

CHAPTER TWO

CONSTITUTIONAL LIMITATIONS

As outlined in the text, The United States is a constitutional democracy with limited powers. The authority of the state and federal governments to enact criminal statutes is limited by various constitutional provisions.

California has its own Constitution, which was established in 1849. Despite the contemporary furor over the debate of separation of church and state, the preamble of the California Constitution reads, “*We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.*”

CALIFORNIA CONSTITUTION - ARTICLE 3, STATE OF CALIFORNIA

Section 2. The boundaries of the State are those stated in the Constitution of 1849 as modified pursuant to statute. Sacramento is the capital of California.

THE RULE OF LEGALITY

The case of *Marbury vs. Madison* 5 U.S. 137(1803) established what is known as the “Supremacy Clause” of the U.S. Supreme Court. Although California and the other states all have their one Supreme Courts, it is the U.S. Supreme Court that they must defer to. This is because the power of the court was challenged in this historical case.

California’s Constitution clarifies this also in Article 3, State of California, Sections 1 and 2:

- *Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.*
- *Section. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.*

The U.S. Supreme court after *Marbury*, became the arbiter of the Constitution, the final authority on what the document meant. As such, the Supreme Court became in fact as well as in theory an equal partner in government, and it has played that role ever since. It is this “*Supremacy Clause*” that places the state courts in a subordinate role to the U.S. Supreme Court. Cases we use in criminal justice, such as *Miranda vs. Arizona*, 384 U.S. 436 (1966), *Terry vs. Ohio*, 392 U.S. 1 (1968), *Mapp vs. Ohio*, 367 U.S. 643 (1961), etc., are examples of this. *Miranda* is well known from countless TV shows and movies where the police read suspects’ their rights. *Terry* gave us the “*Stop and Frisk*” rule, and *Mapp* gave us the *Exclusionary Rule*. Because of the Supremacy Clause, the states had to abide by the decisions of the Supreme Court once they were decided by that court. This also serves to highlight the role of *Stare Decisis* or precedence, in legal cases.

The common law rule of legality provides that an individual only may be criminally punished for an act which was condemned in a statute at the time it was committed.

Constitutional Limitations

BILLS OF ATTAINDER AND EX POST FACTO LAWS

As Article 1, Sections 9 and 10 of the United States Constitution prohibit bills of attainder and ex post facto laws, California's Constitution does also. A bill of attainder is a legislative act that punishes an identifiable individual or group of individuals without the benefit of trial. In other words, the state cannot create a law and punish people without due process. Also, as mentioned in Chapter One, states cannot "change" law to "fit" something "after the fact," or ex post facto.

California does not recognize ex post facto laws either. These would be retroactive criminal statutes written after conduct has already occurred. This would make the conduct illegal, increase the punishment, or remove a defense. In a case where a little girl was murdered in a California casino, the suspect and his friend, who claimed to be just a bystander to the whole drama, fled after assaulting and killing the girl. The bystander left the immediate area just prior to the killing, and later left with his friend. There was a great hue and cry to charge the bystander with being an "accomplice," or at least an accessory, and many wanted to create a "good Samaritan" law, requiring someone to report a crime against a child, and punish them for failure to report it if they did not do so. The clamor to try this accomplice under that law is an example of how people tried to generate support for what was essentially an "ex post facto" law, and it did not succeed. The accomplice was never charged in the case, despite the public outcry.

In a recent California case, (*Stogner v. California*, 539 U.S. 607 (2003) mentioned in your text, the U.S. Supreme Court ruled that a California law authorizing the prosecution of allegations of child abuse that previously were barred by a three-year statute of limitations constituted a prohibited ex post facto law. This law was challenged by Marion Stogner who found himself indicted for child abuse after having lived the past nineteen years without fear of criminal prosecution for an act committed twenty-two years ago. The U.S. Supreme Court ruled that the California law acted in an "unfair" and "dishonest" fashion in subjecting Stogner to prosecution many years after the state had assured him that he would not stand trial. The counting of the time in relations to a statute of limitations is referred to as "tolling."

However, extending the tolling period or statute of limitations, is prohibited under California law:

- *PC§ 3. Not Retroactive. No part of it (Penal Code) is retroactive, unless expressly so declared.*
- *PC 803. Limitation Not Tolloed or Extended - Does Not Commence Until Discovery of Offense (a) Except as provided in this section, a limitation of time prescribed in this chapter is not tolloed or extended for any reason.*

The statute should probably not have been written, as it caused an embarrassing episode for California law.

