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Comments

LIMITING CONGRESSIONAL DENATIONALIZATION AFTER *AFROYIM*

This Comment discusses the constitutional aspects of loss of United States citizenship. It contrasts expatriation with procedures developed by the state in treaty and statute for involuntary deprivation of citizenship. It distinguishes early judicial and legislative debate over the existence of a citizen's constitutionally guaranteed right to forfeit his citizenship with the twentieth-century controversy surrounding unilateral government action to denationalize. Examining existing statutes in light of recent Supreme Court decisions limiting congressional authority in this area, it suggests an analysis of contemporary statutory presumptions based upon the relationship of proscribed activity and allegiance.

INTRODUCTION

"Damn the United States! I wish I may never hear of the United States again!"¹

His wish was promptly granted by the military court which committed young Phillip Nolan into seagoing exile as the man without a country. Although a work of fiction, Edward Everett Hale's story of an early expatriate illustrates a recurring issue in the American law of citizenship.² By its order, was the court

1. E. HALE, *THE MAN WITHOUT A COUNTRY* 8 (1960).

2. Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of society. *Luria v. United States*, 231 U.S. 9, 22 (1913). See text accompanying note 151 *supra*. Insofar as the relationship exists between an individual and a particular nation-state, citizenship and nationality are largely synonymous, and the two terms will be used interchangeably throughout this Comment. "The term 'national' means a

granting Nolan's request or passing his sentence?³ Was the state merely fulfilling the wish of an individual who desired to sever his relationship with his native land, or was it by fiat confiscating Nolan's birthright of citizenship? Fashioned in more general terms, to what extent may the national government relieve a citizen of his nationality without his consent?⁴

This Comment will address that issue, focusing on the power of Congress to legislate loss of citizenship as a consequence of specific acts performed by individual citizens. Because the concurrence of the individual has become a key factor in modern denationalization debate,⁵ the issue of how that concurrence may be expressed has also become significant. In *Afroyim v. Rusk*,⁶ the United State Supreme Court concluded that unilateral deprivation of citizenship by the government is beyond the constitutional limits of congressional power.⁷ The Court, however, has left undefined the scope of the authority of the Legislature to interpret an individual's action as signifying an intent to abjure allegiance. It remains an open question what action by the individual, short of an express expatriating declaration, is sufficient to support the inference by Congress that he desires to sever his tie with the state. Congress has by statute attached such inference to a variety of specific acts.⁸ The performance of any one of these acts, by an individual otherwise silent on the

person owing permanent allegiance to the state. The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." Immigration and Nationality Act of 1940, § 101(a)(21), (22), 8 U.S.C. § 1101(a)(21), (22) (1976). "Nationality" in its broadest consideration means membership in a certain nation which is held together by definite common ethnical, physical, educational, religious, or racial ties or characteristics. See E. SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 6 (1934). See also *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

3. Admittedly, it is the title of Hale's work and not the order of the military court that he created therein that suggests that Nolan suffered loss of citizenship and creates the memorable symbol of a stateless person. Denationalization as a punishment was found unconstitutional in *Trop v. Dulles*, 356 U.S. 86 (1957). See text accompanying notes 97-101 *infra*.

4. Denationalization is a process by which citizenship is lost. When citizenship is voluntarily surrendered, it is expatriation. Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L. J. 315, 316 (1965). "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Perkins v. Elg*, 307 U.S. 325, 334 (1939). Both denationalization and its subset expatriation should be distinguished from denaturalization, "the action by the sovereign to nullify *in fact* a purported status of citizenship which has never existed *in law*." Roche, *Statutory Denaturalization: 1906-1951*, 13 U. PITT L. REV. 276, 279 (1952). See *Luria v. United States*, 231 U.S. 9, 23-24 (1913). See also J. CABLE, *DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP* 85 (1967).

5. See text accompanying notes 51-125 *infra*.

6. 387 U.S. 253 (1966).

7. See text accompanying notes 106-08 *infra*.

8. See text accompanying notes 130-35 *infra*.

subject of his allegiance,⁹ is sufficient to trigger loss of citizenship by expatriation. When Congress attaches such significance to an act that does not create for the actor an alternate foreign allegiance, this author submits, the legislature exceeds its constitutional authority.

The contemporary question of under what circumstances a government can denationalize its citizens can be distinguished from the issues that generated much of the early debate in all three branches of government. For over a hundred years, the key question with respect to loss of citizenship was whether the individual, not the state, had the power to sever the bond of allegiance that tied him to the nation of his birth.¹⁰ Governmental authority to terminate an individual's citizenship was only tangentially involved. In this century, however, the spotlight has shifted from expatriation to denationalization.¹¹ The development of the law pertaining to loss of citizenship is relevant, nevertheless, for what it reveals of the significance of voluntary denationalization as an individual right and the parallel development of involuntary denationalization as a legislative alternative.

LOSS OF CITIZENSHIP PRIOR TO THE CIVIL WAR: COMMON LAW AND STATES' RIGHTS COMPLICATIONS

The question of whether a citizen could sever his allegiance to the state first became a source of controversy in the United States when the Revolutionary War stimulated American thought on matters of national allegiance.¹² The right of expatriation had not

9. "[Allegiance] is the obligation of fidelity and obedience to the government in consideration for the protection that government gives." *United States v. Kuhn*, 49 F. Supp. 407, 414 (S.D.N.Y. 1943), *rev'd on other grounds*, 144 F.2d 576 (2d Cir. 1944). Blackstone defined allegiance as the obligation of a subject to be faithful to his kind and to defend him against all his enemies. 1 W. BLACKSTONE, COMMENTARIES *366. "Allegiance and protection are . . . reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 166 (1874).

10. See text accompanying notes 12-56 *infra*.

11. The distinction is not always honored in the statutes in question. Congress persists in legislating loss of citizenship under the heading of expatriation when it would more appropriately be considered denationalization. See text accompanying notes 51-60, 129-33 *infra*.

12. Allegiance became an issue only somewhat belatedly. At first, popular unrest in the colonies was perceived in terms of resistance to the English Parliament but not to the sovereign to whose person allegiance was owed throughout the empire. This view eventually gave way to one involving severance of allegiance as revolutionary rhetoric took hold and the schism assumed more profound dimen-

been recognized by the common law.¹³ Allegiance, like the natural law from which it was derived, was considered immutable and perpetual.¹⁴ The American Declaration of Independence,¹⁵ however, established that the colonies no longer embraced the notion of perpetual allegiance to the sovereign. What was not clear from the language of the document was by whom the termination could be effected.¹⁶ Allegiance could be severed, but it remained an open question whether such power belonged to the individual or the state.¹⁷

sions. I. TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907*, at 11 n.1 (1942).

13. Although it is not certain whether English law recognized the right of the individual to sever his allegiance to the state prior to 1608, see I. TSIANG, *supra* note 12, at 11 n.1, the decision in Calvin's Case, 77 Eng. Rep. 377 (K.B. 1608), settled the question for the next two and a half centuries. The issue involved in *Calvin's Case* was whether one born in Scotland during the reign of James I was an alien, unable to hold English land. Blackstone wrote:

[I]t is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straight and difficulties, of owing service to two masters; and it is unreasonable that by such voluntary act of his own, he should be able at pleasure to unloose those bonds by which he is connected to his natural prince.

1 W. BLACKSTONE, *COMMENTARIES* *369. See *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 159 (1830) (Story, J., concurring). Such is no longer the law in England and Wales. See note 46 *supra*.

14. Calvin's Case, 77 Eng. Rep. 377 (K.B. 1608); Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 209 (1974).

15. Declaration of Independence of July 4, 1776.

16. *Id.*

17. The seemingly obvious theoretical answer foundered on its practical consequences for a revolutionary government. If expatriation were recognized, it would be difficult to justify sanctions imposed on Loyalists for their individual choices to adhere to crown allegiance. This was the argument later raised by Alexander Hamilton who believed expatriation to be a principle contrary to law and subversive of government. F. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 3-6 (1906); Kettner, note 14 *supra*; Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 30 AM. J. INT'L L. 647 (1936).

If, on the other hand, the rationale was adopted that the Declaration of Independence evidenced the action of colonial governments, not individuals, see *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99 (1830), then treason indictments still awaited those colonists who had engaged in revolutionary activity prior to official action by their legislatures, should those individuals again come under British control. See Kettner, *supra* note 14, at 238-41.

The practical problems were solved by the two nations by stipulation in Jay's Treaty of 1794, wherein an individual right of election of allegiance was recognized by both sides without reaching the theoretical question of expatriation. Jay's Treaty, Nov. 19, 1794, U.S.-Great Britain, 8 Stat. 116, T.S. No. 105; *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 247 (1830). The extraordinary circumstances of the revolution

In the years between the Revolutionary War and the Civil War, the question of whether this country would recognize a personal right to terminate allegiance evolved into separate issues distinguishable by their context. One involved the application of the expatriation principle to an immigrant seeking United States support in his or her attempt to avoid the civil obligations of a prior national allegiance. The other involved would-be American expatriates seeking to avoid the demands of their previous allegiance to the United States.¹⁸ Rarely were both issues considered in the same context, and contradictory signals emanated from the three branches of the national government.

