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EXPATRIATION — ITS ORIGIN AND MEANING

*Daniel Klubock**

I. INTRODUCTION

Although the problems presented by the expatriation statutes¹ are of profound constitutional significance, the Supreme Court has considered them directly in only four cases.² Future Court sessions will face a compelling need for incisive analysis.³

A great deal of confusion has arisen in the attempt to determine the constitutional bases for these statutes. The confusion has been caused by a failure to distinguish among the variety of purposes served by the statutes, to recognize and consider the effects of the changing historical contexts from which the present statutes arose, and to define expatriation accordingly. The purpose of this article is to examine a proposed definition of expatriation, that

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1 8 U.S.C. §§ 1481, 1482 and 1484 are set out in Appendix I. Throughout this paper the words citizen and national, and citizenship and nationality, will be used interchangeably. Similarly, denationalization will be treated as identical to loss of citizenship. The distinction made between nationals and citizens in 8 U.S.C. § 1408 is disregarded.

2. In order of decision, *Mackenzie v. Hare*, 239 U.S. 299 (1915); *Savorgnan v. United States*, 338 U.S. 491 (1950); *Perez v. Brownell*, 356 U.S. 44 (1958); *Trop v. Dulles*, 356 U.S. 86 (1958). See also *Rusk v. Cort*, 369 U.S. 367 (1962); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Gonzales v. Landon*, 350 U.S. 920 (1955); *Kawakita v. United States*, 343 U.S. 717 (1952); *Kurtz v. Moffit*, 115 U.S. 487 (1885).

3 In the October 1962 Term, the Court will hear *Kennedy v. Mendoza-Martinez*, 238 F.2d 239 (9th Cir. 1956), remanded, 362 U.S. 384, 192 F. Supp. 1 (S.D. Cal. 1960), restored to calendar for reargument, 369 U.S. 832 (1962) (No. 19, 1961 Term; renumbered No. 2, 1962 Term) and *Rusk v. Cort*, 187 F. Supp. 683 (D.D.C. 1960), set for reargument, 369 U.S. 367 (1962) (No. 20, 1961 Term; renumbered No. 3, 1962 Term). In addition, certiorari has been granted in *Schneider v. Rusk*, No. 15,959 D.C. Cir., May 11, 1962, cert. granted, 31 U.S.L. WEEK 3125 (U.S. Oct. 15, 1962) (No. 251, 1962 Term). *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962), will probably reach the Court before long. The *Cort* and *Mendoza-Martinez* cases challenge the constitutionality of 8 U.S.C. § 1481 (a)(10). The *Schneider* case challenges 8 U.S.C. § 1484 (a)(1). The *Marks* case challenges 8 U.S.C. § 1481 (a)(3).

is derived historically, for its theoretical consistency and its amenability to practical application.⁴

There are five possible purposes that can be served by the expatriation statutes: they can permit a citizen to exercise the right to change his nationality; they can prevent international friction; they can rid the country of undesirable persons; they can regulate the political franchise; and they can punish citizens who engage in prohibited activity.

Expatriation has had four major definitions: loss of nationality, or alienation; denial of diplomatic protection; disfranchisement; and banishment. It is the purpose of this article to show that in construing the expatriation statutes, the sanction contained in each of these definitions of expatriation should be applied according to the purpose of the statute. When the right to transfer nationality is concerned, alienation is appropriate. When the purpose is to eliminate international friction, it is appropriate to withhold diplomatic protection. When the integrity of the political franchise is threatened, the remedy should be disfranchisement. When the purpose of expatriation is to rid the country of undesirable citizens, or to punish citizens, it can only be called banishment.

II. THE EVOLUTION OF THE CONCEPT

A. HISTORICAL BACKGROUND

Until the American Revolution, expatriation was unknown to the English common law.⁵ The Declaration of Independence then proclaimed the right of citizens to break all ties of allegiance to the sovereign.⁶ This doctrine, of course, conflicted with the English notion of perpetual allegiance, and England fought to retain its sovereignty over the colonies. As a result of its defeat, England was forced to modify its position, and, in 1824, an English court continued the evolution of the common law concept of allegiance by declaring that one could expatriate himself with the concurrence of the sovereign, and that the Peace Treaty of 1783 had given the sovereign's consent to the expatriation of the colonists.⁷

In the first part of the nineteenth century, the American courts had little opportunity to deal with the problem. When they did, they were faced with the fact that in the absence of legislation, the only direction available to guide their decisions was that of the common law principle of perpetual allegiance.

⁴ Some fundamental questions of a theoretical nature will not be considered in this article. Concepts of the nature and inherent powers of sovereignty and of sovereignty as derived from the consent of the governed will not be discussed. See Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510 (1960). For a comprehensive treatment of the nature of sovereignty in connection with a passport denial, see Judge Bazelon's dissenting opinion in *Briehl v. Dulles*, 248 F.2d 561, 579 (D.C. Cir. 1957), *rev'd sub nom. Kent v. Dulles*, 357 U.S. 116 (1958).

Further, neither the problems of international order presented by the stateless person and the deportation and exclusion of the "undesirable" person, nor the problems of the stateless person himself will be considered here. See the references collected in Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1189 n. 84 (1955); Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALBANY L. REV. 151 (1962).

⁵ See *Story's Case*, 3 Dyer's Reports, §§ 298b, 300b (1571); *Calvin's Case*, 7 Coke 1 (1608); TSIANG, *EXPATRIATION IN AMERICA PRIOR TO 1907* (1942).

⁶ The theory developed that the sovereign had an obligation to protect his subjects, and that when he did not, he no longer had the right to subject. This, of course, was far from a personal right.

⁷ *Doe d. Thomas v. Acklam*, 2 Barn. and Cr. 779, 107 Eng. Rep. 572 (K.B. 1824).

In no Supreme Court case was it held that a citizen had expatriated himself except by exercising the choice offered under the Peace Treaty of 1783.⁸

Urged by the Court to provide more liberal legislative direction, Congress debated the question frequently. However, no proposals could gain acceptance due to the opposition of those who believed that any federal legislation constituted a threat to the individual's right to expatriate himself. It was thought by many that federal citizenship depended on state citizenship, and that, therefore, the states should be the only sovereign entities to define the means by which a citizen could effect his expatriation.⁹ Besides, the pressure for legislation was light since there were few instances in which Americans desired to expatriate themselves. The Court was faced with the problem only when a prosecution for the violation of a neutrality proclamation was challenged,¹⁰ or when property rights were at issue.¹¹ It is only in the latter cases that one might find precedent for involuntary expatriation where expatriation meant literally the loss of American citizenship. However, in each of these cases it was clear that the claim to United States citizenship was but an afterthought following a voluntary and intentional exercise of the option provided by the Treaty of 1783.¹²

The major problem in the nineteenth century was that of securing the rights of naturalized Americans who sought to sever all ties of allegiance to their native countries. This problem, which was one of those leading to the War of 1812, was a constant source of difficulty for the Government. It was the policy of the Executive to protect naturalized citizens abroad as it would protect native Americans, with the exception of naturalized citizens who returned to their native countries. This exception was probably due more to the fact that the United States was not strong enough to challenge effectively another country's law of perpetual allegiance, than to a theoretical position. As the United States grew stronger, and the vote of the increasing numbers of immigrants grew more influential, the United States took a more forceful position. In 1859, under the leadership of President Buchanan, the principle of protecting all citizens equally was asserted.¹³ It has been suggested that this policy was adopted not only "to keep pace with the growing interest in the protection of American citizens abroad," or to appeal to the large vote of naturalized citizens,

8 *Inglis v. Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99 (1830); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 241 (1830). *But see* *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), in which it was held that an American citizen could expatriate himself for certain commercial purposes. See also *Juando v. Taylor*, 13 Fed. Cas. 1179 (No. 7558) (D.C.S.D.N.Y. 1818).

9 See, e.g., the expatriation act of Virginia, written by Thomas Jefferson, adopted in 1779. Hening, *The Statutes at Large: Being a Collection of all the Laws of Virginia from the First Session of the Legislature in the Year 1619*, 129 (1819-1823). The statute was also adopted in Kentucky when it became a state. The acts were amended in Virginia in 1819 and Kentucky in 1851 to provide that one could not expatriate himself by naturalization in a country with which the United States was at war. See Tsiang, *op. cit. supra* note 4, at 26-27. The Supreme Court, in *Talbot v. Jansen*, 3 U.S. (3 Dall.) 131 (1795), ruled that the Virginia act could not operate to affect United States citizenship.

10 *Talbot v. Jansen*, 3 U.S. (3 Dall.) 131 (1795); *Henfield's Case*, 11 Fed. Cas. 1099 (No. 6360) (C.C.D.Pa. 1793).

11 E.g., *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830); *Inglis v. Trustees of Sailor's Snug Harbour*, 28 U.S. (3 Pet.) 99 (1830); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *McIlvaine v. Cox's Lessee*, 8 U.S. (4 Cranch) 209 (1808); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

12 See cases cited note 8 *supra*.

13 See TSIANG, *op. cit. supra* note 5, at 71-82.

but also because Buchanan "believed . . . that the way to avert a civil war was to unite North and South by a common foreign policy of a nature to arouse national feeling."¹⁴

During the Civil War, this policy was not enforced for two reasons: 1) the Government did not want to incur the hostility of a nation that might, as a result, aid the Confederate States; and 2) the fact that "when conscription was made necessary . . . by the continuation of the War, the . . . Government actually found . . . [that] there were many naturalized Americans calling upon the United States for protection from conscription in their native lands when they had just returned to the country of origin for the purpose of evading the American draft."¹⁵ This situation prompted President Lincoln to suggest that "it might be advisable to fix a limit beyond which no citizen of the United States residing abroad may claim the protection of his Government."¹⁶

It was in this context, as well as that of a large number of desertions, that Congress passed the Act of 1865, which included a provision:

That, in addition to the other lawful penalties of the crime of desertion . . . , all [deserters] . . . shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens; and . . . shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof; and all persons who . . . shall depart the jurisdiction of the district in which he is [sic] enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the penalties of this section.¹⁷

It was this Act from which sections (a)(8) and (a)(10) of 8 U.S.C. § 1481 were drawn.¹⁸

Whether the Act declared that citizens lost their citizenship or only their rights of citizenship has been an issue under a great deal of debate.¹⁹ The Government has contended that the proper interpretation is that it was citizenship itself that was lost. It has based its argument on three grounds: 1) that the words "shall be deemed and taken to have voluntarily relinquished and forfeited" are words appropriate to the meaning of expatriation as it was then conceived — as a voluntary act; 2) that the Act was explicit about the fact that aliens would be denied the right to become citizens; and 3) that it was later interpreted as imposing loss of citizenship.²⁰ The Government explains the stress in the debates on the bills that served as models for this Act on the

¹⁴ *Id.* at 82.

¹⁵ *Id.* at 83.

¹⁶ Annual Message of Dec. 8, 1863, 7 *Messages and Papers of the President* 3381-3382, quoted in TSIANG, *op. cit. supra* note 5, at 83-84.

¹⁷ Act of March 3, 1865, 13 Stat. 487, § 21.

¹⁸ See Appendix I. See *Trop v. Dulles*, 356 U.S. 86, 94 (1958); Brief for Appellant, p. 34, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term.

