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Comments

COMMENTS

CONSTITUTIONAL LAW—DOUBLE JEOPARDY—A HISTORICAL PERSPECTIVE—SUCCESSIVE CONVICTION FOR A CRIME BY TWO SOVEREIGNTIES.

Before and at the Common Law

FEAR and dislike of governmental power to try people twice for the same conduct is one of the oldest ideas found in Western Civilization.[1] Its origin runs deep into Greek and Roman times.[2] As Cicero stated concerning the scope of this early idea "Nor is it one thing at Rome and another at Athens, one now and another in the future, but among all nations it is the same".[3] The idea that one trial and one punishment was sufficient survived through the Dark Ages, and was found at the common law in the nature of four pleas in bar.[4] These pleas were the equivalent of the plea of double jeopardy: autrefois acquit, autrefois convict, autrefois attaint and former pardon. Blackstone called them by the term "Former Jeopardy".[5]

This basic idea developed in England and became the rule that an acquittal or conviction by a foreign court of competent jurisdiction, was a bar to a subsequent prosecution for the same offense.[6] But it also was evident that since an indictment could charge only a single felony, and since only one sentence was awarded on any indictment,[7] two penalties could be imposed only as a result of two trials. Thus the common law rule prohibiting a second trial for the same "offense" operated to bar multiple punishment as well as multiple prosecution.[8] It appears, therefore, that the Courts of England rejected efforts at second prosecutions.[9]

1 Bartkus v. Illinois, 359 U.S. 121, 79 S.C. 676, 3 L.Ed. 2d 684 (1959).

2 Radin, Roman Law, 475, n.28 (1936).

3 17 Am. L. Rev. 735 (1883).

4 1 Pollack and Maitland History of English Law 448-449 (2d ed. 1899); 2 Cooley's Blackstone 335 (4th ed. 1899).

5 See note 4 supra, Cooley's Blackstone; *Autrefois Acquit*—formerly acquitted; the name of a plea in bar to a criminal action, stating that the defendant has been once indicted and tried for the same alleged offense and has been acquitted. State v. Bilton, 156 S.C. 324, 153 S.E. 269, 272 (1930); *Autrefois Attaint*—formerly attainted; a plea that the defendant has been criminally prosecuted for another. This is not a good plea in bar in the United States, nor in England in modern law. Singleton v. State, 71 Miss. 782, 16 So. 295 (1894); *Autrefois Convict*—formerly convicted; a plea by a criminal in bar to an indictment that he has been formerly convicted of the same crime; *Autrefois Pardon*—formerly pardoned.

6 R. v. Thomas, 1 Keb. 663, 83 Eng. Rep. 1172 (K.B. 1662); 1 Lev. 118, 83 Eng. Rep. 326 (1793); 1 Sid. 179, 82 Eng. Rep. 1043 (1888); R. v. Hutchinson, 3 Keb. 785, 84 Eng. Rep. (K.B. 1678); R. v. Roche, 1 Leach 134, 135, 168 Eng. Rep. 169 (K.B. 1775); See Grant, Scope and Nature of Concurrent Power, 34 Col. L. Rev. 995 (1934).

7 1 Chitty, Criminal Law 170 (1st ed. 1819).

8 1 Stephen, Criminal Law of England 508 (1883); Levin v. United States, 5 F.2d 598 (9th Cir. 1925) cert. den. 269 U.S. 562, 46 S.Ct. 21, 70 L.Ed. 412 (1925); Clawans v. Rives, 104 F.2d 240, 70 D.C. Cir. 107 (1939); State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937); Ex parte Wilson, 196 Cal. 515, 238 Pac. 359, 362 (1925).

9 In Rex v. Segar, 1 Comb. 401, 90 Eng. Rep. 554 (K.B. 1696); Turner's Case, Kel. 30, 84 Eng. Rep. 1068 (K.B. 1664); Jones and Bever's Case, Kel. 52, 84 Eng. Rep. 1078 (K.B. 1665).

The development of a common law doctrine aiding the defendant was prompted by such factors as the severity of criminal penalties, the disproportionate trial advantages held by the prosecution and the disabilities suffered by the accused.[10] The experience of our early settlers with these harsh practices in England and on the continent[11] induced them to bring the common law doctrine to this country as a part of their heritage of freedom.[12]

Court Construction in the United States

a. *Under the Fifth Amendment*

This universal doctrine was incorporated into the Fifth Amendment of the Constitution of the United States[13] which provides that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb, . . ." and the Constitutions of nearly all the states contain a similar provision,[14] which, however, is merely declaratory of the common law rule.[15] This protection afforded to citizens is not only against the peril of second punishment, but also against the peril of being tried again for the same offense.[16]

In order that one trial be a bar to a subsequent one, it is necessary to state at the outset that an accused be first put in jeopardy.[17] Jeopardy is used to designate the danger of conviction and punishment which an accused incurs in a criminal action when he is put on trial in a court of competent jurisdiction upon an indictment or information sufficient in form and substance to sustain a conviction, and if the court tries a case without a jury, jeopardy attaches when the court begins the hearing of the evidence.[18] It

[10] Radin, Anglo-American Legal History 228-229, 236-237 (1936). An accused man never saw the indictment until it was read to him. He could call no witnesses on his behalf. He was not permitted to have counsel. Penalties—Mutilation was the punishment for serious offenses recorded at Northampton in 1176. During the 13th Century in much of England all felonies were punishable by death. A thief was hung at once and also, the loser of an appeal was hanged by the successful appellant; See generally, Stephen, History of the Criminal Law of England Chap. 7 (1883).

[11] Lea, Superstition and Force, Philadelphia 371-522 (1878). According to Mr. Lea torture was gradually introduced through the continent in the course of the Fourteenth, Fifteenth and Sixteenth Centuries. It was connected with the revival of the Roman Law.