Congress considered expatriation on numerous occasions,¹⁹ particularly in the course of legislating naturalization. Attempts to make national law, however, were unsuccessful.²⁰ The failure of Congress to supply a statutory answer can be attributed not only to congressional disagreement on the basic issue of an individual right to terminate allegiance, but also to the deep division within the Legislature concerning the political issue of states' rights.²¹ With the exception of the constitutional mandate to Congress to establish a system of naturalization, citizenship had been generally regarded as an area primarily within the purview of the states.²² A national statute governing loss of citizenship

made necessary a one-time personal choice of allegiance exercised within a reasonable period of time and binding once made. Kettner, *supra* note 14, at 225.

18. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 315 (1915); Gordon, *supra* note 4, at 317-22; Roche, *The Expatriation Cases: "Breathes There the Man with Soul So Dead . . .?"*, 1963 SUP. CT. REV. 325, 327-29.

19. The issue first came up during debate of the Naturalization Act of 1795, ch. 20, 1 Stat. 414, when an amendment was proposed which would have placed national restrictions on regaining citizenship by one who had expatriated himself. After some debate, it was withdrawn. 2 ANNALS OF CONG. 1005 (1795). In 1797, a bill was briefly considered which would have regarded as expatriated a citizen who entered the service of any foreign prince of state. 7 ANNALS OF CONG. 349 (1797). In 1808, a bill was offered providing that all citizens would be considered such only while they actually resided in the country and that any citizen who expatriated himself would be deemed an alien. 18 ANNALS OF CONG. 1841 (1808). The manner in which American citizens might expatriate themselves was addressed in a bill tabled in 1814. 5 T. BENTON, *ABRIDGEMENT OF THE DEBATES OF CONGRESS, 1789-1856*, at 160-62 (1857-61). Finally, a bill in 1817 defined expatriation in terms of a declaration made to a federal court followed by emigration. 31 ANNALS OF CONG. 1035 (1817).

20. 31 ANNALS OF CONG. 1030-1105 (1817).

21. See the partisan historical reviews presented by each side of a split Supreme Court in *Afroyim v. Rusk*, 387 U.S. 253 (1966) (Black, J., majority opinion, 257-61) (Harlan, J., dissenting, 271-80).

22. F. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED*

was, therefore, in the eyes of many, yet another challenge to states' rights.²³

Absent statutory endorsement of a personal right to sever allegiance, it is not surprising that the Executive equivocated in its support of the principle of expatriation in the international forum.²⁴ The diplomatic protection of naturalized Americans abroad often ceased when they visited the nation from which they had emigrated.²⁵ Preoccupied with its duty of protecting Americans overseas, the Executive narrowed its focus on expatriation to its exercise by a new citizen seeking freedom from an old allegiance.²⁶ By contrast, the Supreme Court was presented with the issue of whether an American could abjure his American citizenship.²⁷ Although it sometimes displayed a predilection for the

STATES 134-66 (1906); Morrow, *The Early American Attitude Toward the Doctrine of Expatriation*, 30 AM. J. INT'L L. 647 (1936).

23. 31 ANNALS OF CONG. 1030, 1039 (speech by Rep. Robertson of Louisiana), 1046 (speech by Rep. Pindall of Virginia), 1058 (speech by Rep. McLane of Delaware) (1817); see Roche, *The Expatriation Cases: "Breathes There the Man with Soul So Dead . . . ?"*, 1963 SUP. CT. REV. 325, 329.

24. CITIZENSHIP OF THE UNITED STATES, EXPATRIATION AND PROTECTION ABROAD, H. R. DOC. NO. 326, 59th Cong., 2d Sess. 7-10 (1907) [hereinafter cited as CITIZENSHIP]; E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 356 (1915); I. TSIANG, *supra* note 12, at 71-82.

25. Henry Wheaton, Minister of Prussia, wrote to a Prussian-born naturalized American: "Having returned to the country of your birth, your native domicile and national character revert (so long as you remain in the Prussian dominions), and you are bound in all respect to obey the laws exactly as if you had never emigrated." *Quoted in* CITIZENSHIP, *supra* note 24, at 10.

At the other end of the spectrum, Secretary of State Cass wrote to one of Wheaton's successors:

The moment a foreigner becomes naturalized, his allegiance to his native country is severed forever. He experiences a new political birth. A broad and impassable line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character than if he had been born in the United States. Should he return to his native country, he returns as a citizen, and in no other character.

Letter from Cass to Wright (July 8, 1859) in 52 State Papers 1331, *quoted in* I. TSIANG, *supra* note 12, at 81. See, e.g., the opinion of Attorney General Black in 1859 concerning one Christian Ernst:

The natural right of every free person, who owes no debts and is not guilty of any crime, to leave the country of his birth in good faith and for an honest purpose, the privilege of throwing off his natural allegiance and substituting another allegiance in its place—the general right, in one word, or expatriation, is incontestable.

9 OP. ATT'Y GEN. 357-58 (1859).

26. Secretary of State Marshall wrote to the U.S. Envoy to London in 1800:

With the naturalization of foreigners no other nation can interfere further than the rights of the other are affected . . . consequently those persons who, according to our laws, are citizens, must be so considered by Britain, and by every other power not having a conflicting claim to the person.

Quoted in CITIZENSHIP, *supra* note 24, at 7.

27. In the first case involving expatriation to reach the Supreme Court, each member involved in the decision wrote a separate opinion (Justice Wilson took no

common law principle of perpetual allegiance,²⁸ the Court repeatedly sidestepped the issue.²⁹

The inability of the national government to come to grips with the two-edged issue of expatriation passed with the Civil War and the emergence of the immigrant as a political force at the polls.³⁰ Congress legislated in the last days of the war on the question of American expatriation.³¹ Soon afterward, both Congress and the state department recognized expatriation as the personal right of immigrants entering the United States.³²

EARLY EXPATRIATION STATUTES AND TREATIES

The first statute governing denationalization was passed by Congress on March 3, 1865,³³ and provided that Union deserters and draft evaders "shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens"³⁴ Shortly thereafter, Congress

part in the case). Justice Patterson addressed the question most forthrightly but concluded that expatriation could not occur as a result of an act of illegality. *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 152 (1795). Chief Justice Rutledge and Justice Cushing agreed that the issue of expatriation need not be reached. *Id.* at 168-69. Justice Iredell, who was uncertain whether the issue need be addressed, nevertheless opined that expatriation was subject to congressional regulation. *Id.* at 162-63.

28. *See, e.g.*, *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 159 (1830) (Story, J., concurring); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830).

29. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804); *M'Ilvaine v. Coxe's Lessee*, 8 U.S. (4 Cranch) 209, 212 (1808); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 346 (1822); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246-47 (1830).

A district court suffered from no such reticence in 1818. District Judge Van Ness stated:

In this country expatriation is conceived to be a fundamental right. As far as the principles maintained, and the practice adopted by the government of the United States is evidence of its existence it is fully recognized. It is constantly exercised, and has never in any way been restrained. The general evidence of expatriation is actual emigration, with other concurrent acts showing a determination and intention to transfer his allegiance.

Juando v. Taylor, 13 F. Cas. 1179, 1181 (S.D.N.Y. 1818) (No. 7,558) (frequently cited as *Stoughton v. Taylor*, 2 Paine 652).

30. *Gordon*, *supra* note 4, at 322.

31. *See* notes 33-34 and accompanying text *infra*.

32. *See* notes 35-41 and accompanying text *infra*.

33. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487, 490-91. Its most recent embodiment, at 8 U.S.C. § 1481(a)(8) (1976), was repealed by Act of Oct. 10, 1978, Pub. L. No. 95-432, 92 Stat. 1046, following the adverse ruling of the Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Court relates the history of the statute beginning at 170).

34. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487, 490-91. Although the language of the statute reads "rights of citizenship" and a distinction elsewhere generally

passed the Expatriation Act of 1868³⁵ which recognized "the right of expatriation as a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness."³⁶ The Act declared that executive pronouncements which impaired expatriation were inconsistent with the fundamental principles of the American government³⁷ and guaranteed to naturalized citizens the same diplomatic protection as was afforded the native-born.³⁸

The Act of 1868 was a guarantee made by Congress to naturalized American citizens.³⁹ The United States government would intercede on behalf of a naturalized American who, during a visit to his homeland, was called upon to perform duties arising from his previous allegiance.⁴⁰ In that sense, the legislation provided direction for the Executive, particularly the Department of State. The diplomatic protection of Americans abroad would no longer

exists between loss of citizenship and loss of civil rights, Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949), the courts have treated the statute as affecting loss of citizenship itself. *Severance v. Healey*, 50 N.H. 448, 451 (1870); *Gotcheus v. Matheson*, 58 Barb. 152, 154 (N.Y. 1870); *Huber v. Reily*, 53 Pa. 112, 114 (1866). See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Afroyim v. Rusk*, 387 U.S. 253, 281 (1967) (Harlan J., dissenting).