¹⁹ *Trop v. Dulles*, 356 U.S. 86, 108-109 (Brennan, J., concurring), 116-117 n. 2 (Frankfurter, J., dissenting); Brief for Petitioner, p. 34 n. 11, Brief for Respondent, pp. 41-44, Supplemental Brief for the Respondents on Reargument, pp. 11-17, *Perez v. Brownell*, 356 U.S. 44 (1958); Brief of American Civil Liberties Union as *Amicus Curiae*, pp. 10-15, *Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960); Brief for Appellant, pp. 65-71, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term; Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25-26, 61-62 (1950).

²⁰ Brief for the Appellant, pp. 65-71, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term.

loss of rights — particularly the loss of the political franchise — as the primary consequence, by pointing out that in 1865 disfranchisement “*was* the major consequence of the loss of citizenship; this country had virtually no laws barring aliens, who were as free to come and go as were citizens, and no laws providing for aliens’ deportation; the great difference between citizens and aliens was in the right to vote and to hold office.”²¹

Perhaps a more reasonable interpretation of the statute would be that it means what it appears to mean — that aliens would lose their right to become citizens, and that citizens would lose the rights of federal citizenship. Good reason can be found for the distinction. The Constitution expressly gave Congress the power to limit naturalization.²² It did not give Congress the power to take citizenship away.²³ At the same time, it was well established that a felon could be disfranchised.²⁴

In addition, disfranchisement was not the only right denied the alien. One of the most important rights of citizenship was the right to the diplomatic protection of the United States. It appears from the context of the problem referred to by President Lincoln in his message to Congress, that the Act was designed to relieve the United States of the obligation to extend its protection to its citizens who had fled to foreign countries to escape service in the armed forces of the United States.²⁵ This interpretation would give some meaning to the fact that the Act was phrased in terms of the voluntary forfeiture of rights. The citizen being outside the jurisdiction of our courts, there could be no adjudication of his guilt. The Constitution forbade the denial of rights without due process of law,²⁶ but it was not unreasonable to presume that one who remained outside the jurisdiction of the United States against its laws was willing to forfeit his right to its protection. Since the denial would not operate until sixty days after the law was proclaimed, the citizen actually could choose between remaining abroad without protection or returning to serve in the armed forces.²⁷

This interpretation would explain why the provision was divided as it was. The offenders (1) “shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship . . . and [2] such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof. . . .” The second clause imposes disfranchisement. It does not rely, as does the first clause, on the presumption of voluntary forfeiture of rights. The first clause covers diplomatic protection. If read as “loss of citizenship,” it would make the second redundant. The second clause refers to positive rights. Probably the right to

²¹ *Id.* at 69.

²² U.S. CONST. art. I, § 8.

²³ “The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.” *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898).

²⁴ See, *e.g.*, *Barker v. People*, 20 Johns. R. 457 (N.Y. 1823).

²⁵ Note 16 *supra*.

²⁶ U.S. CONST. amend. V.

²⁷ This may have been something of a Hobson’s choice — serving in the forces of the United States or of the native country. In addition, it did not account for those abroad under duress.

vote was not specified because, with the exception of elections held in the Territories,²⁸ the right to vote was controlled by the states.²⁹ The first clause implies the loss of passive rights—the rights owed the citizen by the Government.

A further argument that militates for the conclusion that the Act was not designed to deprive a citizen of his citizenship itself is that from the very beginning of the debate over the right to expatriation it was maintained that an unlawful act could never effect a citizen's expatriation. Hamilton, arguing against a bill introduced in the legislature of New York in 1784 that would have expatriated those who had supported the British in the Revolution, expressed his fears that such a bill would nullify the laws passed to punish traitors: "The idea, indeed, of citizens transforming themselves into aliens, by taking part against the State to which they belong, is altogether of new invention, unknown and inadmissible in law, and contrary to the nature of the social compact."³⁰ Jefferson, the foremost proponent of the right of expatriation, wrote that laws regulating expatriation "would never prescribe an illegal act among the legal modes by which a citizen might disfranchise himself; nor render treason, for instance, innocent by giving it force of a dissolution of the obligation of the criminal to his country."³¹

The courts that interpreted the Act of 1865 demonstrated the confusion over the meaning of the provision. They were state courts, and for the most part were called upon to determine whether a citizen of their state had lost his right to vote under the Act.³² Since the states controlled the right to vote, the federal government could not disfranchise a citizen unless it took away his citizenship. Therefore, the loss of the right to vote imposed by the federal government, was equated with the loss of citizenship. Of course, this rationale was valid only in those states that required United States citizenship as a condition for the exercise of the vote. Twenty-two states have in the past permitted aliens to vote, and it was not until 1928 that no aliens could vote in the presidential election.³³ Typical of the decisions is *Huber v. Reily*,³⁴ where it was stated that, "as a penalty for crime against the General Government, Congress may impose upon the criminal forfeiture of his citizenship of the United States. Disfranchisement of a citizen as a punishment for crime is no unusual punishment. . . ."

It is significant that no case actually held that the alleged deserter had lost any rights. In keeping with the notion that the statute prescribed the disfranchisement often attendant on conviction of a felony, each court held that before any rights could be lost, the citizen must be adjudged guilty in a proper criminal trial before a court-martial. This position was later approved by the

28 See *Murphy v. Ramsey*, 114 U.S. 15 (1885).

29 See, e.g., *Huber v. Reily*, 53 Pa. 112 (1866).

30 *Letters from Phocion*, 4 WORKS OF ALEXANDER HAMILTON 256 (Constitutional ed. 1904).

31 Letter from Jefferson to Morris, Aug. 16, 1793, 4 THE WRITINGS OF THOMAS JEFFERSON 37-38 (Washington ed. 1859).

32 *State v. Symonds*, 57 Me. 148 (1869); *Severance v. Healey*, 50 N.H. 448 (1870); *Green v. Shumway* 39 N.Y. 418 (1868); *McCafferty v. Guyer*, 59 Pa. 109 (1868); *Huber v. Reily*, 53 Pa. 112 (1866). *Holt v. Holt*, 59 Me. 464 (1871), dealt with the right to sue.

33 Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931).

34 53 Pa. 112, 116 (1866).

Supreme Court in *Kurtz v. Moffit*,³⁵ and is consistent with the interpretation of the statute proposed here.

The confusion of the meaning of expatriation was compounded when the Act of 1868,³⁶ proclaiming the right of expatriation, was passed. This Act was directed at other countries, and served notice that the United States would extend its protection to all citizens, naturalized as well as native-born. There was no question that expatriation here meant the transfer of citizenship from a foreign country to the United States.³⁷ Yet the Act proclaimed that "this Government has freely received emigrants from all nations, and invested them with the rights of citizenship. . . ."

All provisions of the original bill that would have relieved the United States from the duty of providing certain citizens with diplomatic protection were stricken before the bill was enacted into law.³⁸ This problem still plagued the Executive, and it continually requested that Congress legislate means by which a citizen could effect his own expatriation from the United States. Until 1906, no legislation was forthcoming, and the executive and judicial bodies were left to their own inadequate devices. Foreign military service, positions in foreign governments, voting in foreign elections, foreign residence, and taking oaths of allegiance to other governments were not considered expatriating unless they required renunciation of American citizenship.³⁹ Nonetheless, the Executive practice was to withhold diplomatic protection in many of these circumstances.⁴⁰

The major force that has militated for expatriation against the will of the citizen has been the State Department, which has always felt that it was not theoretically consistent to withhold diplomatic protection from a citizen.⁴¹ It is difficult to understand just what this means.⁴² Certainly withholding protection is no more inconsistent with citizenship than is disfranchisement.

This theoretical position had its origin in the principle that all citizens should be treated equally, whether they were naturalized or native-born. The State Department has not recognized that it is consistent to hold that citizens may not be treated differently because of origin, but may be treated differently because of their actions. The Act of 1868 declared that "All naturalized

35 115 U.S. 487 (1885).

36 Act of July 27, 1868, REV. STAT. §§ 1999, 2000, 2001 (1875) (latter two sections now 22 U.S.C. §§ 1731, 1732 (1958)).

37 See CONG. GLOBE, 40th Cong., 2d Sess. *passim* (1868).

38 It is important to note that this bill would not have expatriated those citizens. It would merely have withheld diplomatic protection from them. "Such citizen would merely not be entitled to the interposition of the Government on his behalf." CONG. GLOBE, 40th Cong., 2d Sess. 783 (1868).

39 TSIANG, *op. cit. supra* note 5, at 101-03, and nn. 29-38.

40 TSIANG, *op. cit. supra* note 5, at 51, 71-72, 75-79, 95-96, 98, 103, 108; Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 40, 43 (1950); BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* §§ 315-80.

41 Letter of June 1, 1938, from Cordell Hull, Secretary of State, Homer Cummings, Attorney General, and Frances Perkins, Secretary of Labor, to the President, transmitting proposals for what became the Nationality Act of 1940, 54 Stat. 1137. *Hearings on H.R. 6127, Superseded by H.R. 9980, Before the House Committee on Immigration and Naturalization*, 76th Cong. 1st Sess. 407-10 (1940).

42 See 10 OPS. ATT'Y GEN. 382, 408 (1862): "Those who most indulge in the assumption that to constitute a citizen at all, the person must have all the privileges and immunities which any citizen can enjoy, rarely venture to specify precisely what they mean."

citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.⁴³ This is not to say that *no* citizen may be denied protection in appropriate circumstances. Despite its theoretical position, the State Department has been consistent in practice in denying protection to certain citizens.

By the beginning of the twentieth century, four separate concepts of expatriation had developed: that of disfranchisement imposed on the felon; that of denial of diplomatic protection to those who incurred obligations to a foreign country or whose residence in the foreign country was itself disapproved; that of the right of a citizen to sever his ties with his native land in order to take on a new citizenship; and that of the merging of the wife's legal person with her husband's.⁴⁴ The Act of 1906⁴⁵ was designed to further the aims of the second. It declared that those naturalized citizens who had returned to their native lands to take up permanent residence within five years after naturalization in the United States were *prima facie* presumed to have acquired their naturalization fraudulently. The concept of denaturalization is quite distinct from that of expatriation. Denaturalization is based on the theory that one never actually was a citizen; that the alien had been treated as a citizen because of his fraudulent misrepresentations, but that his naturalization was void *ab initio*.⁴⁶ Thus, the Act of 1906 provides no theoretical precedent for imposition of involuntary loss of citizenship.

Executive agitation for legislation to detail methods by which a citizen could effect his expatriation from the United States resulted in the Act of 1907.⁴⁷ This Act provided that a citizen could expatriate himself by becoming naturalized in or taking an oath of allegiance to a foreign country. It limited this grant of freedom to expatriate oneself by forbidding such expatriation in wartime, in order to prevent the abuses feared by Hamilton and Jefferson. In addition, the Act codified the common law notion that a woman who married an alien took on her husband's nationality, and it provided a means for such a woman to resume her American citizenship when the marriage terminated. Section 2 of the Act declared that:

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen. . . .⁴⁸

This provision was designed to permit the State Department to withhold diplomatic protection from naturalized citizens who resided abroad, but who could not be denaturalized under the Act of 1906 since their residence abroad occurred so long after naturalization that they could not be presumed under that Act to have acquired their citizenship fraudulently.⁴⁹ Essentially it provided naturalized citizens with a means to expatriate themselves if that was their desire.