[12] Ferrand, The Laws and Liberties of Mass. (1929 ed.).

[13] U.S. Constitution, Amend. V.

[14] Rogers v. Commonwealth, 257 Ky. 495, 78 S.W.2d 340 (1935); State v. Shannon, 136 Me. 127, 3 A.2d 899 (1939); State v. Fredlund, 200 Minn. 44, 273 N.W. 353 (1937); State v. Brooks, 38 Okla. Cr. 302, 260 P. 785 (1927); Bonds v. State 79 Tex. Cr. 395, 185 S.W.2d (1916).

[15] Alford v. Commonwealth, 240 Ky. 523, 42 S.W.2d 716 (1931); Harmon v. State, 43 Okla. Cr. 251, 278 P. 354 (1929); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934).

[16] See note 1, supra; Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797 (1904); 49 L.Ed. 114; Stroud v. United States, 241 U.S. 15, 40 S.Ct. 50, 54 L.Ed. 103 (1919).

[17] Scaff v. Commonwealth, 195 Ky. 830, 243 S.W. 1034 (1922).

[18] Hunter v. Wade, 169 F.2d 973 (8th Cir. 1948), aff'd, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); The general rule is that when a person has been placed on trial on a valid indictment or information before a court of competent jurisdiction, has been arraigned, and has pleaded, and a jury has been impaneled and sworn, he is in

is when the accused is twice placed in the above situations that many problems arise under the fifth amendment. One of these has been in the area of state prosecutions followed by federal prosecutions or vice versa based on the same crime.

There were many early state cases which recognized this problem of which four held that prosecution by one government must bar subsequent prosecutions elsewhere.[19] This holding was consistent with the early English Courts.[20] Two other state courts approved of the doctrine that successive state and federal prosecutions do not violate basic principles of justice.[21] Other state courts declined to uphold the principle of concurrent jurisdiction for fear that the result might usher in two trials for the same offense.[22] The proposition that successive state and federal prosecutions should not be barred was supported by the statement that the States should retain the power, concurrently with Congress, to regulate on all subjects not pre-empted by or specifically reserved to the Federal Government;[23] and further that concurrent power is essential to enable the states to provide for the general welfare and protection of those within their respective jurisdictions.[24] However, there was argument raised for the barring of successive state and federal prosecutions. The contention was that allowing one government to prosecute after another had tried or acquitted the accused would subject the offender to double punishment for the same offense, and further that the punishment would be multiplied if one came within the jurisdictions of three or more governments.[25] It was considered as against natural justice and the common law principles.[26]

In 1847 the Supreme Court[27] recognized the problem of double punishment, and stated that both the state and federal governments had the power to concurrently impose criminal sanctions to protect concurring

jeopardy, but that, until these things have been done, jeopardy does not attach. See, e.g., McCarthy v. Zerbst, 85 F.2d 640 (10th Cir. 1936), cert. denied, 299 U.S. 610, 57 S.Ct. 313, 81 L.Ed. 450 (1936); United States v. Kraut, 2 F. Supp. 16 (S.D.N.Y. 1932); People v. Young, 100 Cal. App. 18, 279 Pac. 824, 826 (1929); State v. Yokum, 155 La. 846, 99 So. 621, 623 (1923); People On Complaint of Forastiere v. Clark, 3 A.D.2d 700, 159 N.Y.S.2d 66 (1st Dep't 1957); People v. Slafford, 123 Misc. 488, 205 N.Y.S. 793 (Monroe County 1924); Holt v. State, 160 Tenn. 366, 24 S.W.2d 886 (1930); Rosser v. Commonwealth, 159 Va. 1028, 167 S.E. 257 (1933); But see, People v. Orr, 138 Misc. 535, 246 N.Y.S. 673 (Madison County 1930); See, 22 C.J.S. Criminal Law § 241 (1940).

[19] State v. Antonio, 2 Tread, Const., S.C., 776 (1816); State v. Randall, 2 Aitkens, Vt., 89 (1827); Harlan v. People, 1 Doug., Mich. 207 (1843); Commonwealth v. Fuller, 8 Metc., 49 Mass. 313 (1814).

[20] See note 6, supra.

[21] State v. Tutt, 2 Bailey, S.C., 44 (1830); Hendrick v. Commonwealth, 5 Leigh, 32 Va. 707 (1834).

[22] State v. Brown, 2 N.C. 135 (1794); Mattison v. State, 3 Mo. 225 (1834).

[23] See note 22 supra, 3 Mo. 225 (Justice Walsh dissenting).

[24] Ibid.

[25] See note 22 supra, 3 Mo. 225.

[26] Ibid.

[27] Fox v. Ohio, 5 How. 410, 12 L.Ed. 213 (1847).

interests. It was specifically said by the high court that the power conferred upon Congress to provide for punishment of a federal crime does not prevent a state from likewise punishing for the offense committed against its laws, nor does the prohibition within the amendment to the Constitution restrict the states, but only the Federal Government.[28]

There were many subsequent state and federal decisions concerned with the validity of subsequent state and federal prosecutions,[29] and in one decision, in 1850[30] the Supreme Court reiterated the rule that the states had the right to punish for concurrent crimes. In 1852 the high court again upheld the validity of dual prosecutions, stating that a man may simultaneously commit a breach of the public peace, and inflict a private injury, and thus, be twice punished for the same offense.[31] The Court further stated that every citizen of the United States is a citizen of a state or territory, and as such he may owe allegiance to two sovereigns, and, therefore, may be liable to punishment for an infraction of the laws of either sovereign.[32] The same act may well be an offense or transgression of the laws of both;[33] however the offender is not being punished twice for the same offense, but by one act he committed two offenses, for each of which he is justly punishable. Thus, the accused could not plead the punishment by one as a bar to a conviction by the other.[34]

The principle was affirmed by the high court many times between 1852 and 1922,[35] and in 1922[36] the Supreme Court firmly upheld the dual-sovereignty doctrine stating that one act may constitute a criminal offense against both, and a prior state conviction will not be a bar to a subsequent federal prosecution. Thus successive state and federal prosecutions are not in violation of the fifth amendment,[37] and ever since *United States v.*

[28] Ibid.