35. Ch. 249, 15 Stat. 223 (1868), *superseded by* the Expatriation Act of 1907, ch. 2534, 34 Stat. 1228, *superseded by* the Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1168. Section 401 was reenacted as § 349 of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 267 (codified at 8 U.S.C. § 1481 (1976)), *as amended by* the Expatriation Act of 1954, ch. 1256, 68 Stat. 1146; Act of Sept. 26, 1961, Pub. L. No. 87-301, § 17, 75 Stat. 650, 656; the National Emergencies Act of 1976, Pub. L. No. 94-412, 90 Stat. 1258; Act of Oct. 10, 1976, Pub. L. No. 95-432, 92 Stat. 1046.

36. Expatriation Act of 1868, ch. 249, 15 Stat. 223.

37. *Id.* § 1, at 224.

38. *Id.* § 2, at 224. Some doubts enshadow the significance of this legislation as a statutory embodiment of an American's right to expatriation. Its language, *see id.* § 3, at 224, and history clearly demonstrate that the primary purpose of the Act was to assert a national position with respect to American protection of naturalized citizens abroad. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 315 (1915); I. TSIANG, *supra* note 12, at 85-86; Gordon, *supra* note 4, at 323. Commentators differ on its impact with respect to the American citizen wishing to loose the bonds of United States allegiance. See generally Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312 (1931); Hurst, *Can Congress Take Away Citizenship?*, 29 ROCKY MOUNTAIN L. REV. 62, 65 (1956). Roche looks at the title, "Act concerning the Rights of American Citizens in Foreign States," and the placement of the expatriation endorsement in the preamble and concludes that the Act of 1868 was "merely another affirmation of the rights of foreign nationals to expatriate, *i.e.*, to become naturalized American citizens. . . ." Roche, *The Expatriation Cases: "Breathes There the Man with Soul So Dead . . .?"*, 1963 SUP. CT. REV. 325, 330. See also *Afroyim v. Rusk*, 387 U.S. 253, 264-66 (1966).

39. See, *e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 831 (1868) (comments by Rep. Banks of Mass.); *id.* at 4207 (comments by Sen. Conness of Calif.); *id.* at 4446 (speech by Sen. Howard of Mich.). See also *Comitis v. Parkerson*, 56 F. 556, 559 (C.C.E.D. La. 1893).

40. CONG. GLOBE, 40th Cong., 2d Sess. 831 (1868) (exchange between Rep. Chandler of N.Y. and Rep. Banks of Mass.).

be suspended when they returned to their native land.⁴¹ The reciprocal thesis that the United States government must accede in the decision to terminate allegiance made by one of its own citizens was not as clearly established⁴² beyond the narrow confines of treaty provisions to that effect.⁴³

Even before Congress passed the Act of 1868, the Executive had demonstrated a new postwar assertiveness in the international arena regarding expatriation. In a treaty with the Prussian government of Bismarck, each nation recognized as an act of expatriation the naturalization of a former citizen by the other country.⁴⁴ A number of agreements containing similar provisions governing expatriation were soon concluded with other nations,⁴⁵ including

41. See note 25 *supra*.

42. That the proposition with respect to expatriation by America's own citizens was not self-evident to the judiciary is clear from the division among the lower federal courts. Compare *In re Look Tin Sing*, 21 F. 905, 908 (C.C.D. Cal. 1884), *Charles Green's Son v. Salas*, 31 F. 106 (C.C.S.D. Ga. 1887), and *Jennes v. Landes*, 84 F. 73, 74-75 (C.C.D. Wash. 1897), with *Comitis v. Parkerson*, 56 F. 556, 558-59 (C.C.E.D. La. 1893). The Supreme Court said in the most passing of dicta in *Elk v. Wilkins* that the Act of 1868 "affirms the right of every man to expatriate himself." 112 U.S. 94, 107 (1884).

It was the opinion of Attorney General Williams in 1873 that "[t]he affirmation by Congress [in the Expatriation Act of 1868], that the right of expatriation is a neutral and inherent right of all people includes citizens of the United States as well as others, and the Executive should give to it that comprehensive effect." 14 OP. ATT'Y GEN. 296 (1873). See also *State v. Adams*, 45 Iowa 99, 100-01 (1876).

43. See notes 44-46 and accompanying text *infra*.

44. "Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such." Reciprocally: "Citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such." Naturalization Treaty, Feb. 22, 1868, United States-North German Union, 15 Stat. 615, T.S. No. 261, quoted in C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 71 (1971). See also CITIZENSHIP, *supra* note 24, at 12; E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 315 (1915); I. TSIANG, *supra* note 12, at 88-90.

45. Naturalization Convention, July 20, 1872, United States-Denmark, 17 Stat. 941, T.S. No. 69; Naturalization Treaty, May 6, 1872, United States-Ecuador, 18 Stat. 197, T.S. No. 78; Naturalization Convention, Sept. 20, 1870, United States-Austria-Hungary, 17 Stat. 833, T.S. No. 12; Naturalization Treaty, May 26, 1869, United States-Sweden-Norway, 17 Stat. 809, T.S. No. 350; Naturalization Treaty, Nov. 16, 1868, United States-Belgium, 16 Stat. 747, T.S. No. 24; Treaty of Peace, Amity, and Commerce, July 28, 1868, United States-China, 16 Stat. 739, T.S. No. 48; Naturalization Treaty, July 19, 1868, United States-Baden, 16 Stat. 731, T.S. No. 15; Naturalization Treaty, July 10, 1868, United States-Mexico, 15 Stat. 687, T.S. No. 213;

Great Britain.⁴⁶

The year 1868 also marked the ratification of the fourteenth amendment.⁴⁷ The first sentence of the 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,"⁴⁸ provided for the first time a constitutional definition of national citizenship.⁴⁹ It was to have a profound effect on expatriation law nearly a century later.⁵⁰

THE ACT OF 1907: CONGRESSIONAL DENATIONALIZATION UNDER THE GUISE OF EXPATRIATION

In 1907, Congress responded to the uncertain state of expatriation law by passing "the first general statute governing loss of American citizenship."⁵¹ The Act of 1907⁵² provided for denationalization by an American citizen who underwent naturalization in a foreign state or took a foreign oath of allegiance.⁵³ A rebuttable presumption of expatriation was created when a naturalized American returned to live in his homeland for a period of two years or elsewhere abroad for five years.⁵⁴ American women who married foreigners acquired the nationality of their husbands.⁵⁵

Naturalization and Extradition Treaty, July 10, 1868, United States-Wurttemberg, 16 Stat. 735, T.S. No. 375; Naturalization Treaty, May 26, 1868, United States-Bavaria, 15 Stat. 661, T.S. No. 18.

46. Naturalization Treaty, May 13, 1870, United States-United Kingdom, 16 Stat. 775, T.S. No. 130, *supplemented by* Renunciation of Naturalization Treaty, Feb. 23, 1871, 17 Stat. 841, T.S. No. 132. Upon the recommendation of a royal commission appointed by Parliament in 1868, a statute, The Naturalization Act of 1870, 33 Vict. 12, C. 14, § 7, was ultimately adopted which reintroduced expatriation to British law, bringing to an end the influence of the decision in *Calvin's Case*. See notes 13 & 14 *supra*; *Newcomb v. Newcomb*, 108 Ky. 582, 585, 57 S.W. 2d, 4-5 (1900).

47. U.S. CONST. amend. XIV.

48. *Id.* § 1. The language was adapted from the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, which reads: "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . ." J. CABLE, *DECISIVE DECISIONS OF UNITED STATES CITIZENSHIP* 30 (1967); Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 373-74 (1973); Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 26 (1950).

49. *In re Look Tin Sing*, 21 F. 905, 909 (1884). *But see* *United States v. Wong Kim Ark*, 169 U.S. 649, 675-76 (1898). See also Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369, 372 (1973).

50. See text accompanying notes 113, 122-29 *infra*.

51. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 26 (1950).

52. Expatriation Act of 1907, ch. 2534, 34 Stat. 1228. For subsequent legislative history, see note 35 *supra*.

53. Expatriation Act of 1907, ch. 2534, § 2, 34 Stat. 1228.

54. *Id.*

55. *Id.* § 3.