43 REV. STAT. § 2000 (1875) (now 22 U.S.C. § 1731 (1958)).

44 See *Perez v. Brownell*, 356 U.S. 44, 69 n. 20 (Warren C.J. dissenting) (1958).

45 Act of June 29, 1906, §15, 34 Stat. 601 (now 8 U.S.C. 1451(d) (1958)).

46 See note 135 *infra*.

47 Act of March 2, 1907, 34 Stat. 1228.

48 *Ibid.*

49 41 CONG. REG., Part 2, 1464-66 (1907).

If they did not intend to give up their citizenship, they could rebut the presumption easily, either by returning to the United States,⁵⁰ or by declaring allegiance to the United States while still abroad.⁵¹ Certainly the provision did not deprive a naturalized citizen of his citizenship against his will.⁵²

B. SUPREME COURT DECISIONS

The first significant Supreme Court decision with which we are concerned was *Mackenzie v. Hare*,⁵³ in 1915. Mrs. Mackenzie, a native American, had married a citizen of Great Britain in 1909. She had continuously lived in the United States with him. When she applied for registration as a voter in 1913, her application was refused on the ground that she was no longer an American citizen — that she had lost her citizenship in accordance with the Act of 1907. The Court affirmed the denial of her petition for mandamus. The opinion is difficult to assess, and it has been interpreted in more than one way.⁵⁴ The holding can be said to be that the Government may take away one's citizenship against his will to avoid international embarrassment, and to achieve certain domestic purposes. However, the language of the opinion contains important qualifications.

First, this is a status that is distinct from total loss of citizenship. It is temporary. The Court said that as long as her marriage lasts "it is made tantamount to expatriation" and that her act "is as voluntary and distinctive as expatriation."⁵⁵ Second, the Court's concept of "voluntary" is ambiguous. The Court said that "it may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences."⁵⁶ This language makes no sense. The Court characterized her expatriation voluntary because her marriage was voluntary, and because she was aware of the consequences attached. Since one must always be assumed to know the legal consequences of an act, one may call imprisonment for robbery voluntary incarceration by the same rationale.⁵⁷ Under the Court's analysis, the only expatriation that would be involuntary would be that attached to an act performed under duress, or expatriation decreed by legislation to be made conditional on something other than an act of the citizen. Perhaps an example of the latter would be expatriation of a woman who married a citizen who became an alien while she was still married to him.

The Court's problem was that the status of women had changed so as to give them a legal identity other than that of their husband's, while the common law lagged behind. In this case it was the right to vote that confused the Court.

50 28 OPS. ATT'Y GEN. 504 (1910).

51 In *United States v. Gay*, 264 U.S. 353, 358 (1924), the Court characterized the presumption as being one that it is "easy to preclude, and easy to overcome. It is a matter of option and intention."

52 41 Cong. Rec., Part 2, 1464-66 (1907).

53 239 U.S. 299 (1915).

54 *Perez v. Brownell*, 356 U.S. 44 (1958). Compare the majority opinion of Justice Frankfurter, 51-52, 61-62, with the dissenting opinion of Chief Justice Warren, 69-73.

55 239 U.S. at 312.

56 239 U.S. at 311-312.

57 See note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1179 (1955).

The common law principle of identity of husband and wife raised a problem concerning diplomatic protection. The wife had no legal rights apart from her husband, so that giving her protection would mean giving her husband protection from his own country. The Court ought to have interpreted the Act as withholding diplomatic protection only. Certainly there was no reason to deprive a woman of the vote. The right to vote being a peculiarly personal one, the principle of identity of husband and wife was inapplicable. However, the Court, whether right or wrong, established the principle that one could be deprived of all of the rights of his citizenship involuntarily, if only temporarily.

With the *Mackenzie* case as precedent, the Court held in *Savorgnan v. United States*⁵⁸ that one who obtained citizenship in a foreign country would lose her American citizenship against her will under the Act of 1907 and under its successor, section 401(a) of the Nationality Act of 1940.⁵⁹ In 1940, Mrs. Savorgnan had married an Italian citizen. Since he was an official in the Italian Foreign Ministry, he had to have permission to marry her. In order to get this permission, his bride-to-be had to apply for Italian citizenship. The District Court found that she believed that her application was only a technical matter, and that it would have no effect on her American citizenship.⁶⁰ In 1941, she accompanied her husband to Italy where she lived with him until 1945. On her return to this country in 1945, she brought an action to declare her citizenship in the United States. The District Court held that she was an American citizen since she at no time had the intention of expatriating herself.

The Supreme Court's decision reversing this holding did not conform to the theoretical purpose of the Act of 1907, which was to permit citizens to expatriate themselves if they wished to do so. The legislative purpose of the Act of 1940 was more ambiguous, however. Although it was considered an extension of the Act of 1907, there is good evidence that the purpose of the provision was quite different — that it was intended to prevent dual citizenship.⁶¹ As in the *Mackenzie* case, the Court did not go so far as to admit that it was upholding involuntary loss of citizenship. It stressed the fact that she had "voluntarily and knowingly sought and obtained Italian citizenship."⁶² Yet the holding of the Court established the position that the United States could call on the power to regulate foreign affairs — here exercised to prevent dual citizenship — to impose loss of citizenship against a citizen's will.⁶³ Recognizing the historical and constitutional objections to such a result, the Court attempted to provide a framework that would make its decision sound less extreme:

[T]he acts upon which the statutes expressly condition the *consent* of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that

⁵⁸ 338 U.S. 491 (1950).

⁵⁹ Now 8 U.S.C. § 1481(a)(1).

⁶⁰ *Savorgnan v. United States*, 73 F. Supp. 109, 110-111 (D.C. Wis. 1947).

⁶¹ *Hearing to Revise and Codify the Nationality Laws of the United States Before the House Committee on Immigration and Naturalization*, 76th Cong., 1st Sess. (1939).

⁶² 338 U.S. at 502.

⁶³ In a concurring opinion in *Nishikawa v. Dulles*, 356 U.S. 129, 138-139 (1958), Justices Black and Douglas expressed the opinion that if the *Mackenzie* and *Savorgnan* cases stood for this principle, they were "inconsistent with the Constitution and cannot be regarded as binding authority."

the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.⁶⁴

The absence from the provisions of the present expatriation statutes of a rule that one who obtains foreign nationality by marriage loses her American citizenship may reflect a recognition by Congress that the act of obtaining foreign nationality in such a situation is not a voluntary one. That Mrs. Savorgnan's choice, of applying for citizenship in Italy or losing a potential husband, was a form of duress was apparently not argued,⁶⁵ though it had been found that her application for foreign citizenship did not reflect a transfer of allegiance.⁶⁶

The issue of intent has bearing here for another reason. If in fact Mrs. Savorgnan had not intended to give up her American citizenship, her application for Italian citizenship was fraudulent, and she may never have become an Italian citizen except through her marriage itself.⁶⁷ Since expatriation was decreed only when a citizen actually became naturalized in a foreign country, the Court should have determined whether, under Italian law, her naturalization was void. In these circumstances, fraudulent expatriation poses little danger to the United States. Here, it was a fraud against Italy, not the United States. Had Mrs. Savorgnan registered her expatriation by the methods provided by 8 U.S.C. § 1481(a)(6),(7) — that is, by making a formal declaration to a United States official — perhaps then she should not have been allowed to claim her act was fraudulent without subjecting herself to the penalties of perjury.

The dangers to the United States of fraudulent action such as that of Mrs. Savorgnan consist of administrative confusion and possible international conflict in the event that the citizen returns to the country he has defrauded and that country takes action that is incompatible with American citizenship. There seems to be no reason why the latter can not be avoided merely by refusing the protection of the United States to the citizen⁶⁸ — at least until he has formally severed his relationship with that country in accordance with its laws. As for the administrative problem, the most convenient practice for keeping track of citizens would be that of recognizing *only* intentional expatriations, and only then when official notice thereof is provided by the expatriate. There-

64 338 U.S. at 499-500. (Emphasis added.) Consent of the government implies petition by the citizen.

65 In dismissing Mrs. Savorgnan's argument that she acted involuntarily, the Court summarily referred to and dismissed the duress point. 338 U.S. at 502 n. 18. The court apparently did not consider the argument that her act was involuntary because she had no real choice.

66 See note 60, *supra*.

67 See 8 U.S.C. § 1489. This point was raised in an amicus brief, Brief for Amicus Curiae (Revedin), pp. 6-7, but was not discussed by the Court. It is essentially the converse of *Knauer v. United States*, 328 U.S. 654 (1946), where the Court held that Knauer had fraudulently sworn allegiance to the United States, and that therefore he was not a citizen of the United States, implying that he had not in fact renounced his German citizenship, and was therefore still a German citizen.

68 This was the practice under the Act of 1907 in regard to residence abroad, 28 Ops. ATT'Y GEN. 504 (1910); *Camardo v. Tillinghast*, 29 F.2d 527, 530 (1st Cir. 1928); and was the practice generally before that, see Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 40, 43 (1950); Letter from Secretary of State to Minister of France (1873) 1 FOREIGN REL. U. S. 256, 259; Secretary of Navy Robeson to President Grant, (1873), 2 FOREIGN REL. U. S. 1211, 1214; TSIANG, *op. cit. supra* note 5, at 98, 102-103, 108. But see Act of 1868, REV. STAT. 2000, 2001, (now 22 U.S.C. §§ 1731, 1732), requiring the President to provide diplomatic protection to *all* citizens. These provisions have been ignored.

fore, it appears that there is neither statutory nor rational justification for the Government's position in the *Savorgnan* case that "whether petitioner's Italian naturalization is or is not cancelable for fraud . . . is a matter . . . into which American courts have no duty or right to inquire."⁶⁹ If they do not so inquire, the effect on the individual could well be to leave him stateless.⁷⁰ This was certainly not the intent of Congress.

The element of intent in effecting expatriation was treated in a considerably different manner in *Kawakita v. United States*.⁷¹ Kawakita was a national of both Japan and the United States at birth. At the start of World War II, he was in Japan. Under claim of American citizenship, he returned to the United States after the war. When he was later tried here for treason, he claimed that he had expatriated himself under section 401 of the Nationality Act of 1940.⁷²

Kawakita's major contention was that he had expatriated himself under section 401(b) ("Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state") by registering as a citizen in the Koseki, a family census register. At the same time, he changed his registration with the police from that of an alien to that of a citizen, and performed several other similar acts. He faced the east each morning and paid his respects to the Emperor. He testified that between 1943 and 1945 he felt no allegiance to the United States.

The Court pointed out that these acts were ambiguous, and said that:

The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries. . . . *The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other.* In this setting petitioner's registration in the Koseki might reasonably be taken to mean no more than an assertion of some of the rights which his dual citizenship bestowed on him.