[29] See State v. Duncan, 221 Ark. 681, 255 S.W.2d 430 (1953); Dashing v. State, 78 Ind. 357 (1881); State v. Gathier, 121 Me. 522, 118 A. 380 (1922); Commonwealth v. Nickerson, 236 Mass. 281, 128 N.E. 273 (1920); State v. Holm, 139 Minn. 267, 166 N.W. 181 (1918); State v. Frach, 162 Or. 602, 94 P.2d 143 (1939); Jett v. Commonwealth, 18 Grat. 933, 59 Va. 933 (1867); Nielson v. Oregon, 212 U.S. 315, 320, 29 S.Ct. 383, 53 L.Ed. 528 (1909); United States v. Furlong, 5 Wheat. 184, 5 L.Ed. 64 (1820).

[30] United States v. Marigold, 9 How. 560, 13 L.Ed. 257 (1850).

[31] Moore v. Illinois, 14 How. 13, 14 L.Ed. 306 (1852).

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1875); Cross v. North Carolina, 132 U.S. 131, 10 S.Ct. 47, 33 L.Ed. 728 (1889); Sexton v. California, 189 U.S. 319, 23 S.Ct. 543, 47 L.Ed. 833 (1903); Ponzi v. Fessenden, 258 U.S. 254, 42 S.Ct. 309, 66 L.Ed. 607 (1922).

[36] United States v. Lanza, 260 U.S. 377, 43 S.Ct. 141, 67 L.Ed. 314 (1922).

[37] Herbert v. Louisiana, 272 U.S. 312, 47 S.Ct. 103, 71 L.Ed. 270 (1926); Westfall v. United States, 274 U.S. 256, 47 S.Ct. 629, 71 L.Ed. 1036 (1927); Puerto Rico v. Shell Co., 302 U.S. 253, 58 S.Ct. 167, 82 L.Ed. 235 (1937); Jerome v. United States, 318 U.S. 101, 63 S.Ct. 483, 87 L.Ed. 640 (1943); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

Lanza[38] in 1922, the principle has been accepted by the high court[39] and the lower courts.[40]

b. *Under the Fourteenth Amendment*

The question of the validity of successive federal and state prosecution is a manifestation of the evolutionary unfolding of the law, and it is only one of the many problems arising under the fourteenth amendment. The issue posed for determination with respect to successive federal and subsequent state prosecutions, is whether the fifth amendment of the Constitution is made binding on the states by the due process clause of the fourteenth amendment.[41] If the first eight amendments are made binding upon the states by the fourteenth amendment, then the double jeopardy clause of the fifth amendment would bar a state prosecution subsequent to a federal prosecution because the second prosecution would be unconstitutional.

In the annals of English History, specifically the Magna Charta, which contains limitations upon all the powers of English Government, is found our English traditions, and the basis for our constitution.[42] The basis for our due process clause is to be found in the Magna Charta as interpreted by Lord Coke.[43] He stated that "the law of the land as mentioned in the Magna Charta was intended to be due process of law" and further that the phrase was intended to protect the safety of the citizen, securing his liberty and his property, by preventing his unlawful arrest or such seizure of his property.

The provisions of the Magna Charta were deemed essential enough to be incorporated into our bill of rights.[44]

Legislation in various states pertaining to a citizen's rights does not always provide similar protection; the due process clause does not profess to make the legislation similar but only to protect the citizen from an abridgment of his constitutional rights.[45]

[38] See note 36 supra.

[39] See note 37 supra.

[40] McKinney v. Landon, 209 F. 300 (8th Cir. 1913); Morris v. United States, 229 F. 516 (1st Cir. 1916); Vandell v. United States, 6 F.2d 188 (2d Cir. 1925); United States v. Levine, 129 F.2d 745 (2d Cir. 1942); United States v. Wells, 28 Fed. Cas. 522 (No. 16,665) (D.C. Minn. 1872); United States v. Barnhart, 22 Fed. 285 (C.C. Or., 1884); United States v. Palan, 167 Fed. 991 (C.C.S.D.N.Y. 1909); In Re Morgan, 80 F. Supp. 810 (D.C.N.D. Iowa 1948); United States v. Mandile, 119 F. Supp. 266 (D.C.E.D.N.Y. 1954).

[41] United States Constit. Amendment XIV.—The States cannot deprive any person of life, liberty or property without due process of law.

[42] Stubbs, Lectures on Early English History—Magna Charta, 30, 108, 122, 289, 293, 344-345 (1906); See generally, Crabb, History of English Law (1831); Beck, The Constitution of the United States, Ch. 1, 16, 17 (1st ed. 1925); Potter, Historical Introduction to English Law (1932).

[43] 4 Blackstone Commentaries 310.

[44] Hurtado v. California, 110 U.S. 516, 526, 4 S.Ct. 111, 119, 28 L.Ed. 232, 237 (1883).

[45] Walker v. Savinet, 92 U.S. 90, 23 L.Ed. 678 (1875); Missouri v. Lewis, 101 U.S. 22, 23, 25 L.Ed. 989, 990 (1879).