Due Process

The 5th Amendment establishes the issue of Due Process. However, it was not applied to the States until the passage of the 14th Amendment. The California State Constitution, Section 7. (a) states, "A person may not be deprived of life, liberty, or property without **due process** of law or denied equal protection of the laws..."

STATUTORY CLARITY

The concept of "due process," can be traced at least back to the Magna Carta, (1215 A.D.) in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." The phrase "due process of law" first appeared in a statutory rendition of this chapter in 1354 A.D.

*"No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by **due process of law.**"*

Historically, the very premise of due process was largely the result of political struggles at the time, including the Divine Right of Kings, but has now become a cornerstone of American law. The critical issue is that one's liberty or property cannot be taken by the state (Government) without either an information bringing charges by a prosecutor or a presentment to a Grand Jury.

In California, PC 804 outlines just when prosecution for an offense is commenced and how. For the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs:

- An indictment or information is filed by a grand jury
- A complaint is filed charging a misdemeanor or infraction by the District Attorney or local prosecutor
- A case is certified to the superior court by a judge.
- An arrest warrant or bench warrant is issued, by a judge, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. (As spelled out by the 4th Amendment)

Due process then remains a form of checks and balances on the state, as it is a restraint on the legislative, executive and judicial powers of the government to arbitrarily arrest or seize them or their property. Interestingly, it applies to virtually "all" persons within the territory of the United States who are entitled to its protection. This has brought some recent heated debates about "non-combatants, and "illegal aliens," having certain rights even though they are not citizens or even in the country legally. The California Constitution also includes guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the law. (Article 1, Section 7)

Status as a crime?

In California law, the issue of *status* had to be clarified. Just because someone "is" something, in and of itself, does not necessarily mean they are engaged in criminal behavior. The early case of *Robinson v. California* (370 U.S. 660 (1962)) addressed the status of an "addict." The statute made it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction, the California courts construed the statute as making the "status" of a narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. As a result the court held that the statute did inflict a cruel and unusual punishment in violation of the 8th and 14th Amendments and the case was overturned.

Void for Vagueness

The Fifth and Fourteenth Amendments of the United States Constitution prohibit depriving individuals of "life, liberty or property without due process of law." Due process requires that criminal statutes should be drafted in a clear and understandable fashion. A statute that fails to meet this standard is unconstitutional on the grounds of *void-for vagueness*.

Your text cites that the due process clause of the United States Constitution requires that statutes clearly inform individuals of the acts that are prohibited and establish clear, definite and certain standards that limit the discretion of law enforcement officials. A statute that fails to provide sufficient clarity is considered to be "void-for-vagueness."

Constitutional Limitations

EQUAL PROTECTION

As stated, the 5th and 14th Amendments to the United States Constitution provide for the equal protection of the law:

5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRIVACY

Although the words, "right to privacy," are not specifically mentioned in the United States Constitution, it has been held that it does provide for a right to privacy that protects intimate personal activities from criminal punishment. State Constitutions also provide for this right, and some more specifically, such as California's Constitution.

California's Constitution

ARTICLE 1 DECLARATION OF RIGHTS SECTION 1. *All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.*

FREEDOM OF SPEECH

Since the 1st Amendment to the United States Constitution guarantees the right to freedom of expression, one would think that this would have been automatically adopted by the states, and not have to be asserted in state constitutions. However, it is included in the California Constitution as well.

California Constitution, Article 1, Declaration of Rights, Section 2. *(a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. Section (b) covers freedom of the press.*

Speech, however, may be limited on the grounds that it constitutes an incitement to riot, threat, fighting words or obscenity. In California law, there are also limitations on speech in certain circumstances. Here are some examples:

Threats

Can mere threats be a crime? What about just a verbal threat? After all, don't we have the protection of "freedom of speech" to say anything we want? While in most cases this is true, the law does offer some restrictions on the use of certain speech that is not protected by the 1st Amendment. The old adage that you can't yell "Fire!" in a crowded theater is an old one but still accurate. In addition, what other verbal language could be illegal or even considered a "threat?" What about making a phony bomb threat, or worse, a false report of threatening to unleash weapons of mass destruction! What about extortion, even robbery, where "speech" is used?

For example, you cannot make obscene phone calls nor can you threaten the President of the United States or certain officials. You cannot joke or make statements about terrorists or bombs while waiting in

the airport security areas. You also can't threaten to bomb someone or plant weapons of mass destruction (WMD's)!