* * *

If what petitioner now says were his thoughts, attitudes, and motives in 1943 and 1944 and in part of 1945, he did intend to renounce his American citizenship. If [that] . . . were believed by the jury, the signing of the family register, and the changing of his registration at the police station and at the University would assume different significance; those acts might then readily suggest the making of a declaration of allegiance to Japan within the meaning of § 401(b).⁷³

Essentially what the Court has held here is that for a citizen (at least for a citizen with dual nationality) to expatriate himself by taking an oath of allegiance to another country, *he must intend* to renounce his allegiance to the

69 Brief for Respondents, p. 45 n. 25, *Savorgnan v. United States*, 338 U.S. 491 (1950). 8 U.S.C. § 1481 (a)(1) calls for expatriation only upon *naturalization* in a foreign country, and this, of course, depends on foreign law.

70 Mrs. Savorgnan would escape this fate since her Italian nationality is ensured by her marriage. See U.N. COMMISSION ON THE STATUS OF WOMEN, NATIONALITY OF MARRIED WOMEN 49 (1954). If German law were the same as American law, Knauer would have been stateless.

71 343 U.S. 717 (1952).

72 54 Stat. 1137, 1168.

73 343 U.S. at 723-24, 726. (Emphasis added.)

United States; and that his "thoughts, attitudes, and motives" bearing on his intent are to be determined by the trier of fact.

To say that this opinion is difficult to reconcile with *Savorgnan v. United States* would be an understatement.⁷⁴ *Savorgnan* is cited only once and on a different point. There are, however, two possible grounds on which to distinguish the cases: 1) *Kawakita* may hold that where the alleged expatriating act is unclear, the citizen's intent will be decisive; 2) The Court may have been attempting to fashion a different rule for dual nationals.⁷⁵

This case serves to emphasize the weakness of the expatriation statutes. Had *Kawakita* originally been a citizen of only the United States, he would have been considered expatriated; had he voted in an insignificant local election, he would have been expatriated;⁷⁶ had he been working for the Japanese Government directly, rather than through a private employer, at the same work, he would have been expatriated.⁷⁷ There is no rational justification for such a result. Indeed, it would be something of a delight to hear an argument that a citizen had expatriated himself by voting in an election during war in an enemy country after the decision of *Perez v. Brownell*.⁷⁸ Yet the statute unequivocally declares such an act to effect loss of citizenship.

It seems to follow from the foregoing discussion that if foreign naturalization and the taking of an oath to a foreign nation are to be considered devices through which the Government allows one to effect his expatriation, then intent to expatriate must be read into them as a required condition. If, however, the purpose of these provisions is to eliminate the problems caused by dual nationality and divided allegiance, they should be treated only as permitting the State Department to withhold diplomatic protection.

The next case before the Court was *Gonzales v. Landon*.⁷⁹ The Court held that in order to expatriate a citizen under section 401(j) of the Nationality Act of 1940, the Government must prove through clear, convincing and unequivocal evidence that the citizen had remained outside the country to avoid military service. The Government has stated that, "This standard of proof is comparable to that applied in a criminal case. . . ."⁸⁰

The next cases decided by the Court were decided together in 1958. In *Nishikawa v. Dulles*,⁸¹ the Court held that the standard of proof declared necessary in the *Gonzales* case also applied to the proof under 8 U.S.C.

74 For a square holding on the oath provision in a case in which the facts were nearly identical with those in *Savorgnan*, see *Revedin v. Acheson*, 194 F.2d 482 (2d Cir.), cert. denied, 344 U.S. 820 (1952).

75 *Jalbuena v. Dulles*, 254 F.2d 379 (3d Cir. 1958), held that an oath of allegiance to the Philippine Islands did not effect the expatriation of one who was a national of that country and the United States. "[C]onduct merely declaratory of what one national aspect of dual citizenship necessarily connotes, cannot reasonably be construed as an act of renunciation of the other national aspect of the actor's dual status." *Id.* at 381 (citing *Kawakita v. United States*). The case is criticized in Note, *Expatriating the Dual National*, 68 YALE L.J. 1167 (1959).

76 *Quaere* whether voting is not in the same class as the oath for a dual national?

77 The Nationality Act of 1940, § 401(d), now 8 U.S.C. § 1481(a)(4)(A) specifies its application to dual nationals.

78 356 U.S. 44 (1958).

79 350 U.S. 920 (1955).

80 Brief for Appellant, p. 52, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term.

81 356 U.S. 129 (1958).

§ 1481(a)(3) that a citizen had *voluntarily* entered the armed forces of another country. During World War II, Nishikawa, a national of both the United States and Japan, had been drafted into the Japanese army. The question centered on whether he could have avoided the draft. Since the proof never reached the required level, the Court was not forced to reach the question of the constitutionality of the provision itself.⁸²

In *Perez v. Brownell*,⁸³ the Court held that a citizen could be expatriated against his will under 8 U.S.C. § 1481(a)(5) for voting in a foreign political election. Perez was born in the United States in 1909, and lived here until he was 10 or 11 years old. He then moved with his parents to Mexico, where he lived until 1943. He was aware of his duty as an American citizen to register for the draft, but failed to do so. In 1943 and 1944, he gained admission to the United States as a Mexican citizen. In 1947 he applied for admission again, this time as an American citizen. He was ordered excluded on the ground that he had expatriated himself, when he admitted having remained outside of the United States to avoid military service⁸⁴ and having voted in political elections in Mexico. In 1952 Perez again entered the United States as a Mexican citizen. In 1953 he surrendered to immigration authorities who ordered him deported as an alien not in possession of a valid immigration visa. In 1954 he brought suit for a judgment declaring him to be an American citizen.

Justice Frankfurter's majority opinion in the *Perez* case is a model of clarity. After examining the history of the subject, he asked on what source of power Congress drew, and answered that it was the power to regulate foreign affairs. He then stated a fundamental conception of the nature of the legislative power:

Broad as the power in the National Government to regulate foreign affairs must necessarily be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with other nations. Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution. More simply stated, the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs. The inquiry—and, in the case before us, the sole inquiry—into which this Court must enter is whether or not Congress may have concluded not unreasonably that there is a relevant connection between this fundamental source of power and the ultimate legislative action.⁸⁵

This passage tells us that the only limitation on legislative action is that Congress must reasonably believe it was not acting arbitrarily. It is difficult to imagine this restriction's being applied with "vigor." The test is whether Congress itself thinks it acted arbitrarily, not whether it actually did or not. Seemingly one

⁸² This provision was held constitutional in *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962).

⁸³ 356 U.S. 44 (1958).

⁸⁴ The Court found it unnecessary to consider whether Perez could be expatriated for draft evasion.

⁸⁵ 356 U.S. at 58.

will always be able to find that Congress thought it was not acting arbitrarily. The Court may only inquire into whether Congress' conclusion was reasonable — or, rather, not unreasonable.

From here on in it is easy sledding:

We cannot deny to Congress the reasonable belief that [serious embarrassments] . . . might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy.⁸⁶

In addition, Justice Frankfurter brought in the fact that voting has been interpreted by Congress "not irrationally" as evidence of a divided allegiance.⁸⁷

The last argument cannot be taken as more than an aside. Justice Frankfurter would certainly not raise this one sentence to the dignity of a holding without further discussion. To hold that Congress may expatriate one for having a "less than complete and unswerving allegiance to the United States"⁸⁸ would be too important a pronouncement to be delivered without what might pass for a reasoned elaboration. Perhaps this sentence was placed in the opinion to avoid ignoring completely the true congressional purpose and the major argument of the Government.⁸⁹

There is no doubt but that legislative history shows clearly that it was just this question of allegiance that was the determining fact to Congress.⁹⁰ Justice Frankfurter tried to sidestep this fact, after recognizing it, by citing the international embarrassments that were the target of the Act of 1907. This will not do, for the problem in 1907 concerned the protection sought by citizens abroad who owed duties to foreign governments and *refused* to take part in the affairs of the foreign countries — specifically, refused to perform required military service. Nor did the argument of the Government even mention the kind of international embarrassments that worried Justice Frankfurter.⁹¹ In fact, the Government relied primarily on the issue of the case that was not decided — draft-evasion — and gave the entire area of voting in a foreign election only

86 *Id.* at 59.

87 *Id.* at 60-61.

88 *Ibid.*

89 The argument is also relevant to a due process analysis.

90 It seems clear that the provision concerning voting was directed specifically at those German-Americans who had voted in the Saar elections. *Hearings on H.R.6127 Before the House Committee on Immigration and Naturalization*, 76th Cong., 1st Sess., pp. 286-87. See 356 U.S. at 54-56, 73-76.

91 Conduct by an American such as taking an oath of allegiance to another country . . . or serving in its army . . . or working for its government . . . or the commission of an act of treason . . . and even voting in a foreign political election . . . may very well lead to embroilment or conflict between the foreign state and this country over the duties and obligations of the American who has performed such acts. *Since the other nation has an obvious claim upon him, as does this country, the possibility of serious controversy is ever-present.*

Brief for Respondent, p. 33. *Perez v. Brownell*, 356 U.S. 44 (1958). (Emphasis added.)

one paragraph in its brief,⁹² and one paragraph in its supplemental brief on reargument.⁹³

The proposition that by voting in a foreign election, or serving in a foreign army, one may be unwittingly promoting a course of conduct contrary to the interests of the United States is not one on which expatriation should be based. That argument was not suggested by the Government. Even if there were substance to the notion that the United States may expatriate those who promote a course of conduct contrary to the interests of the United States, it is questionable whether the expatriation provision should be effective against those who *promote* the interests of the United States. These questions are difficult ones, and it cannot be that Justice Frankfurter would pass on them without considering them more carefully. His argument can be taken only as rather loose dictum, and should not be considered in any way as precedent.

Justice Frankfurter's basic rationalization is that our Government can be embarrassed by the citizen's vote being interpreted by the foreign government and its people as the action of the United States or a reflection of United States policy, and that Congress, under its power to regulate foreign affairs, may remedy this danger by providing for the alienation of such citizen. If the foreign government permits the alien to vote, it will not feel that his voting is meddling.⁹⁴ If the ballot is a secret one, no one will be able to say that the American's vote was an expression of American policy because the vote will not be known. Even if the vote is open, it would seem unlikely that anyone would take the vote to represent American policy unless American policy were already well known, as it was in the case of the Italian elections of 1946 and 1948. Furthermore, section 1481(a)(5) would apply in war, and one could not very well say that an American voting in an enemy country would increase international friction. Had Kawakita, for example, voted in a local Japanese election in 1942, he would have escaped punishment for treason.⁹⁵ Surely this result would *not* be "not unreasonable." And, of course, there are the arguments well made by the dissenters in *Perez* that there is much greater harm possible from speeches and writings.⁹⁶

In summary, Justice Frankfurter's argument is that Congress' power to regulate foreign affairs justifies the expatriation of one voting in a foreign political election because Congress could believe, not unreasonably, that: a) the foreign government will be upset at American meddling despite its permitting it; and b) in the case of an open ballot the vote will be taken to reflect official American foreign policy when that policy is not otherwise public. The fact that these results will be possible only in very limited circumstances, and will be clearly impossible in the vast majority of cases, does not seem to Justice Frankfurter to be relevant. He gave no indication that the Court would examine each case to determine whether the possibilities were in fact present. The

92 *Id.* at 39. The emphasis on the evil of divided allegiance is stressed.

93 Supplemental Brief for Respondents on Reargument, p. 6, *Perez v. Brownell*, 356 U.S. 44 (1958).

94 This would also be true for a dual national voting in his other country.

95 *But see* notes 73, 75-76 *supra*.