In an early case,[46] the Supreme Court held that a state may regulate the procedural aspects of protecting a citizen's rights as long as such rights are not essentially abridged. The high court stated that an information substituted as provided for by statute, for a presentment or indictment by a grand jury was not in violation of the due process clause, nor did a state fail to protect a citizen's interest. This case was indicative of the early status of concurrent state and federal criminal jurisdiction.[47]

Other early cases have held specifically that the due process clause of the fourteenth amendment does not apply to the states any of the provisions of the first eight amendments.[48]

Then in 1937, in an important decision,[49] the Supreme Court attempted to indicate the purport of due process and to outline its application to this problem. The high court held that one's conviction upon a retrial was not a derogation of any privileges or immunities belonging to him as a citizen of the United States, nor did the fourteenth amendment guarantee protection against state action by an incorporation of the original bill of rights.[50]

However, there are situations where immunities, valid against the Federal Government by force of particular amendments have been "implicit in the concept of ordered liberty",[51] and, therefore, through the fourteenth amendment, became valid against the states; such situations and immunities are found within the framework of the first amendment,[52] but not within the fifth amendment.

It was stated in *Palko v. Connecticut*[53] that "reasonable men would consider the due process clause a prohibition to the states of only those practices repugnant to the conscience of mankind".

In *Snyder v. Mass.*,[54] the accused was denied the privilege of viewing the alleged scene of a murder with the jury and the denial was not held to be prejudicial to the accused, nor a denial of due process under the fourteenth amendment. Whereas in *Kepner v. United States*,[55] where the accused was first acquitted by a lower court and again tried and then

46 See note 44, supra.

47 Ibid. See e.g. 2 Stat. 404 § 4 (1806); 2 Stat. 423 (1807); 4 Stat. 122 § 26 (1825), (legislation permitting concurrent criminal jurisdiction).

48 In Re Kemmler, 136 U.S. 436, 10 S.Ct. 430, 34 L.Ed. 519 (1890); Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900); Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); See Fairman, Does The Fourteenth Amendment Incorporate The Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949).

49 Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

50 Ibid.

51 Id. at 324, 58 S.Ct. at 151, 82 L.Ed. at 291-92.

52 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

53 See note 46 supra at 323, 58 S.Ct. 150, 2 L.Ed. at 290.

54 Snyder v. Mass., 291 U.S. 97, 114 (78 674) 682, 54 S.Ct. 330 78 L.Ed. 674 (1933).

55 See supra note 16, Kepner v. United States.

convicted by an appellate court, the Supreme Court held that a violation of the double jeopardy clause existed. The second trial was repugnant to the conscience of mankind.

One[56] of the recent cases[57] which have commended Justice Cardozo's statement in *Palko*, held that the adaption of the irrestible impulse test was not "implicit in the concept of ordered liberty".[58]

Present Day Construction

Two recent decisions are of extreme importance to the issues at hand. The first of these was *Bartkus v. People of Illinois*,[59] where the high court was concerned with the problem of successive federal and state prosecutions. There it was held by the court that where an accused is tried in a federal court[60] under an indictment charging him with the commission of a federal crime, but resulting in an acquittal, a subsequent trial of the accused in a state court[61] based on the same crime did not deprive the accused of due process of law under the fourteenth amendment.

The defendant after his acquittal in federal court was tried in Illinois under almost identical facts. The state[62] and federal[63] courts affirmed the Illinois conviction, but the Supreme Court allowed a reargument[64] on defendant's plea of autrefois acquit.

The majority found that the due process clause of the fourteenth amendment does not apply the first eight amendments to the states, and therefore, that the double jeopardy clause does not bind the states.[65] If the provisions of the first eight amendments were made binding upon the states by the due process clause, ten of the thirty states ratifying the fifth, sixth, and seventh amendments would have imposed upon themselves constitutional requirements on vital issues of state policy contrary to those present in their own constitutions.[66] Furthermore, none of the constitutions of twelve states who were admitted after ratification of the fourteenth

[56] Leland v. Oregon, 343 U.S. 790, 801, 72 S.Ct, 1002, 1008, 96 L.Ed. 1302 (1952).

[57] See e.g. Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1935); Greenberg v. California, 331 U.S. 796, 67 S.Ct. 1748, 91 L.Ed. 823 (1946); See supra note 48, Adamson v. California; Bute v. Illinois, 333 U.S. 640, 659, 68 S.Ct. 763, 773, 92 L.Ed. 986 (1947); Rochin v. California, 342 U.S. 165, 169, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1951).

[58] See note 56 supra.

[59] See note 1 supra.

[60] Bartkus v. United States, Federal District Court, N.D. of Illinois, December 18, 1953.

[61] Bartkus v. Illinois, 7 Ill., 2d 138, 130 N.E.2d 187 (1958).

[62] Ibid.

[63] Cert. granted, 352 U.S. 907, 77 S.Ct. 150, 1 L.Ed. 2d 116 (1956); 352 U.S. 958, 77 S.Ct. 358 (1957); Second conviction affirmed; 355 U.S. 281, 78 S.Ct. 336, 2 L.Ed. 2d 270 (1958).

[64] Motion to reargue granted, 356 U.S. 969, 78 S.Ct. 1004, 2 L.Ed. 2d 1075 (1957).

[65] See note 48 supra.

[66] See note 1 supra at 140-49, 76 S.Ct. 687-91, 3 L.Ed. 2d 696-74. (For differences in certain provisions of State and Federal Constitutions.)

amendment have similar provisions in their state constitutions to the fifth, sixth or seventh amendments.[67] Thus there is evidence that the due process clause of the fourteenth amendment did not apply the restrictions of the first eight amendments to the states, but only bound the states to desist from depriving any person of life, liberty or property without due process of law.[68]

Justice Black dissenting, stated that for the first time in history, the court upheld the state conviction of an accused who had been acquitted of the same offense in federal courts. He also argued that for the same man acquitted in the federal court, a second trial for an identical act would be barred by the fifth amendment. He said that the same act is no less offensive when one of the trials is conducted by the federal government and the other by a state.[69] Justice Black further contended that the majority in reliance on the doctrine of dual sovereignty permitted double prosecution and concluded that such a reliance will result in an undermining of the laws of each.

