal Convention 375, 435, 440, 617, 640 (rev. ed. 1937).

v. Bull,[13] went on to declare ex post facto every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.

It was later held, by a divided Court,[14] that deportation is the result of civil proceedings, and not a punishment.[15] Thus, deportation laws are not subject to the limitations of the ex post facto clause.[16] Later decisions have indicated that both the construction of ex post facto and this definition of punishment are debatable,[17] but have refused to overturn the earlier decisions because a great body of statutory and case law has been built on them.[18] Justices Douglas and Black have dissented from this unyielding preservation of the status quo.[19]

The Court has recognized that deportation may deprive a person of all that makes life worth living.[20] Denials of the privilege of practicing law before the Supreme Court,[21] or of being a priest,[22] or a teacher[23] have been defined as punishment; and such laws operating retroactively have been struck down as ex post facto.[24]

While there is a great need for stability in the law, that fact should not be the sole criterion for determining constitutionality. It is submitted that the Court should have re-examined its early

[13] 1-7 U.S. (3 Dall.) 172, 176 (1798).

[14] Fong Yue Ting v. United States, 149 U.S. 698, 732, 744, 762 (1898) (dissenting opinions).

[15] Id. at 730.

[16] Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594, 595 (1952); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Johannesen v. United States. 225 U.S. 227, 242 (1912).

[17] See Galvan v. Press, 347 U.S. 522, 531, 532 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 595 (1952).

[18] See cases cited note 17 supra.

[19] See Marcello v. Bonds, 349 U.S. 302, 319 (1955) (dissenting opinion); Galvan v. Press, 347 U.S. 522, 532 (1954) (dissenting opinion); Harisiades v. Shaughnessy, 342 U.S. 580. 598 (1952) (dissenting opinion).

[20] See Galvan v. Press, 347 U.S. 522. 530 (1954); Harisiades v. Shaughnessy, 342 U.S. 522, 587 (1952); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947); Bridges v. Wixon, 326 U.S. 135, 147, 154 (1945); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[21] Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1867).

[22] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

[23] Cf. Wieman v. Updegraf, 344 U.S. 183, 185 (1952).

[24] But see Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951); American Communications Ass'n, CIO v. Douds, 339 U.S. 382 (1949); Hawker v. New York, 170 U.S. 189 (1898).

decisions. If an earlier Court was ill-advised, their decision should be reversed. Such action is not unknown, though the holding be of long standing.[25]

Deryl F. Hamann, '58

[25] Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).