The Expatriation Act of 1907 brought about a subtle shift in the legal debate that had surrounded loss of citizenship for over a century. Until its passage, the question for both Congress and the courts had been whether the individual could terminate an allegiance relationship.⁵⁶ The Act of 1907 finally confirmed the existence of an individual right of expatriation for American citizens. At the same time, however, the Act of 1907 reserved for the state the power to infer an individual's assent to the loss of his or her citizenship and to statutorily define the circumstances under which that inference would be drawn. By legislating that certain acts by the citizen evidenced an otherwise unexpressed willingness to sever allegiance, Congress could unilaterally declare the expatriating option exercised by its individual holder.⁵⁷ Although titled and couched in terms of "expatriation," the Act of 1907 reestablished⁵⁸ denationalization as a state prerogative while paying lip service to the element of individual choice which otherwise distinguishes expatriation from other loss of citizenship.⁵⁹ The focus of legal debate would hereafter be upon the power of Congress, not the right of the individual, to terminate citizenship.⁶⁰

Endorsement for this legislative approach was soon provided by the Supreme Court. In *Mackenzie v. Hare*,⁶¹ the Court conceded that "a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."⁶² Nevertheless, the Court found that the Act of 1907 encompassed sufficient consent when it made loss of citizenship the result of "a condition voluntarily entered into, with notice of the consequences."⁶³

56. See text accompanying notes 12-43 *supra*.

57. Section 2 of the 1907 Act first speaks of a citizen being "deemed to have expatriated himself." Later on it says, "[I]t shall be *presumed* that he ceased to be an American citizen . . ." Ch. 2534, 34 Stat. 1228 (1907). Section 3 does not even expressly address *loss* but speaks of how, after marriage to a foreigner, a woman can "*resume* her American citizenship." *Id.* (emphasis added). But see *Mackenzie v. Hare*, 239 U.S. 299 (1915). Section 3 was repealed by the Act of Sept. 22, 1922, ch. 411, § 7, 42 Stat. 1022.

58. In effect, the Expatriation Act of 1907 revived the legislative precedent set by the Act of 1865, see text accompanying note 33 *supra*, in which Congress established that certain acts, other than express renunciation, could result in loss of citizenship as a matter of law. In 1865, it was desertion. By 1907, marriage to a foreigner was sufficient. See Gordon, *supra* note 4, at 324; Hurst, *Can Congress Take Away Citizenship?*, 29 ROCKY MOUNTAIN L. REV. 62, 65 (1956).

59. See note 4 *supra*.

60. See text accompanying notes 61-65, 83-129 *infra*.

61. 239 U.S. 299 (1915).

62. *Id.* at 311.

63. *Id.* at 312. In *Mackenzie*, a cooperative Court was willing to conclude that

Two distinct rationales provided the basis for the Supreme Court's decision in *Mackenzie*. The first limited the role of the individual in his own expatriation by recognizing that Congress had the power to create the inference of his assent. The government could thus statutorily redefine the requisite act of will by a citizen as nothing more than his performance of an act designated by Congress, with prior constructive knowledge and without duress.⁶⁴ The second rationale employed by the court in *Mackenzie* identified as an attribute of sovereignty the authority of Congress to denationalize without the assent of the citizen whenever the government reasonably concluded that such action was made necessary by conditions of national moment.⁶⁵

THE NATIONALITY ACT OF 1940 AND ITS SUCCESSORS: THE
DEVELOPING TECHNIQUE OF STATUTORY PRESUMPTION

Congress expanded the scope of expatriation by implication when it subsequently revised and codified the law governing naturalization and citizenship. The Nationality Act of 1940⁶⁶ not only provided for loss of citizenship as a result of naturalization in a foreign state,⁶⁷ as had its 1907 predecessor,⁶⁸ but it also mandated denationalization for an American citizen who served in the armed forces⁶⁹ or government of a foreign power,⁷⁰ voted in a

the marriage of an American woman to a foreigner was "tantamount to expatriation." *Id.* at 312. Although apparently sensitive to the lexicological abuse done to the word "expatriation" by its usage in the 1907 Act, the Court nevertheless upheld the statute. No specific intent to expatriate herself was required of Mrs. Mackenzie. In fact, as the Court later acknowledged, "[t]he woman had not intended to give up her American citizenship." *Savorgnan v. United States*, 338 U.S. 491, 501 (1950). Sufficient acquiescence in her denationalization was found in Mrs. Mackenzie's willingness to perform an act to which Congress had legislatively affixed the consequence of loss of citizenship. *See also Ex parte Ng Fung Sing*, 6 F.2d 670 (W.D. Wash. 1925); *Ex parte Griffin*, 237 F. 445, 453 (N.D.N.Y. 1916). In *Perkins v. Elg*, the Supreme Court concluded that the Act of 1907 did not operate to denationalize the American-born daughter of Swedish nationals who had returned with their daughter to their homeland. Her acquisition of Swedish citizenship through her parents did not result in the loss of her United States citizenship during her minority. "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles." 307 U.S. 325, 329 (1939).

It would appear that although the Court would limit the Act of 1907 (or at least § 2 thereof) to voluntary denationalization, it would also recognize an independent congressional power to take away citizenship. Note the word "or" used in the quoted portion. *Contra*, 41 OP. ATT'Y GEN. 86 (1951).

64. 239 U.S. at 311-12.

65. *Id.*

66. Ch. 876, 54 Stat. 1137, *reenacted as* the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 267 (codified at 8 U.S.C. § § 1101-503) (1976).

67. Ch. 876, § 401(a), 54 Stat. 1137, 1168 (1940).

68. Expatriation Act of 1907, ch. 2534, § 2, 34 Stat. 1228 (1907).

69. Ch. 876, § 401(c), 54 Stat. 1137, 1169 (1940).

70. *Id.* § 401(d).

foreign election,⁷¹ committed treason,⁷² or deserted from the armed forces of the United States.⁷³ A separate section created a presumption of expatriation in the case of dual citizens living for extended periods in their homeland.⁷⁴

The provisions in the Act of 1940 governing loss of citizenship underwent little or no change in the recodification of immigration and naturalization law by Congress in 1952.⁷⁵ Two years later, Congress passed the Expatriation Act of 1954.⁷⁶ To the existing statutory provision⁷⁷ for loss of citizenship by one convicted of committing treason, attempting to overthrow the government by force, or bearing arms against the United States,⁷⁸ the new law added denationalization for conviction under the Smith Act.⁷⁹ An

71. *Id.* § 401(e).

72. *Id.* § 401(h). "Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, providing he is convicted by a court martial or by a court of competent jurisdiction." This subsection was not part of the original draft code drawn up by the Executive, nor was it included in the House bill, H.R. 9980. It was subsequently added by the Senate, S. REP. NO. 2150, 76th Cong., 3d Sess. 1 (1940) and the amendment was unopposed by the House, 86 CONG. REC. 13234-40 (1940).

73. Ch. 876, § 401(g), 54 Stat. 1137, 1169 (1940). Like the portion of the 1907 Act challenged by Mrs. Mackenzie, *supra* note 57, subsections (h) and (g) of the 1940 Act did not even require emigration but could denationalize a citizen who had not even left the country.

74. Ch. 876, § 402, 54 Stat. 1137, 1169 (1940).

75. 8 U.S.C. § 801 became 8 U.S.C. § 1481 by the Immigration and Nationality Act of 1952.

76. Ch. 1256, 68 Stat. 1146. President Eisenhower said in his State of the Union Address:

We should recognize by law a fact that is plain to all thoughtful citizens—that we are dealing here with actions akin to treason—that when a citizen knowingly participates in the Communist conspiracy he no longer holds allegiance to the United States.

I recommend that Congress enact legislation to provide that a citizen of the United States who is convicted in the courts of hereafter conspiring to advocate the overthrow of this Government by force or violence be treated as having, by such act, renounced his allegiance to the United States and forfeited his United States citizenship.

Pub. Papers (January 7, 1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 3926, 3926.

Deputy Attorney General Rogers wrote to Speaker of the House Martin that the ensuing bill would be "a statutory recognition of the plain fact that citizens who knowingly participate in the Communist Conspiracy no longer hold allegiance to the United States" Letter (Jan. 2, 1954), *reprinted in* [1954] U.S. CODE CONG. & AD. NEWS 3925, 3926.

77. Nationality Act of 1940, ch. 876, § 401(h), 54 Stat. 1137, 1169 (current version at 8 U.S.C.A. § 1481(a)(7) (Supp. II 1978)).

78. *See* note 72 *supra*.

79. 18 U.S.C. § § 2383-2385 (1976).

American citizen thereafter would lose his citizenship upon conviction for having participated in rebellion or insurrection,⁸⁰ having engaged in seditious conspiracy,⁸¹ or having advocated the violent overthrow of the government.⁸²

MODERN SUPREME COURT DECISIONS ON LOSS OF CITIZENSHIP

After the passage of the Expatriation Act of 1954, the spotlight of expatriation law again passed from the Congress to the judiciary. In a five-to-four decision, the Supreme Court upheld in *Perez v. Brownell*⁸³ the denationalization of an American citizen who had voted in a foreign election.⁸⁴

As in *Mackenzie v. Hare*,⁸⁵ the issue was the power of Congress to legislate loss of citizenship.⁸⁶ The Court held in *Perez* that Congress had the power to denationalize an American citizen who voted in a foreign election.⁸⁷ Again the Court was willing to endorse congressional denationalization, but the opinion by Justice Frankfurter forebore any reliance on an expatriation rationale embodying implied assent.⁸⁸ It was a distortion of *Mackenzie*, concluded the *Perez* court, to rest that decision on the theory that "a citizen's assent to denationalization may be inferred from his having engaged in conduct that amounts to an 'abandonment of citizenship'"⁸⁹

The decision in *Perez* instead rested on the alternative rationale

80. *Id.* § 2383.