Justice Frankfurter speaking for the majority held that one government might provide minor penalties for acts harshly punished by the others, and by accepting pleas of guilty shield wrongdoers from justice,[70] and that to allow such a federal bar to deprive a state of its right to maintain peace and order within its confines, would subvert the principle of dual sovereignty.

Justice Brennan,[71] also in dissent contended that connivance in bringing about the state trial, in effect, was double federal prosecution in violation of the fifth amendment.

Admitting that there was federal and state cooperation, the high tribunal further stated that cooperation between the two sets of prosecutors was essential in the endless fight against crime and in accord with conventional practice.[72]

In the second leading case, *Abbate v. State of Illinois*,[73] the Supreme Court again reaffirmed the rule that a prior state conviction based on the same crime, does not act as a bar to a subsequent federal prosecution under the double jeopardy clause of the fifth amendment.

The dissent contended that a state and the nation cannot do together as two separate sovereigns what neither can do alone.[74] It argues that the states are not more, but less distinct from the Federal Government than are foreign nations from each other,[75] and further that a prior conviction

[67] Ibid. (In order of their admission) Colorado, North Dakota, Montana, South Dakota, Washington, Idaho, Wyoming, Utah, Oklahoma, Arizona, New Mexico, Alaska.

[68] Southwestern Oil Co. v. Texas, 217 U.S. 114, 30 S.Ct. 496, 54 L.Ed. 688 (1910).

[69] See note 1 supra.

[70] The Chief Justice, and Justice Douglas concurred with both dissenters.

[71] See supra note 37, Screws v. United States.

[72] See Proceedings of the Attorney General's Conference on Crime (1934).

[73] Abbate v. United States, 247 F.2d 410 (5th Cir. 1957).

[74] See note 1 supra at 140-49, 76 S.Ct. 687-91, 3 L.Ed. 2d 696-74. (Almost all of the states have constitutional provisions similar to the Double Jeopardy Clause of the Federal Constitution.)

[75] Testa v. Katt, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947).

has been accepted in most countries as a bar to a second trial in their jurisdiction.[76]

Notwithstanding this contention, the majority, as in the *Bartkus* case stated that the *Lanza*[77] principle has been accepted without question[78] and we do not wish to overrule it. If Lanza were overruled the state prosecutions for crimes violating their laws would bar federal prosecutions based on the same acts, and, therefore, hinder federal law enforcement. It would be highly impractical for the federal authorities to keep informed of all state prosecutions which might affect federal offenses.[79]

While the states are not bound to follow the Supreme Court in its interpretation of the fifth amendment, upon similar grounds to wit constitutional, statutory or common law they also have held that there is no bar to successive prosecutions.[80]

The New York Court of Appeals for many years followed the dual sovereignty doctrine[81] until it became one of fifteen states which have statutes barring a second prosecution if the accused has been tried by another government for a similar offense.[82] The New York Statute,[83] which is typical of these laws, demonstrates the difficult task of determining when the federal and state statutes are enough alike to have a former prosecution act as a bar to a latter one.[84]

While the Supreme Court has again recognized that it was the intention of Congress that concurrent jurisdiction should exist[85] by reaffirming the principle of dual-sovereignty, the majority felt that the problem of successive state and federal prosecutions is one with which the states are more competent to handle than is the court.

Although the judicial precedent declares that a prosecution and conviction or acquittal under the courts of one jurisdiction, state or federal, will not bar a subsequent prosecution in the courts of the other, based on the same act or crime, yet it does not follow that punishment will necessarily be imposed and executed in the courts of both jurisdictions. One jurisdiction may consider a prior sentence in another jurisdiction when fixing a penalty, where the court has discretion in a matter, or the execution of a subsequent sentence may be suspended.

Punishment in the courts of each jurisdiction, although not prohibited,

[76] See supra note 6, Grant, Scope and Nature of Concurrent Power.

[77] See note 36 supra.

[78] See note 37 supra.

[79] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, L.Ed. 306 (1932); Gore v. United States, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1958).

[80] See note 1 supra at 135, 79 S.Ct. 684, 3 L.Ed. 2d 693.

[81] People v. Welch, 141 N.Y. 266, 36 N.E. 328 (1894).

[82] American Law Institute Model Penal Code 61 (Tentative Draft No. 5, 1956).

[83] N.Y. Penal Law, § 33, N.Y. Code Crim. Pro. § 139.

[84] People ex rel. Liss v. Superintendent of Women's Prison, 282 N.Y. 115, 25 N.E.2d 869 (1940); People v. Mignogna, 296 N.Y. 1011, 73 N.E.2d 583 (1947); People v. Parker, 175 Misc. 776, 25 N.Y.S.2d 247 (Kings County Court, 1941); People v. Adamshesky, 184 Misc. 769, 55 N.Y.S.2d 90 (N.Y. County Court 1945).

[85] See note 47 supra.

should not, in practice, be imposed, unless extraordinary situations, aggravating circumstances, or special considerations in light of public safety justify or require it. W. S. K.

