

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10 NORTHERN DIVISION
11

12 FRANCISCO KENDOZA-MARTINEZ,)

13 Plaintiff,)

14 v.)

15 ARDYLE R. MACKAY, The Commissioner)
16 of Immigration and Naturalization,)
17 and WILLIAM P. ROGERS, Attorney)
18 General of the United States,)

19 Defendants.)

Civil No. 1314-MD

MEMORANDUM

AND

ORDER

20 On the 22nd day of September, 1955, this Court
21 entered judgment in the above cause, which judgment
22 adjudicated and decreed that the plaintiff lost his United
23 States citizenship and nationality through expatriation
24 by remaining outside the jurisdiction of the United States
25 after September 27, 1941, in time of war and during a period
26 declared by the President of the United States to be a period
27 of national emergency, for the purpose of evading and
28 avoiding training and service in the land and naval forces
29 of the United States. This judgment was affirmed by the
30 Court of Appeals for the Ninth Circuit on November 2, 1956.
31 (238 Fed. 2d 239)
32

1 On April 7, 1958, the Supreme Court of the United States
2 vacated the judgment and remanded the cause "to the United
3 States District Court for determination in light of Trop v.
4 Dulles, ante, p. 86, decided March 31, 1958". (356 U.S. 253)

5 Pursuant to the order of the Supreme Court a hearing was
6 held on July 10, 1958. The plaintiff was represented by
7 DiGiorgio and Davis, Thomas R. Davis appearing, and the
8 defendant was represented by Laurence H. Waters, United States
9 Attorney, James R. Dooley, Assistant United States Attorney,
10 appearing.

11 At the original trial, the only issue presented to the
12 Court for determination was the constitutionality of
13 Section 501(j) of the Nationality Act of 1940 (54 Stat. 1137)
14 as amended, the parties having stipulated that the plaintiff,
15 a citizen of the United States by birth, at the age of 20
16 and while subject to the Selective Service and Training Act,
17 (Title 50 App. U.S.C.A. 312 et seq) in the year 1942 departed
18 from the United States for the Republic of Mexico for the
19 sole purpose of evading and avoiding training and service
20 in the armed Forces of the United States, and remaining in
21 Mexico continuously from some time in 1942 until on or about
22 November 1, 1946, for the sole purpose of evading and avoiding
23 such training and service.

24 At the hearing held on July 10, 1958, the cause was
25 submitted to the Court for determination on a trial
26 stipulation of the parties containing the following
27 provisions:

28 1. Plaintiff was born in the United States on
29 March 3, 1922, and thus was a citizen of the United States
30 by birth.

1 2. Under the laws of Mexico, plaintiff, now and ever
2 since his birth, has been a citizen and national of the
3 Republic of Mexico.

4 3. During 1942 plaintiff departed from the United
5 States and went to Mexico for the sole purpose of evading and
6 avoiding training and service in the Armed Forces of the
7 United States.

8 4. Plaintiff remained in Mexico continuously from
9 sometime during 1942 until on or about November 1, 1946 for
10 the sole purpose of evading and avoiding training and service
11 in the Armed Forces of the United States.

12 5. On June 23, 1947, plaintiff upon his plea of
13 guilty was convicted in the United States District Court for
14 the Southern District of California for violation of Section
15 11 of the Selective Service and Training Act of 1940. He was
16 sentenced to imprisonment for a period of one year and a day.

17 6. On February 3, 1953, a warrant of arrest in
18 deportation proceedings was served upon the plaintiff.
19 Pursuant to this warrant, a deportation hearing was held on
20 May 25, 1953; and on September 11, 1953, the Special Inquiry
21 Officer who presided at the hearing rendered his decision,
22 ordering that plaintiff be deported from the United States as
23 an alien.

24 7. Plaintiff appealed the decision of the Special
25 Inquiry Officer to the Board of Immigration Appeals, Depart-
26 ment of Justice, and on October 23, 1953, said Board
27 dismissed plaintiff's appeal.