96 356 U.S. at 81-82 (dissenting opinion). The Constitution protects the right to speak and write, but voting in a foreign election is not protected activity.

decision, however, must be taken to include all cases, including those in which the United States has urged its citizens to vote, those of the dual citizen, and those of the citizen voting in a country with which we are at war. The only standard being applied with "vigor" is the standard that the Court will in no circumstance declare legislation unconstitutional.

Chief Justice Warren, dissenting in the *Perez* case, maintained the position that Congress does not have the power to take away citizenship; that Congress can only acquiesce to the wishes of a citizen to expatriate himself, and provide rules to regulate the exercise of the right. He explained *Mackenzie v. Hare* and *Savorgnan v. United States* on that basis: "The precise issue posed by Section 401(e) [now 8 U.S.C. § 1481(a)(5)] is whether the conduct it describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship."⁹⁷ The Chief Justice agreed that voting could in some instances provide evidence that there had been a transfer of allegiance, but he felt that:

The fatal defect in the statute . . . is that its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. In specifying that any act of voting in a foreign political election results in loss of citizenship, Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship.⁹⁸

Justice Douglas, while agreeing with the Chief Justice, felt it necessary to emphasize the dangerous implications of the decision. He pointed out that much greater chance of international friction arises from those who advocate certain policies, visit proscribed countries, or trade with countries under a ban. He stated that the right to citizenship granted by the fourteenth amendment can only be lost by waiver by a "voluntary act" which has "a sufficient relationship to the relinquishment of citizenship," and that *Perez's* act of voting abroad did not have the latter quality.⁹⁹ Justice Whittaker, on the other hand, agreed with the majority that Congress could provide for expatriation to prevent international friction, but believed that the provision was too broad since it covered all voting, not just that which threatened to cause such friction. Moreover, he felt that the provision was too broad since voting in a foreign election per se "cannot reasonably be said to constitute abandonment or any division or dilution of allegiance to the United States."¹⁰⁰

It would seem that there is little, if any, danger to the United States from the possibility that those voting in foreign elections will create international friction.¹⁰¹ There is no evidence that it has ever in fact caused such difficulty, nor is there any basis for believing that it might cause harm in the future. The voting provision was sustained on a rationale which was not based on fact, legislative intent, or executive argument. It was based

⁹⁷ 356 U.S. at 75 (dissenting opinion).

⁹⁸ *Id.* at 76.

⁹⁹ *Id.* at 82-83.

¹⁰⁰ *Id.* at 85.

¹⁰¹ The same arguments apply to 8 U.S.C. § 1481 (a)(4), prescribing expatriation for holding public office in a foreign country. The conflict of interest created would be a personal one, and would not tend to create international friction unless the American hid his American citizenship, was found out, and accused of being a spy or of subverting the foreign government under instructions of the United States.

solely on a theoretical possibility devised for the occasion by five Justices. Undoubtedly the dramatic neatness of its operation was appealing: it is the citizenship that causes the harm; cut off the citizenship and magically the harm is gone.¹⁰² However, this seems to be using too large an instrument to attack a small problem. Whatever danger might in fact exist could be deterred by threat of criminal action.¹⁰³

In *Trop v. Dulles*,¹⁰⁴ the Court held that section 401(g) of the Nationality Act of 1940¹⁰⁵ provided an unconstitutional punishment. During World War II, Trop had escaped from a military stockade in Casablanca in an attempt to rejoin his company. Within 24 hours, he was picked up as he was returning to the stockade. He was then convicted by a court-martial of desertion, sentenced to forfeiture of pay and allowances, imprisonment, and a dishonorable discharge. In 1952, Trop's application for a passport was refused on the ground that he had lost his citizenship. In 1955 he sued for a judgment declaring that he was a citizen.

The first problem of the Court was to determine whether the purpose of the provision was penal or remedial in nature. According to the statutory provision, expatriation is to be imposed on a deserter only after he has been convicted of desertion in a proper criminal proceeding. The criminal procedure prescribed provides evidence that Congress intended the sanction of expatriation to be penal. However, the evidence is not conclusive. A regulatory device based on the fact of criminality is consistent with a criminal procedure. Thus, if expatriation meant disfranchisement, it would not be penal.

The dissenters, in an opinion by Justice Frankfurter, found that, "there is nothing on the face of this legislation or in its history to indicate that Congress had a [penal] . . . purpose. . . ." ¹⁰⁶ As Justice Frankfurter pointed out, section 401(g) is a direct descendant of the Act of 1865.¹⁰⁷ That Act, however, provided that expatriation (loss of the rights of citizenship) was to be imposed "in addition to the other lawful penalties of the crime of desertion from the military or naval service." In *Huber v. Reily*,¹⁰⁸ it was held that expatriation could only follow a criminal conviction, and that decision was referred to approvingly by the Supreme Court in *Kurtz v. Moffit*.¹⁰⁹ It seems clear from the legislative history that when Congress passed the Nationality Act of 1940, it adopted the holding of *Huber v. Reily*, and for that reason wrote into the provision the requirement of prior criminal conviction.¹¹⁰ If the Act is treated as imposing only disfranchise-

102 If the need to avoid friction with foreign countries is so great, could Congress not expatriate any citizen who creates such friction? The fact that the voter was singled out for expatriation is evidence that the question of allegiance, rather than the regulation of foreign affairs, was the determinative one for Congress.

103 See p. 35 *infra*.

104 356 U.S. 86 (1958).

105 Now 8 U.S.C. § 1481(a)(8).

106 356 U.S. at 125.

107 13 Stat. 487. See note 17 *supra* and accompanying text.

108 53 Pa. 112 (1866).

109 115 U.S. 487 (1885).

110 The committee report on which the Act was based stated that the Act "technically is not a penal law," but that 401(g) was "distinctly penal in character." CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, 76th CONG., 1st SESS. 68 (Comm. Print 1939).

ment, the prescribed criminal procedure would be consistent with a nonpenal purpose.

But the dissenters found a different nonpenal purpose:

It is not for us to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens.¹¹¹

This purpose is not in fact nonpenal. It does not provide for compensation for the harm done by the criminal act. Nor is it a regulation of future conduct based on the danger of irresponsible action. It represents only the policy behind the enforcement of criminal statutes generally—that it is debilitating to the rest of society if the criminal is not adequately punished.

C. PENDING CASES

One of the purposes of the Act of 1865 was to eliminate the friction caused by draft evaders who fled to other countries and demanded the protection of the United States whom those countries sought to conscript them. In the cases of *Kennedy v. Mendoza-Martinez*,¹¹² and *Rusk v. Cort*,¹¹³ the Government has tried to justify the expatriation of draft evaders under section 401(j) of the Nationality Act of 1940¹¹⁴ as regulation of foreign affairs. The argument of the Government is disingenuous. In 1865, the danger came from the intervention of the United States to protect these “unworthy” citizens. The Government’s argument now is that danger might result from a conflict between nations when the United States demands that the other country give the draft evader up. This is particularly dangerous, the argument continues, in the case of the dual national. The country of refuge will have an interest in the draft evader, since he will also be a citizen of that state, and may not want to give him up due to its attachment to him. In the case of Mexico—the country involved in the *Mendoza* case—the danger is particularly great since we have a treaty with Mexico providing that neither country need give up such persons to the other. Thus, the implication is that the United States might be led to attack Mexico in violation of its treaty. Why such precipitous action? The Government’s answer is that the United States cannot wait to get its hands on the draft evader until after the war since it must fill up its armed force.¹¹⁵

The inadequacies are obvious: 1) even if we got the evader back, he would probably only go to jail; 2) we would not get him back at all if we expatriated him; 3) the danger comes not from the citizen’s being in Mexico, but from the United States’ violation of international law. The District Court

¹¹¹ 356 U.S. at 122.

¹¹² 192 F.Supp. 1 (S.D. Cal. 1960). Now before the Supreme Court, No. 2, 1962 Term.

¹¹³ 187 F.Supp. 683 (D.D.C. 1960). Now No. 3, 1962 Term.

¹¹⁴ 54 Stat. 1168, as amended, 58 Stat. 746 (1944), now 8 U.S.C. § 1481 (a)(10).

¹¹⁵ Brief for Appellants, pp. 11, 19-27, *Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960). This argument is obviously an attempt to fit an awkward factual situation into the form suggested by Justice Frankfurter—the power to regulate foreign affairs, as suggested in *Perez v. Brownell*, 356 U.S. 44 (1958), and the war power, as suggested in *Trop v. Dulles*, 356 U.S. 86, 114 (1958) (dissenting opinion).

was not swayed by the arguments of the Government and held section 401(j) unconstitutional,¹¹⁶ on the authority of *Trop v. Dulles*.

There is ample evidence to show that the force behind the adoption of the provision declaring expatriation for those who seek refuge from the draft by leaving the country is the notion that they are unworthy of American citizenship.¹¹⁷ In *Mackey v. Mendoza-Martinez* the Government argued, under the rubric "The Inherent Rights of Sovereignty," that when a citizen puts himself physically outside American criminal jurisdiction, "he repudiates his . . . obligation as a citizen to submit to this country's jurisdiction and authority," and that "such a withdrawal is so basic that all other aspects of citizenship can rightly be made to fall with it."¹¹⁸ The argument continued:

Effective jurisdiction can properly be considered as a necessary concomitant of citizenship. The Fourteenth Amendment itself makes it a prerequisite to citizenship that the person be "subject to the jurisdiction" of the United States. Regardless of the crimes with which an individual may be charged, so long as he remains within the reach of our law enforcement agencies, within the enforceable reach of the process of our courts, his act does not strike at the very foundation of his relationship with his government, and with his fellow-citizens, in so drastic a manner as does the act of one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law. If citizenship is a relationship comparable to a mutual compact . . . , the fundamental articles of that agreement are the submission of the citizen to the jurisdiction of lawfully constituted government, and the agreement of the government to proceed within the confines of the powers delegated to it. The withdrawal of the individual from the most basic of the elements of that agreement terminates the contract. At that point, dissolution of his ties to the nation cannot be deemed arbitrary.¹¹⁹

116 *Sub nom.* *Mendoza-Martinez v. Rogers*, 192 F. Supp. 1 (S.D. Cal. 1960).

117 See pp. 4-5 *supra*, for the reasons behind the original passage of the provision in the Act of 1865. The present provision, first passed in 1944, was recommended by Attorney General Biddle. In his letter to Congress, he stated that: "Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any of the existing grounds." H. R. REP. No. 1229, 78th Cong., 2d Sess. 2-3 (1944). Justice Brennan's treatment of section 401(g) in *Trop v. Dulles* is directly applicable:

[T]he Government argues that the necessary nexus . . . is to be found in the idea that legislative withdrawal of citizenship is justified in this case because *Trop's* desertion constituted a refusal to perform one of the highest duties of American citizenship — the bearing of arms in a time of desperate national peril. It cannot be denied that there is implicit in this a certain rough justice. He who refuses to act as an American should no longer be an American — what could be fairer? But I cannot see that this is anything other than forcing retribution from the offender — naked vengeance. *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (concurring opinion).

118 Brief for Appellants, pp. 27-28, *Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960). The "Rights of Sovereignty" rubric now appears at p. 47 of the Government's brief in *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term.