PC 653m. Obscene or Threatening Telephone Calls

- (a) *Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family*
- (b) *Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with intent to annoy another person at his or her residence, is, whether or not conversation ensues from making the telephone call or electronic contact, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.*
- (c) *Every person who makes repeated telephone calls or makes repeated contact by means of an electronic communication device with the intent to annoy another person at his or her place of work ..*

PC 148.1. Falsely Reporting Planting of Bomb

Any person who reports... that a bomb or other explosive has been or will be placed or secreted in any public or private place, knowing that the report is false,...

PC 76. Threaten Life of Government Official

(a) Every person who knowingly and willingly threatens the life of, or threatens serious bodily harm to, any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, or the staff, immediate family, or immediate family of the staff of any elected public official, county public defender, county clerk, exempt appointee of the Governor, judge, or Deputy Commissioner of the Board of Prison Terms, with the specific intent that the statement is to be taken as a threat, and the apparent ability to carry out that threat by any means,...

11418.1. Give, Mail, Send False of Facsimile Weapon of Mass Destruction

Any person who gives, mails, sends, or causes to be sent any false or facsimile of a weapon of mass destruction to another person, or places, causes to be placed, or possesses any false or facsimile of a weapon of mass destruction, with the intent to cause another person to fear for his or her own safety, or for the personal safety of others,...

Can Wearing Offensive Words on a Jacket be illegal?

Cohen v. California , 403 U.S. 15 (1971). In this case, set during the tumultuous Vietnam war era, Paul Cohen, while protesting the war and the draft, he was wearing a jacket that read, "Fuck the Draft." Appellant was convicted of violating that part of Cal. Penal Code 415 which prohibits "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct," for wearing the jacket in a corridor of the Los Angeles Courthouse. Cohen testified that he wore the jacket knowing that the words on the jacket were a means of informing the public of the depth of his feelings against the Vietnam War and the draft. The Court of Appeal held that "offensive conduct" means "**behavior** which has a tendency to provoke others to acts of violence or to in turn disturb the peace," and affirmed the conviction. The court held that absent a more particularized and compelling reason for its actions, the State **may not, consistently with the 1st and 14th Amendments, make the simple public display of this single four-letter expletive a criminal offense.** Conversely, if he had been yelling the comment, instead of wearing the jacket, it may have turned out differently. Freedom of expression

Constitutional Limitations

includes wearing what to some, may be offensive or even obscene words or graphics, but this is not prohibited under the 1st Amendment.

Hate Crimes

Could one's speech alone, be considered a "hate crime?" Much depends on the circumstances, including the "intent" of the person, and the perception of the receiver of such a message. Hate crimes are very often associated with "free speech" issues, as the use of specific language, songs, stories, posters, clothing, etc., can all have a "hateful" message. But this does not mean they would all be prohibited nor would they all be acceptable. And certain "hate crime" statutes prohibit specific language that is derogatory to certain protected classes. You cannot say certain words to people that are sure to provoke an immediate and probably violent response! (PC 415)

"Hate crimes" mean an act or attempted act against the person or property of another individual or institution which in any way manifest evidence of hostility toward the victim because of his or her actual or perceived race, religion, disability, gender, nationality, or sexual orientation. This includes, but is not limited to, threatening telephone calls, hate mail, physical assault, vandalism, cross burning, destruction of religious symbols, or fire bombings. (PC 628.1)

A "hate motivated incident" means an act or attempted act which constitutes an expression of hostility against a person or property or institution because of the victim's real or perceived race, religion, disability, gender, nationality, or sexual orientation. This may include using bigoted insults, taunts, or slurs, distributing or posting hate group literature or posters, defacing, removing, or destroying posted materials or announcements, posting or circulating demeaning jokes or leaflets.

PC 422.6. Civil Rights; Interfere With, Property Damage or Speech

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.

(Note this language) However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

This is a cautionary admonishment and clarifies that mere speech alone, (i.e., calling someone a hateful name, would in and of itself, NOT be considered a violation of the 1st Amendment nor a hate crime.)

PC 11411. Terrorizing

(a) Any person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property...

(d) ...As used in this section, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety.

PC 11412. Religious Terrorism

Any person who, with intent to cause, attempts to cause or causes another to refrain from exercising his or her religion or from engaging in a religious service by means of a threat, directly communicated to such person, to inflict an unlawful injury upon any person or property, and it reasonably appears to the recipient of the threat that such threat could be carried out is guilty of a felony.