81. *Id.* § 2384.

82. *Id.* § 2385.

83. 356 U.S. 44 (1958).

84. Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137, 1169, *subsequently incorporated into* § 349 of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 267-268, and *repealed by* Pub. L. No. 95-432, § 2, 4, 92 Stat. 1046 (1978).

85. 239 U.S. 299 (1915). *See* text accompanying notes 61-65 *supra*. In *Savorgnan v. United States*, 338 U.S. 491 (1950), the Court held that a woman who voluntarily obtained Italian citizenship and thereafter lived abroad lost her American citizenship under either § 2 of the Expatriation Act of 1907, ch. 2534, 34 Stat. 1228, or § 401(a) of the Nationality Act of 1940, ch. 876, 54 Stat. 1137, 1139.

There is nothing . . . in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent or understanding to have been contrary to the usual legal consequences of such an act.

338 U.S. at 500.

86. 356 U.S. at 51.

87. Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1169, *as amended by* Act of Sept. 27, 1944, ch. 415, 58 Stat. 745.

88. *See* note 63 *supra*.

89. 356 U.S. at 61. "Those two cases [*Mackenzie* and *Savorgnan*, *see* note 85 *supra*] mean nothing—indeed, they are deceptive—if their essential significance is not rejection of the notion that the power of Congress to terminate citizenship depends upon the citizen's assent." *Id.*

suggested by *Mackenzie*: that Congress had, as an attribute of sovereignty, denationalizing power exclusive of expatriation.⁹⁰ Because Congress possessed the implied constitutional power to regulate international affairs, it could legislatively withdraw citizenship from one who engaged in acts that might embarrass the national government in the diplomatic arena or put the country in a position of potential conflict abroad.⁹¹ After *Perez*, the constitutional boundaries of loss of citizenship clearly included both expatriation and unilateral legislative denationalization.⁹²

Chief Justice Warren, dissenting in *Perez*, found the statute fatally defective because it employed a classification so broad that it failed to show a voluntary abandonment of citizenship.⁹³ Warren argued that implied assent by the individual was required for citizenship to be lost.⁹⁴ The Chief Justice could find no congressional power to unilaterally denationalize in the letter or spirit of the Constitution.⁹⁵ Moreover, the "priceless right" of citizenship had been rendered immune to the exercise of governmental powers by the adoption of the fourteenth amendment. Loss of citizenship was thereafter limited to the joint action of the state and the individual.⁹⁶

90. *Id.* at 57-58. See text accompanying note 65 *supra*.

91. 356 U.S. at 59.

92. Justice Frankfurter's approach to the significance of individual acquiescence to loss of citizenship brought expatriation law full circle to the Act of 1865 and its naked exercise of sovereign power. See text accompanying notes 34-35 *supra*.

93. 356 U.S. at 78 (Warren, C.J., dissenting).

94. *Id.* at 68.

95. *Id.* at 77-78.

96. *Id.* The dispute between Justice Frankfurter and Chief Justice Warren in *Perez* over the legitimate scope of denationalization is significant for two reasons: first, both opinions left the Court's decision in *Mackenzie v. Hare* intact. *Mackenzie* endorsed the assertion by Congress that voluntariness by implication was sufficient for expatriation. Justice Frankfurter, however, went one step further and recognized congressional denationalization with no stricter requirement or voluntariness than freedom from duress. Chief Justice Warren, referring to the provision for resumption of citizenship in § 3 of the 1907 Act, see note 57 *supra*, distinguished *Mackenzie* as not pertaining to loss of citizenship at all, but merely to its abeyance. 356 U.S. at 72. More realistically, he was willing to acknowledge that "actions short of express renunciation might be so inconsistent with the retention of citizenship as to result in loss of that status." *Id.* at 78. The low threshold of voluntariness established by *Mackenzie* could survive regardless of which *Perez* position ultimately prevailed.

Perez is also significant because it marks the emergence of the fourteenth amendment as a possible check on congressional denationalization. Although Justice Frankfurter professed to find it inapplicable to the question of how citizenship might be lost, *id.* at 58, Chief Justice Warren regarded its crystallization of the

In *Trop v. Dulles*,⁹⁷ the Court again split five to four, but this time held unconstitutional section 401(g) of the Nationality Act of 1940,⁹⁸ which provided for loss of citizenship upon conviction of desertion in time of war. Chief Justice Warren now wrote in the majority, but to the extent that he would base the *Trop* decision on the impotence of Congress to legislate loss of citizenship,⁹⁹ he still failed to sway a majority of the Court.¹⁰⁰ The majority in *Trop* could agree only that whatever power Congress might have to remove one's citizenship, it could not employ denationalization as a punishment.¹⁰¹

In *Schneider v. Rusk*,¹⁰² the Court found violative of due process section 352(a) (1) of the Immigration and Nationality Act of 1952,¹⁰³ which denationalized any naturalized citizen who returned to reside in his or her homeland for three years or more. Unable to agree on the existence of congressional power to unilaterally take away citizenship,¹⁰⁴ the *Schneider* majority nevertheless found that the statute discriminated against naturalized citizens based upon the impermissible assumption that they were less reliable and bore less allegiance to the United States than did native-born citizens.¹⁰⁵

rights of citizenship as preemptive of any recognition by the Court of an implied governmental power to take away nationality. *Id.* at 77-78.

97. 356 U.S. 86 (1957).

98. Ch. 876, 54 Stat. 1168, 1169, *as amended*, Act of Jan. 20, 1944, ch. 2, 58 Stat. 4.

99. 356 U.S. at 91-93.

100. Justices Black and Douglas agreed as they had in *Perez*, 356 U.S. at 79-84, that involuntary denationalization was beyond the power of Congress, 356 U.S. at 104. Justice Whittaker without comment in *Trop* reversed his previous opinion in *Perez* that Congress could unilaterally take away citizenship, 356 U.S. at 84. Justice Brennan joined in finding the statute unconstitutional in *Trop*, but continued to agree with Justice Frankfurter's *Perez* analysis. 356 U.S. at 86.

101. 356 U.S. at 101 (Warren, C.J.), 104 (Black, J., concurring), 105 (Brennan, J., concurring). See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), where the Court held § 401(j) of the Nationality Act of 1940 and its successor, § 349(a)(10) of the Immigration and Nationality Act of 1952, unconstitutional. The statutes provided for loss of citizenship by those who remained abroad to avoid the draft in time of war. The Court found the statutes to be essentially penal and therefore unconstitutional because they operated without the procedural guarantees of the fifth and sixth amendments. 372 U.S. at 165-66.

102. 377 U.S. 163 (1964).

103. Ch. 477, 66 Stat. 163, 169.

104. 377 U.S. at 166.

105. *Id.* at 168. In dissent Justice Clark relied upon *Mackenzie*, see text accompanying notes 61-65 *supra*, in arguing that Congress had the power to make loss of citizenship the consequence of extended sojourn in one's homeland. "[Mrs. Schneider, like Mrs. Mackenzie] with her eyes open to the result, chose by her action to renounce her . . . citizenship." 377 U.S. at 169 (Clark, J., dissenting). Congress could legitimately discriminate against the class of naturalized citizens herein as it had discriminated against women in the statute upheld in *Mackenzie*. *Id.* at 170. Indeed, here was a distinction more clearly pertaining to divided allegiance which was, according to *Mackenzie*, the central issue in expatriation cases. *Id.* at 176.

DENATIONALIZATION AND THE FOURTEENTH AMENDMENT

The turning point for congressional denationalization came nine years later in *Afroyim v. Rusk*¹⁰⁶ when the Court in still another five-to-four split held that the Constitution did not empower Congress to deprive a person of his citizenship simply because he had voted in a foreign election.¹⁰⁷ Justice Black wrote the decision, finding that the fourteenth amendment with its sweeping grant of citizenship would not countenance government action that would take away citizenship without the concurrence of the citizen.¹⁰⁸ *Perez v. Brownell* was expressly overruled.¹⁰⁹

The Court in *Afroyim* clearly discarded the radical view that congressional denationalization is limited only by the requirement of a rational nexus to a specific constitutional power.¹¹⁰ But what of Justice McKenna's conclusion in *Mackenzie* that sufficient voluntariness could exist to legitimize legislative denationalization absent a specific intention on the part of the individual

106. 387 U.S. 253 (1967). See Duvall, *Expatriation under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 408 (1970).

107. 387 U.S. at 267.

108. *Id.* at 267-68.

To uphold Congress' power to take away a man's citizenship because he voted in a foreign election in violation of § 401(e) would be equivalent to holding that Congress has the power to "abridge," "affect," "restrict the effect of," and "take . . . away" citizenship. Because the Fourteenth Amendment prevents Congress from doing any of these things, we agree with THE CHIEF JUSTICE'S dissent in the *Perez* case that the Government is without power to rob a citizen of his citizenship under § 401(e).