28 8. Issues of fact to be tried: None.

29 9. Issues of law: Is Section 401(j) of the
30 Nationality Act of 1940 unconstitutional, either on its face
31 or as applied to the plaintiff?
32

1 The trial stipulation provided that the cause would be
2 submitted to the Court for decision on said stipulation and on
3 all of the records, files and evidence theretofore received.

4 The proof in this cause is conclusive that the plaintiff,
5 a citizen of the United States, departed from the United
6 States for the Republic of Mexico for the sole purpose of
7 evading and avoiding training and service in the armed forces
8 of the United States, and remained in Mexico continuously from
9 some time in 1942 until on or about 1946 for the sole purpose
10 of evading and avoiding such training and service.

11 I have reconsidered this case in the light of Trop v.
12 Dulles, 356 U.S. 86, as directed by the Supreme Court. The
13 Trop case did not involve Section 401(j) of the Nationality
14 Act of 1940, but involved Section 401(g) of that Act which
15 provides that a citizen shall lose his nationality "by
16 deserting the military or naval forces of the United States
17 in time of war, provided he is convicted thereof by a court
18 martial and as a result of such conviction is dismissed or
19 dishonorably discharged from the service of such military
20 or naval forces; * *"

21 In the Trop case, the Chief Justice, in an opinion
22 joined by Mr. Justice Black, Mr. Justice Douglas and Mr.
23 Justice Whitaker, concluded that even if citizenship could
24 be divested in the exercise of some governmental power,
25 Section 401(g) violates the Eighth Amendment because it is
26 penal in nature and prescribes a "cruel and unusual punishment".

27 Mr. Justice Black in an opinion joined by Mr. Justice
28 Douglas concurred in the opinion of the Chief Justice and
29 expressed the view that even if citizenship could be in-
30 voluntarily divested, the power to denationalize cannot be
31 placed in the hands of military authorities.

1 Mr. Justice Brennan concluded that it lies beyond the
2 power of Congress to enact Section 401(g) because "the requisite
3 rational relation between this statute and the war power does
4 not appear * * *".

5 On the same day as the decision in the Trop case, the
6 Supreme Court rendered its decision in Feroz v. Brownell, (356
7 U.S. 44). In that case the petitioner, a national of the
8 United States by birth, had been declared to have lost his
9 American citizenship by operation of Section 401(e) and
10 Section 401(j) of the Nationality Act of 1940 as amended.
11 Section 401 of that Act provided that "A person who is a
12 national of the United States, whether by birth or
13 naturalization, shall lose his nationality by: * * * (e) Voting
14 in a political election in a foreign state or participating in
15 an election or plebiscite to determine the sovereignty over
16 foreign territory; * * * (j) Departing from or remaining
17 outside of the jurisdiction of the United States in time of
18 war or during a period declared by the President to be a period
19 of national emergency for the purpose of evading or avoiding
20 training and service in the land or naval forces of the
21 United States."

22 Mr. Justice Frankfurter delivered the opinion of the
23 Court which held Section 401(e) to be constitutional. In a
24 closing paragraph of the opinion it is stated: "It cannot be
25 said, then, that Congress acted without warrant when, pursuant
26 to its power to regulate the relations of the United States
27 with foreign countries, it provided that anyone who votes in a
28 foreign election of significance politically in the life of
29 another country shall lose his American citizenship. To deny
30 the power of Congress to enact the legislation challenged here
31
32

1 would be to disregard the constitutional allocation of
2 governmental functions that it is this Court's solemn duty to
3 guard." (356 U.S. 62.)

4 In the closing paragraph of that opinion it is stated:

5 "Because of our view concerning the power of Congress
6 with respect to Section 401(e) of the Nationality Act of 1940,
7 we find it unnecessary to consider--indeed, it would be
8 improper for us to adjudicate--the constitutionality of
9 Section 401(j), and we expressly decline to rule on that
10 important question at this time."