Here are some examples where mere language alone is illegal. They may start out as threats, assaults, and ultimately lead to some form of battery:

PC 415. Fighting, Causing Loud Noise, or Using Offensive Words in Public Place

Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars (\$400), or both such imprisonment and fine:

- 1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.*
- 2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.*
- 3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.*

Note that this definition is highly subjective and can range from a wide variety of interpretations of the "unreasonableness" of the noise. In effect, the level and unreasonableness standard really has to do with whom it is who is complaining! What may be a "trigger" word to one person may not faze another person. In this case, it is who the word was directed at and what their reaction is, not yours! Those words that are "inherently likely to provoke an immediate violent reaction," usually do!

PC 422. Threats to Commit Crime Resulting in Death or Great Bodily Injury

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, ...

Constitutional Limitations

Review Questions

1. Compare and contrast the rights outlined by the U.S. Constitution and the California Constitution with regards to due process.
2. Does California allow ex post facto laws? Why or why not?
3. Explain how language alone can be illegal in certain circumstances.
4. Would you be prohibited from wearing racist, obscene or hateful clothing, such as a “T” shirt or jacket? Why or why not?
5. Which of the following would be illegal based on your status? A member of the KKK, a drug addict, alcoholic, prostitute or gang member?

Web Resources

California Constitution

<http://www.leginfo.ca.gov/const.html>

National Park Service- History of Japanese Internets

http://www.cr.nps.gov/history/online_books/anthropology74/ce8.htm

Street Gangs - Gang Injunctions <http://www.streetgangs.com/topics/1999/061199ganginjl.html>

San Diego District Attorney’s Website – Englebrecht Case

<http://www.sdcdca.org/protecting/englebrecht.php>

My Hero Website – story of Fred Korematsu <http://myhero.com/myhero/hero.asp?hero=Korematsu>

Case Law:

Cohen v. California, 403 U.S. 15 (1971)

<http://laws.findlaw.com/us/403/15.html>

Miranda v. Arizona, 384 U.S. 436 (1966)

<http://laws.findlaw.com/us/384/436.html>

Korematsu v. U.S. 323 U.S. 214 (1944)

<http://laws.findlaw.com/us/323/214.html>

Stogner v. California, 539 U.S. 607 (2003)

<http://laws.findlaw.com/us/000/01-1757.html>

Mapp v. Ohio, 367 U.S. 643 (1961)

<http://laws.findlaw.com/us/367/643.html>

Robinson v. California 370 U.S. 660 (1962)

<http://laws.findlaw.com/us/370/660.html>

Marbury v. Madison 5 U.S. 137 (1803)

<http://laws.findlaw.com/us/5/137.html>

Terry v. Ohio, 392 U.S. 1 (1968)

<http://laws.findlaw.com/us/392/1.html>

Case Study #1 Robinson v. California. 370 U.S. 660 (1962)

Discussion Question: Should someone be liable for arrest for being an alcoholic, addict, or even a prostitute?

Facts

In this case, Robinson was charged with merely being an “Addict,” under the law at the time. The evidence against him was given by two Los Angeles police officers. One officer testified that he had occasion to examine the appellant’s arms one evening on a street in Los Angeles some four months before the trial. The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Another officer testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

Issue

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

After the trial, the court said that, “It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eight and Fourteenth Amendments.

Decision

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.” Therefore, punishing one for merely being an “addict” was overturned.

Constitutional Limitations

Case Study #2 *Stogner v. California* 539 U.S. 607 (2003)

Discussion Question: Do you think the State of California was correct in trying to combat sex offenders by creating a new statute of limitations for such offenders. Why was the case not upheld?

Facts

In 1993, California enacted a new criminal statute of limitations permitting prosecution for sex-related child abuse where the prior limitations period has expired if the prosecution is begun within one year of a victim's report to police. In 1998, Marion Stogner was indicted for sex-related child abuse committed between 1955 and 1973. Without the new statute allowing revival of the State's cause of action, California could not have prosecuted Stogner. Stogner moved to dismiss the complaint on the ground that the Ex Post Facto Clause forbids revival of a previously time-barred prosecution. The trial court agreed, but the California Court of Appeal reversed. The trial court denied Stogner's subsequent dismissal motion, in which he argued that his prosecution violated the Ex Post Facto and Due Process Clauses. The Court of Appeal affirmed.

Issue

Does the Ex Post Facto Clause bar the application of California's retroactive extension of the statutes of limitations for sexual offenses committed against minors?