Id. (footnote deleted).

109. *Id.* at 268. In dissent Justice Harlan repeated Justice Frankfurter's *Perez* analysis of the effect of the fourteenth amendment on expatriation. Silent on how citizenship might be lost, it was simply inapplicable. *Id.* at 292. The first sentence of the fourteenth amendment did no more than state a nonexclusive list of the ways in which American citizenship was acquired, especially by negroes. *Id.* at 283-85. Congress could not have believed it was placing citizenship beyond its reach with the fourteenth amendment because it contemporaneously passed laws and ratified treaties which incorporated provisions for involuntary denationalization. *Id.* at 285-92. Only four years later, congressional power was again ascendant. In *Rogers v. Bellei*, 401 U.S. 815 (1971), the foreign-born son of an American citizen lost his "derivative" citizenship when he failed to live continuously for five years in the United States before his twenty-eighth birthday as required by statute. Justice Blackmun wrote for yet another five-to-four Court. Appellant was neither born in the United States nor naturalized within its boundaries, but rather was a citizen by act of Congress. *Id.* at 830-31. On its face, therefore, the fourteenth amendment simply did not apply. *Id.* at 827-28.

110. *Perez v. Brownell*, 356 U.S. 44, 58 (1958). See text accompanying notes 90-92 *supra*.

to renounce his citizenship?¹¹¹ Such a conclusion would appear to be antithetical to the concern expressed by the *Afroyim* Court for the uninhibited operation of the fourteenth amendment as a citizenship guarantee,¹¹² yet *Afroyim* stopped short of overruling *Mackenzie*. *Afroyim* said Congress had no implied power to unilaterally take away citizenship recognized by the fourteenth amendment,¹¹³ *Afroyim* did not say that Congress could not accomplish the same result by defining an individual's performance of a given act as demonstrative of his assent to the loss of his citizenship.¹¹⁴

SPECIFIC INTENT AND JUDICIAL SCRUTINY

The Court in *Afroyim* professed to adopt Chief Justice Warren's dissent in *Perez*,¹¹⁵ but in his *Perez* dissent, Warren was willing to infer an individual's acquiescence from actions other than express renunciation.¹¹⁶ *Afroyim* eliminated unilateral legislative denationalization, but did not rule out legislatively inferred individual assent to expatriation. Because the issue of legitimate congressional power within the context of expatriation was not considered,¹¹⁷ the Court did not examine the *Mackenzie* conclusion that specific intent to expatriate was not required of the citizen.¹¹⁸ One conclusion that may be drawn is that when *Afroyim* overruled *Perez*, expatriation law returned to the pre-*Perez* rule of voluntariness expressed in *Mackenzie* in 1916.¹¹⁹

111. *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915). See text accompanying note 64 *supra*.

112. *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967).

113. See discussion of *Rogers v. Bellei*, 401 U.S. 815 (1971), note 109 *supra*.

114. "Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." 387 U.S. at 268.

115. *Id.* at 267.

116. "It has long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country." *Perez v. Brownell*, 356 U.S. 44, 68 (1958) (Warren, C.J., dissenting) (citing *Mackenzie v. Hare*).

117. 387 U.S. at 255.

118. When the Court's opinion in *Afroyim* does speak of an expatriation alternative, the variety of words chosen to express the nature of the individual's act of will reveals the Court's ambivalence toward the scope of that right: "voluntary renunciation," *id.*, "voluntarily renounced or given up," *id.* at 256, "assent," *id.* at 263, "voluntary renunciation or abandonment," *id.* at 266, and "voluntarily relinquishes," *id.* at 268.

119. See *Jolley v. I.N.S.*, 441 F.2d 1245 (5th Cir. 1971), where the court refused to find that one who renounced his American citizenship because he morally opposed the draft surrendered his citizenship under duress. "His renunciation was therefore the product of personal choice and consequently voluntary." *Id.* at 1250 (footnote deleted). The dissent considered the real question to be the intention of the citizen himself. *Id.* at 1256 (Rives, J., dissenting).

This low threshold and objective standard of voluntariness was rejected by the Second Circuit in *United States v. Matheson*.¹²⁰ The court concluded that the Supreme Court's decision in *Afroyim* mandated proof of a specific intent for expatriation.¹²¹ The *Matheson* court based its conclusion on the significance of citizenship as a constitutional right insured by the fourteenth amendment, a point first accepted by the Supreme Court in *Afroyim*.¹²² The requirement of specific intent on the part of the expatriate reflects the growing judicial trend to construe conduct as a waiver or forfeiture of a constitutional right only when it is clearly and intelligently intended as such.¹²³

Whether or not the *Matheson* court was correct in its conclusion that *Afroyim* explicitly rejected earlier cases applying an objective test to discover the intent of the expatriate,¹²⁴ its opinion did recognize the new factor that *Afroyim* introduced to judicial analysis of denationalization legislation.¹²⁵ Acceptance by the Supreme Court of the concept that the fourteenth amendment protects citizenship from governmental confiscation profoundly alters the nature of judicial review from the *Mackenzie-Perez* context. As *Matheson* concludes, it may have changed the essence of the act of will required of the individual for expatriation.¹²⁶ It certainly must alter the role of the courts in passing on legislation effecting loss of citizenship.

The *Mackenzie* and *Perez* Courts deferred to congressional decisions concerning what behavior would bear the inference of in-

120. 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

121. *Id.* at 814-15. In *Matheson*, the executor sought to avoid U.S. taxation of the estate by proving the expatriation of the testatrix. She had married a Mexican national, signed a certificate declaring her allegiance to Mexico, and travelled under both U.S. and Mexican passports. The court found such evidence insufficient for expatriation.

Because Mrs. Burns was a United States citizen by birth, she could not lose her citizenship in the absence of proof that she intentionally relinquished it. *Id.* See also *Terrazas v. Vance*, 577 F.2d 7 (7th Cir. 1978), *prob. juris. noted*, 435 U.S. 970 (1979); Note, *Terrazas v. Vance and the Standard of Proof in Expatriation Proceedings: Resolving the Ambiguity of Voluntariness*, 65 VA. L. REV. 713 (1979). "It seems to us absolutely inconsistent with the spirit of *Afroyim* to conclude that Congress somehow retains the power to define in the way it has here the conditions under which an individual is said to have relinquished voluntarily that citizenship." 577 F.2d at 10. See also *King v. Rogers*, 463 F.2d 1188, 1189 (9th Cir. 1972).

122. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

123. 532 F.2d at 814.

124. See note 118 *supra*.

125. 532 F.2d at 814. See note 96 and text accompanying note 108 *supra*.

126. See text accompanying notes 119-22 *supra*.

dividual acquiescence in loss of citizenship. In *Mackenzie*, the Court took for granted the deleterious international repercussions of the legislatively designated expatriating act.¹²⁷ The *Perez* Court only refused to deny Congress the reasonable belief that the designated act might well have consequences "jeopardizing the successful conduct of international relations."¹²⁸ In light of the Court's subsequent recognition of the status of citizenship as a fundamental right, such deference is no longer appropriate. When congressional action is alleged to interfere with individual rights expressly insured by the Constitution, modern concepts of judicial review require independent analysis by the Court.¹²⁹ At least two categories of individual action currently resulting in loss of citizenship could not withstand independent fundamental rights analysis.

THE STATE OF THE STATUTE: CURRENT DENATIONALIZATION LEGISLATION

Today, a citizen may lose his citizenship by operation of statute as a result of performance of one of five kinds of actions:¹³⁰ express renunciation of United States citizenship,¹³¹ naturalization by a foreign state,¹³² formal declaration of allegiance to a foreign state,¹³³ service in the armed forces of a foreign state,¹³⁴ or conviction of a crime against United States allegiance.¹³⁵ Express renunciation by its very nature transcends the issue of implied

127. 239 U.S. 299, 312 (1915).

128. 356 U.S. 44, 59 (1958).

129. See *United States v. Robel*, 389 U.S. 258, 264 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 508-09 (1964). See also *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

130. In 1976, Congress repealed § 349(a)(10) of the Immigration and Nationality Act of 1952, belatedly bowing to the Supreme Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The Court had held that a statute denationalizing persons who remained abroad to avoid the draft was penal in nature and unconstitutional because it ignored the procedural guarantees of the fifth and sixth amendments. *Id.* at 167. In 1978 Congress repealed the provisions found unconstitutional in *Trop*, *Schneider*, and *Afroyim*. See notes 97-101, 102-05, 106-08 and accompanying text *supra*.

A sixth category apparently exists in 8 U.S.C. § 1481(a)(4) (1976), which denationalizes a U.S. citizen who takes employment with a foreign government. Because subparagraph (A) is limited to government employment requiring change of nationality and because subparagraph (B) is limited to government employment requiring an oath of allegiance, § 1481(a)(4) does not reach any class of U.S. citizens not already subject to loss of citizenship under § 1481(a)(1) or § 1481(a)(2).