CONSTITUTIONAL LAW—RESTRICTION IN ISSUANCE OF PASSPORTS—THE SECRETARY OF STATE HAS THE POWER TO RESTRICT TRAVEL TO AREAS DESIGNATED AS "TROUBLE SPOTS."—Two recent cases[1] decided by the Court of Appeals for the District of Columbia have concerned the powers of the Secretary of State to prohibit travel by American citizens to Communist China.[2] The Court in *Worthy v. Herter* held that the Secretary of State has the power to restrict travel to areas designated as "trouble spots."[3] This was reaffirmed in *Frank v. Herter* in a one paragraph opinion.[4] However, the concurring opinion by Justice Berger in the *Frank* case also held that the Secretary of State could make exceptions to the rule prohibiting travel by American citizens to Communist China, as in the case of approximately forty journalists who are being issued passports valid for travel to that "trouble spot," without violating the requirements of the "due process" clause of the Fifth Amendment to the Constitution relating to discrimination.[5]

The mechanics of the travel controls in the cases at bar involve the following steps: (1) a declaration by the State Department that an area is a "trouble spot" and thus restricted to travel by American citizens,[6] (2) noting such restriction on every passport issued, so that every passport is a conditional one,[7] (3) requesting information from a passport applicant as to the purposes of his visit abroad as to the areas to be entered,[8] (4) denial of application for passport when there is an indicated intention to enter a "trouble area."[9]

Prior to having their cases heard before the United States Court of Appeals, the appellants, in each case, went through substantially the identical process. First, the application for a passport valid for travel to Communist China was informally denied.[10] There followed in that sequence, a formal denial by the Passport Division[11] and affirmation on appeal to the Board of

1 Worthy v. Herter, Flash Sheet No. 14806, June 6, 1959 (D.C. Cir. 1959); Frank v. Herter, 269 F.2d 245 (D.C. Cir. 1959).

2 The ban on travel also applies to other communist nations in Asia and Europe which have not received recognition by the United States Government.

3 See supra note 1, Worthy v. Herter.

4 See supra note 1, Frank v. Herter at p. 246.

5 Id. at pp. 246-248.

6 See supra note 1, Worthy v. Herter at p. 7.

7 Id. at p. 2.

8 Id. at p. 6.

9 Ibid.

10 22 C.F.R. § 51.137 prevides for right of an informal hearing.

11 Id. § 51.138. "In the event of a decision adverse to applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139."

Passport Appeals.[12] A complaint having been subsequently filed in a federal district court, appellant's motion for a summary judgment was dismissed.[13]

Each appellant is a journalist. Wm. Worthy Jr. is an accredited correspondent for the Afro-American Newspapers, New York Post and the Columbia Broadcasting System. He had written Premier Chou en Lai asking for permission to enter China for the express purpose of inquiring into current Chinese-American controversies[14] regarding Taiwan, Quemoy and Matsu which might light the spark of war. Worthy had previously violated the restriction in his passport, when, in 1957, he visited Communist China and Hungary. While in Communist China, Worthy sought out Americans who were confined in Chinese prisons. He later broadcasted over the Columbia Broadcasting System a report of the condition, health and morale of the war prisoners.[15]

Waldo Frank, a noted author, wished to travel to Communist China as a special correspondent for some Latin American newspapers and also to teach a course in comparative American Literature at the University of Peiping.[16] He had never violated a passport restriction. There was no question as to his qualifications as a journalist. No reason was given by the State Department for not including him in the experimental group of journalists who would be permitted to apply for visas from the Communist Chinese government.

The first recorded travel controls in the United States date back to the War of 1812.[17] The Civil War and the two World Wars were also the occasion for travel restraints. During the late 1930's, Ethiopia, Spain and, then, China were generally off-limits for an American citizen.[18] Worthy contended that in all of these war situations there was no absolute prohibition on foreign travel; but that exceptions were made as in the case of those on urgent business. We have previously noted that the Secretary of State made exceptions[19] to the rule of no travel to Communist China by American citizens. Apparently the exceptions were made after the *Worthy* case was initiated in the Court below.

The Secretary of State has justified the ban on travel to Communist China for reasons of foreign policy.[20] The presence of an American citizen is regarded as a source of conflict with the Communist nation and a source

[12] Id. § 51.139. The Board of Passport Appeals is composed of not less than three officers of the department to be designated by the Secretary of State. Applicant has the right to a hearing and to be represented by counsel. Applicant and each witness has the right to inspect the transcript of his own testimony.

[13] Applicant sued in the District Court for declaratory relief. The Secretary of State as respondent moved for a summary judgement.

[14] See supra note 1, Worthy v. Herter, at p. 6.

[15] Brief for appellant, Worthy v. Herter, see supra note 1.

[16] See supra note 1, Frank v. Herter, at pp. 246-247.

[17] Kent v. Dulles, 357 U.S. 116, 122-123, 78 S.Ct. 1113, 1116, 2 L.Ed. 2d 1204, 1208 (1958).

[18] See note 15, supra.

[19] See supra note 1, Frank v. Herter at p. 247.

[20] Ibid.; see supra note 1, Worthy v. Herter at pp. 8-10.

of misunderstanding with our allies.[21] Current events point up the war potential in Far Eastern affairs.[22] There are Americans incarcerated in Communist Chinese prisons since the Korean War. Communist China is one of the six nations which is not recognized by the United States government.[23] Our recognition and support of the Nationalist government in Formosa is a key and pivotal part of our broad policy of national defence and foreign relations. Among other considerations at stake is Nationalist China's permanent seat on the Security Council. Already, one of our closest allies, the United Kingdom, has extended diplomatic recognition to the Communist Chinese regime. Tremendous pressures are being exerted on the United States government from within and without to accord full recognition to Communist China. At present, representatives of the United States are meeting with Communist Chinese officials in Warsaw, on an intermittent basis, to explore the problem of American war prisoners in Communist China.