119 *Id.* at 29. (Footnotes omitted.) The argument could apply to all criminals (even those who are only alleged criminals) who seek refuge abroad from prosecution. Certainly Kawakita would have had a greater claim to expatriation if this argument were valid. If expatriation is imposed because criminal jurisdiction is lacking, the acquiescence of the Government in the re-establishment of criminal jurisdiction should serve to effect repatriation.

The Court did remand this case to the District Court for a determination of whether the conviction for draft evasion stopped the Government from alleging expatriation. 362 U.S. 384 (1960). However, the issue was only whether the conviction was an adjudication

If the Government's argument is not meant literally to apply to all crimes, it will indeed be a difficult task to discover which crimes against society are crimes against its basic structure.¹²⁰ Certainly there is authority for the view that it is the duty of a citizen to submit himself to the jurisdiction of his country's courts.¹²¹ And there is no debate over whether such a citizen should be expatriated — *if expatriation means withdrawal of diplomatic protection*. However, if expatriation operates to exclude a citizen from the country when he is willing to return to face prosecution, it is absurd. And it is just this result that the Government urges in *Rusk v. Cort*. Cort was denied a passport to return to the United States from Czechoslovakia on the ground that he had remained outside the country to avoid the draft.

Neither the procedures prescribed, the form of the statute, nor the language used in the statute indicates that the provision in question, now 8 U.S.C. 1481(a)(10), was designed to impose a penalty. Historically, there was a valid remedial purpose to so much of the Act of 1865 that pertained to those draft-evaders who were naturalized citizens avoiding the draft by residing in their native countries. The provision was designed to relieve the United States from the duty of protecting them from the demands of that country.¹²² But the purposes of section 1481(a)(10) are to deprive of their citizenship those who are considered unworthy of it, and to deter draft-evasion by imposing a penalty. A sanction whose purpose is to deter is certainly a penal sanction.¹²³ It is not clear, however, which of the purposes is the dominant one. This consideration may be crucial since the statute does not provide for a criminal procedure.

In *Kennedy v. Mendoza-Martinez* and *Rusk v. Cort*, the Government has argued that section 1481(a)(10) was a valid exercise of the war power, as well as of the power to regulate foreign affairs. Its argument is that the provision was a valid exercise of the war power because:

Unlike desertion, which carries the primary sanction of court-martial and imprisonment, no similar primary check exists to *deter* those individuals who flee this country to avoid fulfilling their military obligations. Draft-evaders outside the country cannot be apprehended there and imprisoned for their departure or their failure to return. . . . [T]hey are not normally subject to extradition. Only if they return to this country after they have accomplished their purpose of avoiding service in time of danger is it possible to enforce criminal sanctions against their offense. This delayed punishment would not aid in raising an army when it is most necessary — during active hostilities. . . . Congress felt that, for the difficult task of raising a wartime army, it needed the immediate *deterrent* of loss of nationality for evasion by flight abroad. By its very nature, such evasion is always a serious offense, never a

of the citizenship status. The District Court held that it was not. 192 F. Supp. 1 (S.D. Cal. 1960). It should also be pointed out that the fourteenth amendment's reference to citizens within the jurisdiction of the United States is meant only to exclude children of enemy aliens and foreign diplomats. *United States v. Wong Kim Ark*, 169 U.S. 682 (1898).

120 Cf. Brennan, J., dissenting in *Trop v. Dulles*, 356 U.S. 86, 113 (1958).

121 Indeed, there is opinion that it is the citizen's duty to submit to the imposition of the death penalty. PLATO, *THE CRITO DIALOGUE*.

122 See pp. 4-6 *supra*.

123 See *Trop v. Dulles*, 356 U.S. 86 (1958).

technical one (as desertion may be); *a severe deterrent is appropriate.*¹²⁴

This argument cannot be squared with the Government's later argument that the provision is primarily remedial, and that its nature is not changed because it "may *incidentally* add to the deterrent effect of the prison terms or fines which may be imposed as true criminal penalties for the conduct."¹²⁵ In addition, the Government's argument that the purpose was remedial in that it sought to prevent low morale is unsound for two reasons: a) one reason for punishing antisocial acts is itself to support the morale of law-abiding citizens; and b) the Government's claim is that: "Congress could well conclude that [morale would be destroyed were it] to permit a . . . [citizen] to absent himself during a time of danger, only to return in better days to accept modest criminal penalties and then resume his place in the community. . . ." ¹²⁶ The obvious way to avoid the morale problem was to make the punishment less modest — which is what Congress did do in enacting this provision.

In *Schneider v. Rusk*,¹²⁷ petitioner has presented a challenge to 8 U.S.C. § 1484, which provides for the expatriation of a naturalized citizen who subsequently resides continuously in his native land for three years.¹²⁸ Mrs. Schneider was a national of Germany at birth. Five years later, in 1939, she came with her parents to the United States, where she lived continuously until 1954. In 1950, she became an American citizen. From 1954 to 1956, she studied abroad, returning only temporarily to the United States. In 1956, she left the United States to marry her present husband, with whom she has lived in Germany ever since. While in Germany, she had two sons who are American citizens.¹²⁹ She has never intended to give up her American citizenship, and is not a citizen of Germany, or any other country. She brought suit for a declaratory judgment after having been issued a Certificate of Loss of Nationality by the State Department.

Section 1484, whose target is the nationalized citizen living overseas, is directed at an aspect of the dual national problem dealt with in 8 U.S.C. § 1482.¹³⁰ These provisions dealing with dual nationals, naturalized citizens, and their families cannot be justified any longer on the ground that such people can create international friction. It is now too simple to settle these problems by treaty or by devising rules for withholding diplomatic protection. The State Department has resisted the latter solution's being enacted into law, though applying it in practice, as being inconsistent with citizenship. Here, however, a distinction must be made between citizenship as a relationship between the individual and the country, and citizenship that establishes a relationship between countries. It is doubtful that the State Department is still concerned

124 Brief for Appellant, pp. 45-46, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term. (Emphasis added, footnotes omitted.)

125 *Id.* at 57. (Emphasis added.)

126 *Id.* at 46.

127 No. 251, October Term, 1962.

128 See Appendix I.

129 They were born before she had lived abroad for three years. It should be noted that her residence abroad might be considered a form of duress since she would otherwise be forced to live apart from her family.

130 See Appendix I.

over the apparent inconsistency between our position that one who is naturalized in the United States should be free of his duties to his native country and the position that in some circumstances a citizen is not entitled to our protection vis-a-vis his native country. Our original position was based on the principle that one should be able to free himself from a country if he so desires. It is not inconsistent to hold that one may choose *not* to free himself.

Any individual coming within the geographic jurisdiction of any country establishes a relationship with that country which differs from citizenship only in degree. The individual must obey the laws of the country, may not attempt to overthrow the government, and may not even act so as to involve that country in international friction. As an individual resides in a country over a period of time, he establishes stronger relations with the country. Perhaps he acquires property that requires protection, for which he pays taxes. For many years the United States and its citizens have not appreciated the responsibility that a citizen has to a country in which he has various interests. Particularly in the economic sphere there has been little sense of obligation to the country that protects the investment of the citizen. This situation is changing rapidly, and with it there should be an acknowledged adjustment of the practices of the State Department in protecting United States citizens who have heavy obligations to a foreign country.

In *United States ex rel. Marks v. Esperdy*,¹³¹ the District Court held that Marks had been expatriated by reason of his service in a foreign army, under 8 U.S.C. § 1481(a)(3). Marks had served in Cuba with the Castro forces before they came to power. He was wounded and returned to the United States. After the Castro forces became the official government army, he returned to Cuba, where he commanded a unit of the army and held the rank of captain. Becoming disaffected with the Castro government, he returned to the United States. Here he was arrested and held for deportation proceedings on the ground that he was an alien who had entered the country unlawfully.¹³² He brought suit for a writ of habeas corpus claiming that he was being detained unlawfully since he was a citizen. The court held that he was no longer a citizen, but that he had not entered unlawfully since he was entitled to a judicial hearing on the issue of whether he lost his citizenship, and this had not yet taken place at the time of his entry. The writ was granted.

III. THE POWER TO IMPOSE EXPATRIATION

A. THE POWER TO WITHDRAW CITIZENSHIP

The Constitution gives Congress the power "to establish an uniform rule of naturalization."¹³³ Nowhere does it give Congress the power to take citizenship away. The cases upholding denaturalization do so on the theory that citizenship was granted on a fraudulent application, and was therefore void

¹³¹ 203 F. Supp. 389 (S.D.N.Y. 1962).

¹³² The Government also claimed that he was deportable as an alien who had been convicted of a crime involving moral turpitude. The court ruled, however, that such conduct, to permit deportation, must have been committed while petitioner was an alien.

¹³³ U.S. Const. art. I, § 8.

ab initio.¹³⁴ The Court has never held the Naturalization Article of the Constitution to imply the power to deprive one of his citizenship.¹³⁵ It certainly cannot be said that this power was considered by the founding fathers.

Citizenship is granted by the fourteenth amendment to all persons born in the United States who are subject to the jurisdiction of the United States. Congress does not have the power to deny the citizenship of such persons.¹³⁶ For three Justices, the inquiry need go no further.¹³⁷ However, the majority view has been that the fourteenth amendment does not restrict the power of Congress to take citizenship away. It has never been supported with reason by the Court.¹³⁸ The wording of the amendment is simple and straightforward. As one commentator has remarked, "surely it was not necessary to add the words, 'and shall remain citizens.'"¹³⁹

There is no historical justification for interpreting the fourteenth amendment as permitting Congress to withdraw the grant of citizenship.¹⁴⁰ The Act of 1865 did not impose expatriation as it is now conceived. The Act of 1868 *permitted* expatriation. The Act of 1906 was concerned with denaturalization. The Act of 1907 implemented the Act of 1868, and raised presumptions of intent to expatriate.

Until 1915,¹⁴¹ there were no Supreme Court holdings that loss of citizenship could be imposed. And even then, it is doubtful that the Court felt such a ruling to be necessary to its decision. The first case that can be said to approach a direct holding on the point was *Savorgnan v. United States*.¹⁴² Even there, however, the Court felt compelled to use equivocal language. The Court there avoided the fourteenth amendment problem by taking the position that foreign naturalization raises a presumption of the intent and desire to give up

134 See *Trop v. Dulles*, 356 U.S. 86, 98-99 (1958); *id.* at 126 n. 6 (Frankfurter, J., dissenting): "In the United States, denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud, see *Luria v. United States*, 231 U.S. 9, 24." The Act of Sept. 26, 1961 adds a provision for denaturalization when naturalization was "illegally procured." 75 Stat. 656, 8 U.S.C. §§ 1451(a), (b) (Supp. III, 1962). The purpose of the amendment was to avoid the necessity of proving fraudulent intent. H. R. REP. NO. 1086, 87th Cong., 1st Sess. 38-40 (1961). For the proposition that citizenship is void *ab initio* when obtained by fraud, see, e.g., *Battaglino v. Marshall*, 172 F.2d 969 (2d Cir. 1949), *cert. denied*, 338 U.S. 829 (1950).

135 *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). See note 23 *supra*.