11 In his opinion in the Trop case, the Chief Justice
12 stated: "Since a majority of the Court concluded in Peres v.
13 Brownell, that citizenship may be divested in the exercise of
14 some governmental power, I deem it appropriate to state
15 additionally why the action taken in this case exceeds
16 constitutional limits, even under the majority's decision in
17 Peres. The Court concluded in Peres that citizenship could be
18 divested in the exercise of the foreign affairs power. In this
19 case, it is urged that the war power is adequate to support
20 the divestment of citizenship. But there is a vital difference
21 between the two statutes that purport to implement those
22 powers by decreeing loss of citizenship. The statute in Peres
23 decreed loss of citizenship--so the majority concluded-- to
24 eliminate those international problems that were thought to
25 arise by reason of a citizen's having voted in a foreign
26 election. The statute in this case, however, is entirely
27 different. Section 401(g) decrees loss of citizenship for
28 those found guilty of the crime of desertion. It is
29 essentially like Section 401(j) of the Nationality Act,
30 decreeing loss of citizenship for evading the draft by remain-
31 ing outside the United States. This provision was also before
32 the Court in Peres, but the majority declined to consider its

1 validity. While Section 401(j) decrees loss of citizenship
2 without providing any semblance of procedural due process
3 whereby the guilt of the draft evader may be determined before
4 the sanction is imposed, Section 401(g), the provision in
5 this case, accords the accused deserter at least the safe-
6 guards of an adjudication of guilt by a court-martial."

7 After studying the opinion rendered by the
8 Supreme Court in the Trop and Peres cases, I have concluded
9 that the law which must govern my re-consideration of the
10 case under review is that Congress has the power to divest
11 citizenship if a rational nexus exists between the content
12 of a specific power in Congress and the action of Congress
13 in carrying that power into execution, unless the action of
14 Congress runs afoul of some provision of the Constitution,
15 such as in the Trop case, the Eighth Amendment.

16 It is my view that the only powers of Congress
17 which need to be considered in the reconsideration of this
18 case are (1) the power to regulate foreign affairs which
19 power is fully set forth in the Peres case, and (2) the war
20 powers of Congress set forth in Article I, Section 8,
21 Clauses 1, 11, 12, 13, 14 and 16 of the Constitution of the
22 United States.

23 It is the position of counsel for the defendant
24 that Congress had the power to enact Section 401(j) under
25 its powers to regulate foreign affairs and relied upon the
26 Peres case in support of his position. In the Peres case
27 the petitioner voted in a politically significant election
28 while living in Mexico, which act was construed in the Peres
29 case "as importing not only something less than complete and
30 unwavering allegiance to the United States but also elements
31 of an allegiance to another country in some measure, at least,
32 inconsistent with American citizenship." and as stated in

1 the majority opinion in the Perez case, "makes the act
2 potentially embarrassing to the American government and
3 pregnant with the possibility of embroiling this country in
4 disputes with other nations."

5 The petitioner's act in departing for Mexico for the
6 purpose of evading training and service in the armed forces
7 is to be condemned. It was an act for which he should have
8 been and was punished. Such conduct, however, does not show
9 a renunciation of his citizenship or an allegiance to a foreign
10 power. While physically present in Mexico the petitioner
11 committed no act which would import a dilution of his American
12 citizenship or which might conceivably embarrass our government.
13 So far as the record in this case shows, the conduct of the
14 petitioner in Mexico was no different than the conduct of law-
15 abiding American citizens who were lawfully in Mexico on visas
16 or passports. It could not be contended that their physical
17 presence in Mexico was a dilution of their American citizenship
18 or that their presence there might be potentially embarrassing
19 to the American government. I am unable to find any rational
20 relationship between the power of Congress to regulate foreign
21 affairs and the enactment by Congress of Section 401(j).

22 Under the so-called "war powers", Congress has the power
23 to provide for the common defense; to declare war; to raise and
24 support armies; to make rules for the government and regulation
25 of the land and naval forces; and to make all laws which shall
26 be necessary and proper for carrying into execution the
27 foregoing powers.