However, considerations of foreign policy and national defence have since the inception of this nation been regarded as political decisions which are not to be inquired into by the Courts, and termed "non-justiciable."[24] Even Congress has been rebuffed by the President when it sought secret information relating to the negotiation of treaties.[25] To this day, Congressional requests from information from the State Department are couched in different terms than are the requests addressed to other Executive departments of our government.[26]

Therefore, if the State Department declares that Communist China is a "trouble spot," that passports should not be validated for travel there, that recognition should be withheld from that government, neither the Courts nor Congress will be heard to complain.

In a recent case involving the denial of passports on the basis of internal

[21] Ibid.

[22] Ibid.

[23] See supra note 1, Frank v. Herter, at p. 246.

[24] Chicago & Southern Airlines v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948); Coleman v. Miller, 307 U.S. 437, 454, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-321, 57 S.Ct. 216, 81 L.Ed. 255 (1936); Oetjen v. Central Leather Co., 246 U.S. 297, 302, 38 S.Ct. 309, 62 L.Ed. 726 (1917).

[25] Chamberlain, Legislative Processes National and State (N.Y., 1936), pp. 321-322. President Washington refused to comply with the request of the House of Representatives for documents relating to the Jay Treaty of 1794 with England, before it would enact legislation to execute that treaty. He wrote: "As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty . . . it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request." See also Crandall, Treaties, Their Making and Enforcement (second ed.) p. 166; Moore, International Law Digest, Vol. V, p. 225.

[26] See supra note 24, United States v. Curtiss-Wright Corp.; Briehl v. Dulles, 248 F.2d 561, 574 (D.C. Cir. 1957).

security considerations,[27] it was held that a citizen's political beliefs and associations could not serve as a reason for withholding a passport which is tantamount to "exit control."[28] The withholding of the passport in the internal security cases had been affirmed in the Federal District Courts.[29] However, in the Court of Appeals there had been a divided court;[30] in which the ruling of the State Department was upheld. In the *Briehl* case in the Court of Appeals,[31] there were three separate dissenting opinions.[32] These dissenting opinions prevailed in the Supreme Court when the Secretary of State's internal security travel bans were struck down.[33] However, in the *Worthy* and *Frank* cases[34] there was a unanimous decision in the Court of Appeals affirming the power of the Secretary of State, on the basis of foreign policy considerations, to control travel to areas designated by the Secretary as "trouble spots."

The *internal security* cases involved a ban on all foreign travel[35] since even the conditional passport was withheld. The *foreign conduct* passport cases, however, involved only a limitation on foreign travel and not an outright prohibition. Applicants could still secure passports valid for travel to all the nations in the world except for areas noted on the passport with whom the United States has no diplomatic relations. In the *Worthy* case, however, there was an interesting variant. Since Worthy had previously violated the restrictions in his passport, assurance was sought from him that he would not again violate the restrictions if his passport was renewed.[36] Worthy refused to give such a promise to the Passport Bureau. Accordingly, no passport has been issued to Worthy. In effect, as in the punishment for civil contempt, Worthy, who is now "imprisoned" within the confines of North America, has the key to unlock his cell; a simple promise not to visit Communist China. Thus, the foreign conduct cases present only a limited abridgement of the freedom of foreign travel, whereas there was an absolute deprivation of the constitutionally guaranteed liberty to travel abroad[37] in the internal security cases.

The denial of passports in the internal security cases were on the basis of the individual merits of the applicant,[38] whereas in the foreign conduct cases, denials were not premised on any considerations of loyalty,[39] legality

[27] See supra note 17, 357 U.S. at pp. 129-130, 78 S.Ct. at pp. 1119-1120, 2 L.Ed. 2d at p. 1212.

[28] Ibid.

[29] Dayton v. Dulles, 146 F. Supp. 876 (D.C.C. 1956).

[30] Kent v. Dulles, 248 F.2d 600 (D.C. Cir. 1957).

[31] See supra note 26, Briehl v. Dulles.

[32] By Circuit Judges Washington and Bazelon, and Chief Judge Edgerton.

[33] See note 17, supra.

[34] See note 1, supra.

[35] See note 17, supra.

[36] See supra note 1, Worthy v. Herter at p. 2.

[37] See note 17, supra.

[38] Ibid.

[39] "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 32 Stat. 386, 22 U.S.C. § 212.

of conduct,[40] or citizenship.[41] To all intents and purposes both Worthy and Frank were loyal American citizens. Neither was intent on violating the law if the passport was issued them. Both specifically sought an unlimited passport, valid for travel to Communist China. Finally, both were qualified journalists.[42] No reasons have been advanced by the State Department as to why passports were denied appellants for travel to Communist China, whereas other journalists, not differing in their merits, were afforded the opportunity to visit Communist China. The resulting issue of discrimination was dealt with in Justice Burger's concurring opinion in the *Frank* case.[43] That opinion held that the Secretary of State was empowered to experiment with a "threshold" program of admitting a limited group of newsmen to Communist China if that would, in the Secretary's judgement based on foreign policy considerations, serve to lessen tensions between the two nations.[44] Nevertheless, it appears to be an open question, whether this type of discrimination violates the guarantees of the "due process" clause of the Fifth Amendment.