136 *Ibid.*

137 Chief Justice Warren and Justices Black and Douglas. *Perez v. Brownell*, 356 U.S. 44, 65-66, 83-84 (1958) (dissenting opinions); *Trop v. Dulles*, 356 U.S. 86, 92 (1958) (opinion of Warren, C.J.); *Nishikawa v. Dulles*, 356 U.S. 129, 138 (1958) (concurring opinion).

138 In *Perez v. Brownell*, 356 U.S. 44, 58 n. 3 (1958), Justice Frankfurter delivered the opinion of the Court. He thought the minority idea only worth a footnote. He distinguished *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), and rested his opinion on dictum of *Perkins v. Elg*, 307 U.S. 325, 329 (1939): "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." The distinction between the power to *deny* and to *withdraw* citizenship may be that the latter requires an *act* of the citizen, the former, only a *status*.

139 Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1528 (1960).

140 At least, "denationalization as a punishment . . . was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day." *Trop v. Dulles*, 356 U.S. 86, 100-01 n. 32 (opinion of Warren, C.J.).

141 *Mackenzie v. Hare*, 239 U.S. 299 (1915).

142 338 U.S. 491 (1950).

one's citizenship, to which act the Government consents.¹⁴³ By making the presumption conclusive, the Court accomplished its sleight-of-hand trick.¹⁴⁴ The only case in which the Court has squarely held that the fourteenth amendment did not restrict congressional power is *Perez v. Brownell*,¹⁴⁵ a decision supported by neither historical, rational, nor empirical analysis.

The division of the Court is clear here. One side would deny Congress the power to withdraw citizenship because the Constitution nowhere gives it that power.¹⁴⁶ The majority view is that because the Constitution does not expressly deny Congress the power to withdraw citizenship, it may be withdrawn.¹⁴⁷ There is no reconciling this basic conflict. One can only hope to avoid it by posing the problem in other terms.

There is no question, however, that *Perez* was the first case (and, as yet, the only case) to hold squarely that loss of citizenship could be imposed for a reason other than that of implementing a citizen's desire to transfer his citizenship — the desire evidenced by the acts of the citizen.

B. WHAT IS EXPATRIATION?

Although the Court in *Perez v. Brownell* decided that *Perez* had been expatriated, it did not decide what that meant. This question was specifically reserved.¹⁴⁸ *Perez* brought the action in an attempt to head off the effect of a deportation order. Instead of bringing suit for an injunction, however, he merely asked for a judgment declaring him to be a citizen. It is difficult to understand how this could be considered a case or controversy out of the context of the threatened deportation. Had the Court declared him to be a citizen, the deportation order would have been automatically invalid. But the declaration that he was an expatriate did not settle the pressing question — whether an expatriate may be deported.

In *Trop v. Dulles*, we were treated to the spectacle of the Court's deciding whether expatriation is penal or remedial, valid or cruel and unusual punishment, or reasonable remedial regulation, without anyone's knowing what expatriation is. The Chief Justice described it as

the total destruction of the individual's status in organized society.

It is a form of punishment more primitive than torture, for it

¹⁴³ Consent implies petition.

¹⁴⁴ See p. 38 *infra*.

¹⁴⁵ 356 U.S. 44 (1958). The Court here discarded the fiction of a conclusive presumption that had been used in the *Savorgnan* case.

¹⁴⁶ *Id.* at 65-66, 68-69 (Warren, C. J., dissenting), 79-81 (Douglas, J., dissenting).

¹⁴⁷ "But there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power *otherwise possessed* by Congress to withdraw citizenship." *Id.* at 58 n.3. (Emphasis added.)

¹⁴⁸ Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported. . . . [S]ince the deporting power has been held to be derived from the power to exclude . . . it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only as a punishment, indistinguishable from banishment. . . .

Since this action for a declaratory judgment does not involve the validity of the deportation order against petitioner, it is unnecessary, as the Government points out, to resolve the question of whether this petitioner may be deported.

Perez v. Brownell, 356 U.S. 44, 65 n. 6 (1958) (Warren, C. J., dissenting).

destroys for the individual the political existence that was centuries in the development. . . . [It] strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. . . . In short, the expatriate has lost the right to have rights.¹⁴⁹

Justice Brennan treated the problem in an entirely different manner, which indicated the reason he declined to join in the decision that expatriation was a violation of the eighth amendment:

In its material forms no one can today judge the precise consequences of expatriation, for happily American law has had little experience with this status, and it cannot be said hypothetically to what extent the severity of the status may be increased consistently with the demands of due process. But it can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable.⁷

⁷ Adjudication of hypothetical and contingent consequences is beyond the function of this Court and the incidents of expatriation are altogether indefinite. . . .

It is also unnecessary to consider whether the consequences would be different for the citizen expatriated under another section than § 401(g).¹⁵⁰

When examining the inefficacy of expatriation as a deterrent, Justice Brennan pointed out that one who is not deterred by the possibility of the death penalty will hardly be deterred by the contemplation of expatriation, "for none of us yet knows its ramifications."¹⁵¹ Justice Frankfurter on the other hand declared that, "Presumably a denationalized person becomes an alien *vis-à-vis* the United States."¹⁵²

Justice Brennan's opinion indicates that he may be open to the development of expatriation along new lines. It is submitted that the development should be in the nature of a return to traditional concepts. Expatriation should again mean the loss of the *rights* of citizenship, and the freedom to change one's citizenship when he wishes to do so.

The most important loss to expatriated American citizens under the Acts of 1865, 1906, 1907 was the loss of diplomatic protection. A second line of development of expatriation was that equated with disfranchisement—the loss of the right to vote and to hold public office. This right was, and still is, taken from various classes of felons. Of the cases decided by the Supreme Court, the rights denied petitioners were the right to vote, *Mackenzie v. Hare*,¹⁵³ and, apparently, the right to an American passport, a requisite for diplomatic protection, *Savorgnan v. United States*.¹⁵⁴ In *Perez v. Brownell*, no rights were adjudicated although Perez brought the action to prevent deportation. These three decisions, the only ones in which the Court has upheld expatriation, were based on Congress's power to regulate foreign affairs. As a justification for

149 356 U.S. at 101-02.

150 *Id.* at 110.

151 *Id.* at 112.

152 *Id.* at 127.

153 239 U.S. 299 (1915). The decision operated to deny the vote because the state deprived aliens of the vote.

154 338 U.S. 491 (1950).

expatriation, this power should be limited, where applicable, to the power to withhold diplomatic protection.

It would seem that many of the problems that have appeared so large might be handled by dealing specifically with the right at stake. In *Trop v. Dulles*, the question was whether Trop should be given a passport. However, the Court did not even suggest that the problem was actually whether Trop should be allowed to travel abroad and then return to the United States. The issue at stake in *Perez v. Brownell* was never discussed; it was whether Perez should be allowed to remain in the United States. The same issue will be before the Court in *Kennedy v. Mendoza-Martinez*¹⁵⁵ this term. In *Rusk v. Cort*,¹⁵⁶ the issue will be whether one who was guilty of the same conduct as Mendoza-Martinez may be excluded from the country. The Court should not decide the citizenship issue in these two cases without examining the results of its determination. It may well be that both are declared expatriated. But that decision would not go to the issue, which is whether a native citizen may be deported or excluded from the country.

With expatriation understood to mean loss of the rights of citizenship, the only rights of citizenship that it makes any sense at all to deny are the right to diplomatic protection, the right to hold public office, and the right to vote. Denial of the right to enter or remain in the United States is no different from banishment. Treating expatriation as loss of the rights of citizenship may not satisfy the desire of Congress to disown unwanted citizens completely, unless banishment is imposed. But the only purpose banishment would serve would be that of insulating the country from unsavory citizens. The same purpose is served by imprisonment.

C. BASES FOR CONGRESSIONAL POWER TO EXPATRIATE

None of the acts that are declared to effect expatriation is protected by the Constitution from congressional prohibition. The citizen has no constitutional right to be free from any disability attached to his naturalization in, or his swearing allegiance to, a foreign country.¹⁵⁷ He has no protected right to serve in the armed forces, hold public office, or vote in a political election in a foreign country. He has no constitutional right to desert from the armed forces of the United States, to commit acts of treason, to conspire or attempt to overthrow the government of the United States, or to evade the draft. Therefore, if Congress has the power to regulate such conduct, it may do so without the restrictions that confine it in other areas. Thus, while Congress would not be restricted from regulating voting in a foreign country, its attempt to regulate political speech in a foreign country would be measured by different standards.¹⁵⁸

There are three powers that Congress has called upon to justify expatriation:

¹⁵⁵ No. 2, 1962 Term. The same issue was presented in *U.S. ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962).

¹⁵⁶ No. 3, 1962 Term.

¹⁵⁷ *Quaere* whether he has a right to reside abroad permanently. See 8 U.S.C. §§ 1482, 1484 (set out in Appendix I).

¹⁵⁸ *Trop v. Dulles*, 356 U.S. 86, 106 n.2 (1958) (Brennan J., concurring).

1) the power to regulate citizenship; 2) the power to regulate foreign affairs; and 3) the power to defend the country — the war power.

1. *The Power to Regulate Citizenship*

The power to regulate citizenship may be divided into two separate categories: a) the power to consent to a citizen's expatriation; and b) the power to regulate standards of conduct required for citizenship.

a) There is no question but that Congress has the power to consent to a citizen's expatriation and the power to refuse to permit expatriation in appropriate circumstances. Intentional and voluntary expatriation, permitted by Congress and effected in the prescribed manner,¹⁵⁹ should make the citizen an alien vis-à-vis the United States. All duties and obligations, except those applicable to aliens, should be considered canceled by both the citizen and the government.

b) One of the purposes of Congress in providing for loss of citizenship has been to prescribe standards of conduct required of citizens. The validity of this purpose is questionable. However, once one grants that the Constitution does not prevent Congress from withdrawing citizenship, it becomes difficult to find constitutional limits to the power.

The Court has never given support to the notion that Congress could regulate citizenship by expatriating unworthy citizens. The only indication that the Court has given that there might be such a power is in the dissenting opinion of Justice Frankfurter in *Trop v. Dulles*: "Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship [the duty to bear arms] and legislative withdrawal of that citizenship?"¹⁶⁰ He cast doubt on this implication, however, by answering that Congress would have this power if it believed that expatriation would aid in winning the war, linking this power to the war power.

The Government had argued in *Trop*, "that the necessary nexus to the granted power [the war power] is to be found in the idea that legislative withdrawal of citizenship is justified . . . because Trop's desertion constituted a refusal to perform one of the highest duties of American citizenship—the bearing of arms. . . ."¹⁶¹ Justice Brennan considered this argument, found that expatriation so imposed could be nothing but retribution,¹⁶² and held that expatriation could not be imposed as a consequence of desertion because "the requisite rational relation between this statute [section 401(g) of the Nationality Act of 1940] and the war power does not appear. . . ."¹⁶³ Nothing is solved, said Justice Brennan, "by the uncritical reference to service in the armed forces as 'the ultimate duty of American citizenship.'"¹⁶⁴ The Government has not given up on the argument despite Justice Brennan's criticism.

¹⁵⁹ Congress may prescribe acts by means of which a citizen may effect his expatriation. Congress may even provide that certain acts raise a presumption of intent to expatriate. However, the presumption should not be conclusive. See p. 38 *infra*.