131. 8 U.S.C.A. § 1481(a)(5), (6) (Supp. 1979).

132. 8 U.S.C. § 1481(a)(1) (1976).

133. *Id.* § 1481(a)(2).

134. *Id.* § 1481(a)(3).

135. 8 U.S.C.A. § 1481(a)(7) (Supp. 1979). See note 72 and text accompanying notes 76-82 *supra*.

voluntariness.¹³⁶ The intent of the expatriate is made clear by his own words. In the other four cases, however, the individual's expression of voluntariness must be implied if the Constitution requires that a citizen be a willing partner in his own denationalization.

These four remaining expatriation acts may be divided into three classes. The first consists of acts which are natural steps toward cementing a new bond between the individual and another state. Seeking naturalization elsewhere or taking a foreign oath of allegiance both reasonably suggest a preference on the part of the individual for another allegiance.¹³⁷ Because the two acts are, by their very nature, so directly related to citizenship and allegiance, they may support the implication of either *Mackenzie* voluntariness or *Matheson* specific intent to expatriate.¹³⁸

Such a conclusion by a post-*Afroyim* court would require two prior determinations. First, the court would have to find that the state's interest in avoiding dual nationality among its citizens was sufficiently compelling to justify an inference of expatriation.¹³⁹ Second, the court would have to find that congressional reliance on an inference was necessary because the individual's intention to expatriate could not be more directly determined.¹⁴⁰

The second class of acts from which expatriation can be cur-

136. Even the most ardent admirer of fourteenth amendment safeguards will not object to a statutory acknowledgment that the government will acquiesce in the wishes of the individual expressly and formally manifested to its representatives. As long as congressional acknowledgment by statute of a means of expatriation is not viewed as limiting, there should be no objection from the parties on either side of the constitutional debate. The fear that such "legislative notice" of a particular method of expatriation might be construed as exclusive has in the past been fatal to congressional legislative attempts on the subject. See the debate surrounding a bill offered into the House in 1817. F. FRANKLIN, *THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES* 142-60 (1906).

137. As Chief Justice Warren noted, "Any action by which he manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status." *Perez v. Brownell*, 356 U.S. 44, 68 (1958) (Warren, C.J., dissenting).

138. See *Kawakita v. United States*, 343 U.S. 717, 734-36 (1952); *Savorgnan v. United States*, 338 U.S. 491, 498 (1950); *Ex parte Griffin*, 237 F. 445, 450-51 (N.D.N.Y. 1916); Borchart, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312, 315 (1931); Flournoy, *Dual Nationality and Election*, 30 YALE L.J. 693, 707 (1921); Orfield, *The Legal Effects of Dual Nationality*, 17 GEO. WASH. L. REV. 427 (1949). But see *United States v. Matheson*, 532 F.2d 809, 811, 815-16 (2d Cir. 1976).

139. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

140. See *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). See also J. No-

rently inferred encompasses a limited number of activities elsewhere defined as criminal.¹⁴¹ Indeed, a criminal conviction thereof is a prerequisite under the statute.¹⁴² The foremost member of this expatriating class is treason, the most serious of all crimes¹⁴³ and the only one defined by the Constitution itself.¹⁴⁴ The others are sedition¹⁴⁵ and seditious conspiracy,¹⁴⁶ insurrection,¹⁴⁷ and advocating the violent overthrow of the government.¹⁴⁸

Treason is, generally speaking, a breach of allegiance to a government committed by a person who owes allegiance to it,¹⁴⁹ although the federal offense as constitutionally defined is considerably narrower.¹⁵⁰ Allegiance is the citizen's obligation of fidelity and obedience to the government, arising in exchange for the protection afforded the citizen by his government.¹⁵¹ To the extent that all the crimes enumerated in subsection (a)(7) of the statute governing loss of citizenship share the common gravamen of an effort to subvert the government or aid its enemies,¹⁵² they are all acts deleterious to allegiance, differing from "treason" only in seriousness¹⁵³ and proof.¹⁵⁴

Congress has statutorily defined as expatriating acts the crimes

WAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 410 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-30 (1978).

141. 8 U.S.C. § § 2381, 2383, 2385 (1976).

142. "[A] person who is a national of the United States . . . shall lose his nationality . . . , if and when he is convicted thereof by a court martial or by a court of competent jurisdiction" 8 U.S.C.A. § 1481(a)(7) (Supp. 1979).

143. Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870); Stephan v. United States, 133 F.2d 87, 90 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943).

Under the laws of the United States, the highest of all crimes is treason.

It must be so in every civilized state; not only because the first duty of a state is self-preservation, but because this crime naturally leads to and involves many other [sic], destructive of the safety of individuals and of the peace and welfare of society.

Charge to Grand Jury—Neutrality Laws and Treason, 30 F. Cas. 1024, 1025 (C.C.D. Mass. 1851) (No. 18,269).

144. "Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

145. 8 U.S.C. § 2383 (1976).

146. *Id.* § 2384.

147. *Id.* § 2383.

148. *Id.* § 2385.

149. Young v. United States, 97 U.S. 39, 62 (1877); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820).

150. 8 U.S.C. § 2383 (1976).

151. Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154 (1872).

152. Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 421 (1945).

153. Hanauer v. Doane, 79 U.S. (12 Wall.) 342, 347 (1870); Stephan v. United States, 133 F.2d 87, 90 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943).

154. U.S. CONST. art. III, § 3, cl. 2.

listed under subsection (a)(7). They are therefore proffered as proof of an individual's desire to lose his citizenship. The relevant link to the termination of allegiance is their nature as acts violative of allegiance. Whether the court, upon independent analysis, would find that an expatriating intent or assent could be reasonably inferred from a breach of allegiance would depend in part upon the court's willingness to equate breach of allegiance with rescission of allegiance. An act violative of the relationship between citizen and State need not express the actor's intent to permanently sever his allegiance and abjure his relationship. The seriousness of the offense, especially in cases of treason or insurrection, might well provide sufficient support for the opposite conclusion.

Two difficulties remain in justifying a congressional inference of expatriating intent from the acts designated under subsection (a)(7). No compelling state interest is served when Congress makes the inference. The threat that existed to the security of the United States or to its relations abroad is, by the time the statute operates to imply expatriation, a *fait accompli*. The citizen has been convicted and is in the custody of the state. The congressional inference lacks the justification of a preventive objective. Moreover, the inference need not be drawn as a matter of necessity because the citizen is readily available to supply a more concrete expression of his intent.

The third category of acts from which an expatriating inference can be drawn under current legislation includes acts distinguishable from other legislatively expatriating actions by the absence of any relationship between the act performed and allegiance. Unauthorized foreign military service¹⁵⁵ need not create a new allegiance, nor need it breach an existing one. The absence of Executive approval, which alone distinguishes the expatriating act from other military exchange programs encouraged by the state, is not sufficient to modify the relationship between citizen and state. The Nationality Act of 1940,¹⁵⁶ the predecessor to the current subsection dealing with foreign military service, required that the expatriate acquire the nationality of his employer. The current statute, introduced as part of the Immigration and Nation-

155. 8 U.S.C. § 1481(a)(3) (1976); *see* *De Cicco v. Longo*, 46 F. Supp. 170 (D. Conn. 1942). *Contra*, *Marks v. Esperdy*, 315 F.2d 673 (2nd Cir. 1963), *aff'd sub nom. Marks v. Kennedy*, 377 U.S. 214 (1964).

156. Ch. 876, § 401(c), 54 Stat. 1137, 1169.

ality Act of 1952,¹⁵⁷ is overly broad for its failure to retain such a limitation. In the absence of some potential for modification of nationality or allegiance, the expatriating inference cannot be drawn.

CONCLUSION

The history of expatriation law in the United States makes it clear that an American citizen can renounce his citizenship and thereby eliminate his obligation of loyalty and obedience to the state. The government, however, does not enjoy that same freedom of action. The state cannot unilaterally disrupt the relationship between itself and its fourteenth amendment citizens, but it can acquiesce in the expatriating act of the individual.

In the absence of express renunciation, the element of voluntariness, which distinguishes expatriation from other types of denationalization traditionally available to the state, is not so clearly evident. Since 1907, Congress has inferred an intent to expatriate from a variety of specific actions. The technique was endorsed by the Supreme Court in *Mackenzie v. Hare*, a decision of reemerging importance in the wake of *Afroyim v. Rusk*. *Afroyim* made clear that denationalization is limited by the Constitution to expatriation; that is, to loss of citizenship that is voluntary. *Afroyim* did not make clear, however, what type of act of the will constitutes sufficient voluntariness for expatriation.