The internal security cases involved another aspect of due process. This arose from the nature of the evidence as to appellant's Communist membership and associations, which was derived from reports made by secret government agents, whose future usefulness would be prejudiced by being exposed to the glare of publicity.[45] The opportunity normally afforded in criminal cases for the accused to confront his accuser was lacking. In coming to their judgement, members of the Board of Passport Appeals and federal district court judges were supposed to have made due and necessary allowance for the absence of the opportunity by the appellant to controvert the government's evidence.[46] It has been held[47] that due process does not require judicial hearings; but merely procedure in which the elements of fair play are afforded. Those elements are ample notice and an opportunity to be heard before reaching of judgement; but the particular procedure to be adopted may vary as appropriate to the disposition of the issues. Ample notice is apparently afforded by the tentative, informal denial of a passport application providing a warning for the applicant to expect a contest as to his right to receive a passport from the Passport Bureau of the State Department. There is an opportunity to be heard without counsel in a hearing before the Passport Bureau; but with the benefit of counsel in a formal hearing before the Board of Passport Appeals in the event of an

[40] This involves a consideration as to whether an applicant was trying to escape provisions of the law by promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, Digest of International Law, § 512 (1906); 3 Hackworth, Digest of International Law, § 268 (1942).

[41] See note 39, supra.

[42] See note 1, supra.

[43] Id. Frank v. Herter.

[44] Ibid.

[45] Dayton v. Dulles, 357 U.S. 144, 148, 78 S.Ct. 1127, 2 L.Ed. 2d 1221 (1957).

[46] Id. at pp. 148-149; 22 C.F.R. § 51.170.

[47] Bauer v. Acheson, 106 F. Supp. 445, 451 (D.C.C. 1952).

adverse decision by the Passport Bureau. This aspect of due process was not raised in the foreign affairs cases.

What precedents can be found for the abridgement of a constitutionally guaranteed freedom arising out of the very delicate, plenary and exclusive power of the President [and the Secretary of State acting in the name of the President and pursuant to the terms of the authority delegated by the former] as the sole organ of the federal government in the field of international relations? Justice Prettyman's opinion in the *Worthy* case considered the authority afforded the Secretary of State by foreign affairs considerations in the imposition of travel controls as fairly well settled by legal precedents.[48] This is in marked contrast to Justice Brazelon's dissenting opinion in the *Briehl* case, which, after cataloguing other foreign affairs cases[49] which involved assertion of executive powers, nevertheless failed to find a single case where the executive action was directed at restraining the freedom of a particular individual. As a clear example of how the President's exercise of foreign policy may abridge the freedom of a citizen "outside areas of plainly harmful conduct . . . to shape his own life as he thinks best, do what he pleases, go where he pleases,"[50] Justice Prettyman cited the *Waterman*[51] case. This case held that there was a distinction between the judgements of an administrative agency[52] and the final decision of the President which was required to make the order modifying a license for overseas air transportation route effective. The President's decision was made without Congressional standards, as enacted in a statute, to guide him. The Supreme Court considered that the President's judgement in the *Waterman* case was based on foreign policy considerations and, hence, immune from judicial review.

Justice Prettyman reasoned that the exercise of travel controls by the State Department to "trouble spots" was a matter of foreign policy, requiring no statutory support,[53] but if such support be deemed necessary, that section 215 of the Immigration and Nationality Act of 1952[54] was sufficient.

[48] See supra note 1, Worthy v. Herter at p. 10.

[49] See supra note 26, Briehl v. Dulles, at pp. 589-595.

[50] Chafee, Three Human Rights in the Constitution of 1787 (1956), at p. 197; "Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."

[51] See supra note 24, Chicago & Southern Airlines v. Waterman Steamship Corp.

[52] Ibid.

[53] See supra note 1, Worthy v. Herter, at p. 12; "We think . . . that the President has ample power under the Constitution itself. His delegation to the Secretary is complete. Proc. No. 3004, 67 Stat. c.31 (1953); Exec. Order No. 7856, 3 Fed. Reg. 681 (1938)."

[54] 8 U.S.C. § 1185, 66 Stat. 190 (1952), "provides that, while a proclamation of national emergency is in force, 'it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, the United States unless he bears a valid passport.' The President delegated this authority to the Secretary by Proclamation No. 3004." See note 53, supra.

In the internal security cases, it was held that the preceding statute contemplated only two general criteria for passport denials; citizenship[55] or allegiance and illegal conduct.[56] Thus the denial of passport application on the grounds of Communist beliefs or associations were struck down by the Supreme Court of the United States as an exercise of a power by the Secretary of State which was not delegated to it by Congress.[57] The question of passport denials to "trouble spots" was not presented to the Court in the leading case of *Kent v. Dulles*.[58] It is problematic whether that Court would have construed the Immigration and Nationality Act of 1952[59] as a delegation by Congress to the Secretary of State of the power to deny passports based on foreign policy considerations.

The importance of the Secretary of State deriving his authority from a statute is that such powers, being delegated by Congress, and involving the abridgement of a guaranteed freedom, must pass scrutiny by the accepted tests.[60] Such a test is "grave, clear and present danger,"[61] which Justice Prettyman finds is present; "when a gunman points a loaded gun, one need not await the report of a shot to know that danger is clear and present. The contention that there is no grave danger involved in the wanderings of uninhibited American newsmen in China . . . today reflects an unawareness of realities."[62]

The last word has seemingly been spoken in regard to the internal security cases, unless Congress, in specific terms, delegates power to the Secretary of State to withhold passports from "security risks." The foreign conduct passport cases are yet to be tested in the Supreme Court of the United States. The Supreme Court's decisions in the internal security cases provide an inadequate basis for predicting the decisions of that Court in the foreign conduct cases. If certiorari is granted by the Supreme Court to Worthy and Frank, both of their cases should be joined, as was the case with Kent and Briehl, in view of the identity of the issues. It will then be a case of first impression for the Supreme Court.—M. M. P.

55 See note 39, supra.

56 See supra note 40, 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.

57 See note 17, supra.

58 Ibid.

59 See note 54, supra.

60 Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1934); cf. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1939); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1950).

61 See supra note 1, Worthy v. Herter, at p. 14.

62 Ibid.