28 Is there a rational relationship between the powers above
29 described and the enactment of Section 401(j)? Conceivably,
30 Congress may have thought that making loss of citizenship a
31 consequence of departing from the United States or remaining
32 out of the United States in time of war for the purpose of

1 evading or avoiding training and service in the land and naval
2 forces of the United States would deter citizens subject to
3 such training and service from evading such service in such
4 manner, and would thereby assist the authorities in raising
5 the requisite manpower to successfully prosecute a war or
6 provide for the common defense, or, conceivably, Congress may
7 have thought that the morale of those who were subject to such
8 service and training or those who had already been drafted into
9 the service would be increased and thereby the efficiency of
10 the armed forces might be improved.

11 Congress, however, enacted the Selective Service and
12 Training Act of 1940, as amended, (50 App. U.S.C.A.). Section
13 11 thereof dealt with offenses and punishment under that Act.
14 Said section provided, in substance, that any person who shall
15 knowingly fail or neglect to perform any duty required by the
16 Act or the rules and regulations made or directions given
17 thereunder, or who shall otherwise evade registration and
18 service in the land or naval forces, shall, upon conviction,
19 be punished by imprisonment for not more than five years, or
20 by a fine of not more than \$10,000.00, or by both such fine and
21 imprisonment. The penalty applies regardless of whether the
22 violation is by departing from the United States or in some
23 other manner. In the instant case, the plaintiff departed from
24 the United States for the purpose of evading service in the
25 land and naval forces of the United States. He committed a
26 felony for which he was subject to trial and punishment. For
27 such violation, the plaintiff was punished by incarceration
28 for a period of one year and one day and also suffered the loss
29 of rights which resulted from conviction of a felony. If the
30 plaintiff had remained in the United States and had evaded
31 service under the Selective Service and Training Act, he would
32 have committed the same offense and would have suffered the

1 penalty provided for such violation, but he would not have
2 been subject to expatriation.

3 It is my conviction that the enactment of Section 311
4 accomplished all legitimate purposes that Congress could have
5 reasonably considered in the enactment of Section 401(j), and
6 that any relationship between the enactment of Section 401(j)
7 and the war powers of Congress is extremely tenuous and
8 ineffectively remote. I am unable to find that the enactment
9 of Section 401(j) could be reasonably calculated to implement
10 war powers possessed by Congress.

11 My views on Section 401(j) are similar to the views
12 entertained by Mr. Justice Brennan on Section 401(g) in his
13 concurring opinion in Trop v. Dulles. Mr. Justice Brennan
14 stated in the last paragraph of that opinion as follows:

15 "I therefore must conclude that Section 401(g)
16 is beyond the power of Congress to enact.
17 Admittedly, Congress' belief that expatriation
18 of the deserter might further the war effort
19 might find some--though necessarily slender--
20 support in reason. But here, any substantial
21 achievement, by this device, of Congress'
22 legitimate purposes under the war power seems
23 fairly remote. It is at the same time
24 abundantly clear that these ends could more
25 fully be achieved by alternative methods
26 not open to these objections. In the light
27 of these factors, and conceding all that I
28 possibly can in favor of the enactment, I
29 can only conclude that the requisite rational
30 relationship between this statute and the war
31 power does not appear--for in this relation
32 the statute is not 'really calculated to effect
any of the objects entrusted to the government
' * * *, McCulloch v. Maryland, 4 Wheat. 316, 423--
and therefore that Section 401(g) falls
beyond the domain of Congress."

33 For the reasons herein expressed, I hold that Section
34 401(j) is unconstitutional and therefore the plaintiff is
35 entitled to the relief sought in his amended complaint.

1 Counsel for the plaintiff is directed to prepare and
2 lodge proposed findings of fact, conclusions of law and form
3 of judgment consistent with the views herein expressed.

4 The Clerk of this Court is directed to forthwith mail
5 copies of this memorandum to all counsel.

6
7 Dated: September , 1958.

8
9
10
11 WILLIAM E. JONES
12 Judge, United States District Court
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32