In addition to terminating unilateral legislative denationalization, *Afroyim* also expressly recognized citizenship as a fundamental constitutional right. This newly recognized status is as yet largely unexplored in its significance to both the type of consent required of an individual for his or her expatriation and the degree of scrutiny to which statutory conclusions about expatriation will be subjected. To the extent that fundamental-rights analysis in the citizenship context follows previous applications, independent judicial evaluation of congressional decisions can be expected. The inference of an expatriating intent from performance of an action by an individual will be sustained only to the extent that it is reasonable, necessary, and directed to an important state interest. Current legislation attaching an expatriating intent to actions

157. 8 U.S.C. § 1481(a)(3) (1976). Other employment with a foreign governmental entity is not sufficient by itself for denationalization of a United States citizen. The statute additionally requires the American employee who would expatriate himself to either assume his employer's nationality or make an oath of allegiance to his employer. See note 130 *supra*. Thus an American soldiering abroad faces denationalization, but an American serving with a foreign intelligence organization, police department, or internal security group does not by that service alone.

that do not produce an alternative allegiance cannot pass such examination.

ADDENDUM

After this Comment was written, the Supreme Court handed down its decision in *Vance v. Terrazas*.¹⁵⁸ As expected, the Court addressed the issue of whether Congress had the power to legislate the evidentiary standard for loss of citizenship embodied in 8 U.S.C. § 1481(c);¹⁵⁹ namely, that proof of an expatriating act under section 1481(a) must be established by a preponderance of the evidence. The Court went on, however, to consider the separate question of whether specific intent to renounce citizenship must be proven after *Afroyim*.¹⁶⁰ Neither the district court nor the Seventh Circuit had taken exception to the government's proof of intent on the part of Terrazas to renounce his United States citizenship.¹⁶¹ In an opinion by Justice White, the Court nevertheless asserted that specific intent to renounce must be shown in addition to performance of one of the specific acts enumerated in section 1481(a).¹⁶²

Laurence Terrazas was born in the United States, the son of a Mexican citizen.¹⁶³ He therefore possessed dual nationality, being a citizen of the United States and of Mexico. At the age of twenty-two, while a student in Monterrey, Mexico, Terrazas applied for a certificate of Mexican nationality. In his application, he expressly renounced his United States citizenship and swore "adherence, obedience and submission to the laws and authorities of the Mexican Republic."¹⁶⁴ The Department of State subsequently issued a certificate of loss of nationality despite Terrazas' objection. After a full hearing, the Board of Appellate Review of the Department of State affirmed the finding that Terrazas had voluntarily renounced his United States citizenship.¹⁶⁵ Terrazas then sued to regain his citizenship.¹⁶⁶

158. 48 U.S.L.W. 4069 (1980).

159. (1976).

160. *Afroyim v. Rusk*, 387 U.S. 253 (1966). See text accompanying notes 106-28 *supra*.

161. 48 U.S.L.W. at 4071.

162. *Id.* at 4071-72.

163. *Id.* at 4070.

164. *Id.*

165. *Id.*

166. *Id.*

The district court found for the Secretary of State, holding that a dual national will be deemed to have expatriated himself when it is shown that he voluntarily committed an act whereby he unequivocally renounced his allegiance to the United States.¹⁶⁷ The court found that Terrazas had knowingly and voluntarily taken an oath of allegiance to Mexico and concurrently renounced allegiance to the United States; he had therefore “voluntarily relinquished United States citizenship pursuant to section 1481(a)(2).”¹⁶⁸

Upon review, the Seventh Circuit reversed.¹⁶⁹ Without questioning the sufficiency of the Secretary’s proof of Terrazas’ intent to expatriate himself, the appellate court took exception to the evidentiary standard embodied in section 1481(c) and held that under *Afroyim*, the Constitution required proof of an expatriating act under section 1481(a) by “clear, convincing and unequivocal evidence.”¹⁷⁰ The case was remanded to the district court for further proceedings; meanwhile, the Secretary appealed.

Before the Supreme Court, the Secretary argued that the Seventh Circuit had erroneously required proof of specific intent to renounce United States citizenship.¹⁷¹ Although the issue had not been raised in the jurisdictional statement, the Supreme Court nevertheless elected to respond to the unanswered question of *Afroyim*: what is the nature of the individual’s assent that the Court in *Afroyim* held was a prerequisite for loss of citizenship? For the Secretary, it was enough that he prove only the voluntary commission of an act so inherently inconsistent with continued retention of United States citizenship that Congress could accord to it its natural consequences; namely, loss of citizenship.¹⁷² All but one of the Justices agreed that “assent” meant at least the intent to relinquish citizenship.¹⁷³ For the majority, that specific intent could be “expressed in words or found as a fair inference from proven conduct.”¹⁷⁴ Proof that a citizen voluntarily performed one of the expatriating acts specified in section 1481(a) will not be treated as conclusive evidence of the assent of the citizen to the loss of his citizenship, although in a particular case it might be highly persuasive evidence of a purpose to abandon citi-

167. *Id.*

168. *Id.*

169. *Id.* at 4071.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 4071, 4074 (Marshall, J., concurring in part and dissenting in part), 4074-75 (Stevens, J., concurring in part and dissenting in part), 4075 (Brennan, J., dissenting).

174. *Id.* at 4071.

zenship.¹⁷⁵

With respect to the evidentiary standard of section 1481(c), the Court found that neither the citizenship clause nor the due process clause dictated requirements of proof beyond a preponderance of the evidence in expatriation proceedings which are civil in nature and do not threaten loss of liberty.¹⁷⁶ The Court noted that section 1481(c) had been enacted by Congress in response to the Court's holding in *Nishikawa v. Dulles*¹⁷⁷ that the party asserting loss of citizenship bore the burden of proving that the expatriating act was voluntarily performed.¹⁷⁸ The *Nishikawa* holding, however, had not been grounded in the Constitution, and the Court had expressly noted that it was acting in the absence of legislative guidance.¹⁷⁹ Congress was free to restore to expatriation proceedings the normal presumption of voluntariness.¹⁸⁰ The Court herein carefully distinguished voluntariness, to which the presumption attaches, from specific intent to expatriate, a distinct element which cannot be presumed but which must be supported by a preponderance of the evidence.¹⁸¹

Justice Marshall agreed with the Court that specific intent was required for expatriation, but concluded with Justice Stevens that the potential consequences of loss of citizenship were sufficiently grave as to require for due process a "clear and convincing" standard of proof.¹⁸² Justice Stevens, because he could find no justification for imposing the requirement of proving specific intent to expatriate, absent language to that effect, concluded that Congress had failed to establish a permissible standard for expatriation in section 1481(a)(2).¹⁸³ Both Justice Brennan and Justice Stewart dissented because they could not find an act inconsistent with continued United States allegiance in the taking of an oath of loyalty to another country of which an individual is a citizen but a dual national.¹⁸⁴ Justice Brennan went on to assert his be-

175. *Id.* at 4072 (quoting Justice Black's concurring opinion in *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958)).

176. *Id.* at 4073.

177. 356 U.S. 129 (1958).

178. 48 U.S.L.W. at 4073.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 4074 (Marshall, J., concurring in part and dissenting in part).

183. *Id.* at 4074-75 (Stevens, J., concurring in part and dissenting in part).

184. *Id.* at 4075-76 (Brennan, J., dissenting).

lief that American citizenship could be lost only by formal renunciation in accordance with the procedures established by Congress.¹⁸⁵

Terrazas attempts to solve the dilemma created by *Afroyim* with respect to proof of expatriation.¹⁸⁶ *Afroyim* made it clear that loss of citizenship could not occur absent the "assent" of the individual.¹⁸⁷ It is now clear that as a matter of law, the assent of the citizen cannot be presumed from his voluntary performance of an act identified by Congress as expatriating. There has been no post-*Afroyim* reversion to *Mackenzie* voluntariness.¹⁸⁸ The act not only must be voluntary, but also must be the result of a specific intent on the part of the individual to terminate United States citizenship.

As a practical matter, congressional objectives served by section 1481(a) will probably not be frustrated to any degree. The Court has merely ruled that Congress may not make the logical deduction of specific intent from a specific act. Coupled with a relatively relaxed standard of proof,¹⁸⁹ the Court's acknowledgment that the requisite intent may be found as a "fair inference from proven conduct,"¹⁹⁰ allows the trier of fact to do what Congress may not do directly. Indeed, the Court's opinion quoted (as did the district court) *United States v. Matheson*,¹⁹¹ when it said, "the declaration to a foreign state in conjunction with the renunciatory language of United States citizenship 'would leave no room for ambiguity as to the intent of the applicant.'"¹⁹² What remains to be seen is to what extent actions less suggestive than an oath of allegiance, coupled with an express renunciation, can be found to evidence the requisite specific intent mandated by *Terrazas* and the fourteenth amendment.¹⁹³

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185. *Id.*

186. See text accompanying notes 110-23 *supra*.

187. 48 U.S.L.W. at 4071.

188. See text accompanying notes 111-19 *supra*.

189. See text accompanying notes 176-81 *supra*.

190. 48 U.S.L.W. at 4071.

191. 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976). See text accompanying notes 120-21 *supra*.

192. 48 U.S.L.W. at 4071.

193. See text accompanying notes 130-57 *supra*.