Decision

Yes. In a 5-4 opinion delivered by Justice Stephen G. Breyer, the Court held that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. The Court reasoned that the features of the law produce the kind of retroactivity that the Constitution forbids by inflicting punishment where the party was not, by law, liable to any punishment. "After...the original statute of limitations had expired,...Stogner was not 'liable to any punishment,'" wrote Justice Breyer. "California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that...it 'inflicted punishment' for past criminal conduct that...did not trigger any such liability." In his dissent, Justice Anthony M. Kennedy argued, "A law which does not alter the definition of the crime but only revives prosecution does not make the crime 'greater than it was, when committed.'"

Case Study #3: Korematsu v. U.S. 323 U.S. 214 (1944)

Discussion Question: Given the circumstances of the fear of sabotage and espionage in WWII, do think this is a case that could be a problem in the future with the specter of terrorism creating fear and mistrust?

Facts

During World War II, Presidential Executive Order 9066 and congressional statutes gave the military authority to exclude citizens of Japanese ancestry from areas deemed critical to national defense and potentially vulnerable to espionage. Korematsu remained in San Leandro, California and violated Civilian Exclusion Order No. 34 of the U.S. Army

Issue

Did the President and Congress go beyond their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent?

Decision

The Court sided with the government and held that the need to protect against espionage outweighed Korematsu's rights. Justice Black argued that compulsory exclusion, though constitutionally suspect, is justified during circumstances of "emergency and peril."

The rest of the story:

Your book refers to the Korematsu v. United States case, in which the United States Supreme Court upheld the conviction of Toyosaburo (Fred) Korematsu, an American citizen of Japanese descent, for remaining in San Leandro in defiance of the Civilian Exclusion Order. President Roosevelt signed Executive Order 9066 on February 19, 1942, which resulted in the forcible internment of people of Japanese ancestry. As a result, about 120,000 Japanese Americans were forced from their homes in California, western Oregon, Washington, and southern Arizona in the single largest forced relocation in U.S. history.

The Korematsu case serves to remind us that despite national concerns about wartime threats, individuals' rights are still respected. Exclusion Order No. 34, which Korematsu knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that 'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.

The curfew subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. In a related case, *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S. Ct. 1375, the court earlier had sustained a conviction obtained for violation of the curfew order.

Although Korematsu lost the case, in 1988, almost half a century after the orders were issued, justice prevailed. Government officials had claimed that the internment was due to "military necessity," but later evidence revealed that the order was largely based on racial prejudice. The U.S. government finally admitted that the Japanese-Americans had posed no danger of spying or risk to security.

In 1998, President Clinton honored Fred Korematsu with the Presidential Medal of Freedom, the highest civilian honor any American can ever hope to receive. After serving his family, his church, many civic organizations and his community, Fred was finally rewarded for his courage and perseverance. President Clinton said Fred was a man of quiet bravery who wanted only to be treated like every other American.

Constitutional Limitations

Answers to Review Questions

Chapter 2

1. Compare and contrast the rights outlined by the U.S. Constitution and the California Constitution with regards to due process.

A. While essentially a subjective answer, the student should be able to recognize that there are no significant differences between the two Constitutions. . The California Constitution guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the law. (Article 1, Section 7)

2. Does California allow ex post facto laws? Why or why not?

A. No, they do not. This is specifically prohibited in California law, which does not recognize ex post facto laws. These would be retroactive criminal statutes written after conduct has already occurred.

3. Explain how language alone can be illegal in certain circumstances.

A. In most cases, no. However, much depends on the circumstances, including the “intent” of the person, and the perception of the receiver of such a message. Threats are generally prohibited, and you cannot say certain words to people that are sure to provoke an immediate and probably violent response! (PC 415)

4. Would you be prohibited from wearing racist, obscene or hateful clothing, such as a “T” shirt or jacket? Why or why not?

A. No, because of Cohen v. California , 403 U.S. 15 (1971). The court held that absent a more particularized and compelling reason for its actions, the State may not, consistently with the 1st and 14th Amendments, make the simple public display of this single four-letter expletive a criminal offense.

5. Which of the following would be illegal based on your status? A member of the KKK, a drug addict, alcoholic, prostitute or gang member?

A. None of them would be. Status alone cannot be “illegal.” Once must have committed some criminal act first. The fact they are addicts or gang members, may be a case for penalty enhancements, but of itself, “status,” is not a crime.