¹⁶⁰ *Id.* at 121-22.

¹⁶¹ *Id.* at 112 (Brennan, J., concurring).

¹⁶² *Ibid.*

¹⁶³ *Id.* at 114.

¹⁶⁴ *Id.* at 113.

In *Mackey v. Mendoza-Martinez*, the Government, apparently downgrading service in the armed forces to the penultimate, argued that the ultimate duty of a citizen is to submit to the criminal jurisdiction of the United States when he is wanted for prosecution.¹⁶⁵

Clearly, Congress has the power to refuse to grant citizenship to an alien deemed unworthy. Whether Congress has the power to take away citizenship for the same reason is, of course, a quite different matter. The major distinction between the citizen and the alien that is relevant here is that the citizen has the right to the political franchise, the right to diplomatic protection, and most important of all the right to live in the United States. Further, Congress has the power to divest the citizen, in appropriate circumstances, of the right to exercise the political franchise and the right to diplomatic protection. The issue that the Court must squarely face is whether Congress also has the power to impose banishment—either as a penalty or as a device to regulate the numbers and kinds of persons who are physically present in this country. This is the heart of the expatriation problem.

The Congressional power to deprive unworthy citizens of the right to vote¹⁶⁶ and to hold public office is used to regulate the political franchise itself. In general, this power has been exercised only after conviction as a felon.¹⁶⁷ The purpose of the deprivation is not complex. A democracy can exist only with a responsible electorate and a responsible bureaucracy. Conviction of a felony is a disqualification, just as is infancy or idiocy. Insofar as expatriation means disfranchisement, there is no objection to its imposition on a convicted felon. But when this disability is applied to other classes of citizens, its imposition is highly suspect.

In *Murphy v. Ramsey*,¹⁶⁸ the Court upheld the disfranchisement of polygamists.¹⁶⁹ No criminal conviction was required; only a nonjudicial determination of fact by the election board. In *Perez v. Brownell*, it was held that loss of the rights of citizenship was imposed to solve a problem in the regulation of foreign affairs. It was not imposed to regulate the franchise. But when disfranchisement is imposed to regulate the franchise itself, as in the disfranchisement of felons, the existence of the danger must first be established by conviction of a criminal act. When Chief Justice Warren distinguished between the disfranchisement and imprisonment of a bank robber,¹⁷⁰ he did not imply that the bank robber could be disfranchised without first being adjudged a felon in a criminal trial. Insofar as his citation to *Murphy v. Ramsey* is taken to imply otherwise, it must be considered only as misleading, and should be clarified at the first opportunity. As the greater protection of criminal procedure is required

165 Brief for Appellants, p. 27, 362 U.S. 384 (1960); now No. 2, 1962 Term, *sub nom.* *Kennedy v. Mendoza-Martinez*, with the same argument now in Brief for Appellant, p. 47. See pp. 20-21 *supra*.

166 Generally the right to vote may only be withdrawn by the states. See Holtzoff, *Loss of Civil Rights by Conviction of Crime*, 6 FED. PROB. 18 (1942).

167 But see *Murphy v. Ramsey*, 114 U.S. 15 (1885).

168 *Ibid.*

169 The vote was in a Territory subject to the regulation of the federal government.

170 *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958).

to deprive a person of physical liberty, so a civil procedure is inadequate to deprive a person of the right to vote — political liberty.¹⁷¹

Murphy v. Ramsey does have an element that is lacking in most instances of disfranchisement, and is lacking in disfranchisement for bank robbery. Disfranchisement was imposed in *Murphy* to prevent polygamists from voting to make polygamy legal.¹⁷² There is no danger that a deserter, or bank robber, would succeed in making desertion or robbery legal. But the objection to the *Murphy* case is that disfranchising those with a particular belief, because of the belief, violates the first amendment. It is no different from disfranchising Jehovah's Witnesses, atheists, fascists, or other unpopular groups, insofar as it differentiates between those beliefs that are "consistent" with our political and social system, and those that are not.

On the basis of the *Murphy* case, those citizens who, by the nature of their divided allegiance or dual nationality, are faced with a conflict of interest might reasonably be denied the franchise if it could be shown that a conflict of interest existed in fact. This concession would go far to satisfy the Congressional appetite for undivided allegiance, and would encourage dual nationals to make a distinct choice between countries. In addition, those convicted of crimes listed in 8 U.S.C. §1481(a)(9) (concerning violent overthrow of the country) might reasonably be denied the franchise. However, grave danger would be encountered in distinguishing conflict of interest from constitutionally protected political belief.¹⁷³

There is another class of citizens whose conduct invites imposed expatriation — expatriation meaning the loss of the right to vote, to hold office, and the right to diplomatic protection. This class consists of those whose being abroad is in itself disapproved; specifically, those who take refuge in a foreign country to escape criminal prosecution in the United States.¹⁷⁴ It is absurd, however, to suggest that these citizens be refused entry to the United States when they are willing to submit to prosecution.

2. *The Power to Regulate Foreign Affairs*

Withdrawal of diplomatic protection is justified in a number of situations: when the citizen is in refuge from prosecution here, when the citizen is a dual national residing in his "other" country; when (and to the extent that) the citizen has assumed obligations to another country; and when the citizen holds public office in or enters the armed services of another country.¹⁷⁵ This remedy might not, however, seem as efficient in some cases as automatic decitizenship,

171 *Compare Garner v. Board of Public Works*, 341 U.S. 716 (1951); *Gerende v. Board of Supervisors*, 341 U.S. 56 (1961); and *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382 (1950); *with Speiser v. Randall*, 357 U.S. 513 (1958).

172 The statute specifically stated, 22 Stat. 30 (1882), in § 9, that the vote was *not* to be denied only on the basis of belief. The reasoning of the *Murphy* opinion, however, makes it clear that it was this danger that the Court feared.

173 See note 171 *supra*.

174 It is theoretically possible for an American abroad to be employed by the United States Government and to vote by absentee ballot. Withdrawal of diplomatic protection would only be justified if diplomatic efforts at extradition failed. It is not suggested that it be used as a punishment.

175 This is not meant to suggest that the State Department be given wide discretion to withhold diplomatic protection.

as interpreted in *Perez v. Brownell*. The whole class of situations that might be called "meddling in affairs of a foreign country" seems at first glance particularly amenable to the solution prescribed by the majority in the *Perez* case.¹⁷⁶ This position was explained by Justice Brennan:

Expatriation . . . has the advantage of acting automatically, for the very act of casting the ballot is the act of denationalization, which could have the effect of cutting off American responsibility for the consequences. If a foreign government objects, our answer should be conclusive — the voter is no longer one of ours. . . . Congress might reasonably believe that in these circumstances there is no acceptable alternative. . . .¹⁷⁷

Four important questions arise from this theory: granting that Congress has the power to regulate foreign affairs and citizenship, a) may Congress use its power to regulate citizenship to regulate foreign affairs; b) is expatriation, as alienation, "reasonably calculated to achieve this legitimate end";¹⁷⁸ c) is there an acceptable alternative; and d) if there is an acceptable alternative, may the Court require Congress to use it.

a) May the power to regulate citizenship be used to regulate foreign affairs?

In the *Perez* case, the majority did not hesitate in declaring that the power to regulate citizenship could be used to regulate foreign affairs. As precedent the Court relied on the *Mackenzie* and *Savorgnan* cases, both of which presented situations in which it was the fact of dual citizenship itself that was undesirable. In *Perez*, it was an act, voting in a foreign election, rather than a status, that created the alleged problem. The Court was intrigued by the fact that taking away the citizenship solved the problem, and it overlooked the fact that, unlike *Mackenzie* and *Savorgnan*, the citizenship without more was not objectionable. Instead of proscribing voting in a foreign country in a traditional manner — as it proscribed negotiation with a foreign country, for example — Congress used the power to regulate citizenship to avoid the harm of a potentially dangerous act.¹⁷⁹

Unwise as it may be, there seem to be no constitutional objections to such a device. Questions about the use of the taxing power to regulate were concerned with whether the power to regulate itself was within the power of Congress. It seems to have been conceded that if Congress had the power to regulate, it could exercise it by using its power to tax.¹⁸⁰ We must conclude, therefore, that the use of the power to regulate citizenship to regulate foreign affairs is not unconstitutional as such, and must be challenged on other grounds.

¹⁷⁶ See pp. 14-18 *supra*, for discussion to the effect that the problem treated by the *Perez* majority was not the problem which Congress had had in mind.

¹⁷⁷ *Trop v. Dulles*, 356 U.S. at 106 (concurring opinion).

¹⁷⁸ *Id.* at 107.

¹⁷⁹ See 18 U.S.C. § 953 (1958). Another argument against the interpretation of Congressional intent made by the *Perez* majority (*i.e.*, to prevent meddling in foreign affairs) is that Congress never has attempted to proscribe voting in a foreign country as it has private negotiation.

¹⁸⁰ See, *e.g.*, *United States v. Butler*, 297 U.S. 1 (1936). See also "Note: Motives in Tax Legislation," 1 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW 217 (1954).

b) Is expatriation, as alienation, reasonably calculated to achieve the legitimate end?

The following are the three statutory bases for expatriation which might be said to constitute meddling by the American citizen in the affairs of a foreign country:

(i) Voting in a foreign election.¹⁸¹

The effectiveness of expatriation depends on whether it allows the United States to answer a foreign government's complaint of meddling in its affairs by declaring, conclusively, that the voter is no longer one of ours. This hypothesis is vulnerable in three respects.

First, it may not be enough to answer that he is no longer one of ours. He was one of ours when he went to the polling place, took a ballot, went into a booth, marked the ballot, folded it, and prepared to drop it into the box. He did not become expatriated until — at the earliest — the ballot was irretrievably cast.

Second, it is questionable whether the answer may be considered conclusive at all. If the vote were cast under duress, the citizen would not be expatriated.¹⁸² There would be no final determination of this matter until, in a proper judicial trial, the Government proved that the act was voluntary.¹⁸³ There is no indication that a finding of duress operates to provide automatic repatriation. It must be assumed that expatriation is not conclusive until the citizen has been given an opportunity to present his case in a proper United States court.¹⁸⁴ There is no limitation on the time he must bring such an action. In fact, until *Rusk v. Cort*,¹⁸⁵ it was in doubt whether he could bring any action until he had been denied a passport, and taken rather elaborate procedural steps. Perez, who did not face the problems of Cort (who is out of the country and denied a passport), did not bring his action until he was threatened with deportation. The election in which Perez voted was in 1946. There was no final determination that he was expatriated until 1958. The Government contends that automatic expatriation of draft evaders will operate to relieve international tension in the same way that expatriation operated in *Perez*. Yet Mendoza-Martinez has still not been conclusively expatriated, more than seventeen years after his draft evasion.¹⁸⁶ Thus, the United States can give no immediate conclusive answer to a protesting country.

A third question arises when the citizen who votes in a foreign election

181 8 U.S.C. § 1481(a)(5).

182 *E.g.*, *Takano v. Dulles*, 116 F. Supp. 307 (D. Hawaii 1953) (voting in Japan under fear that failure to do so might hamper procedures for return to the United States); *Uyeno v. Acheson*, 96 F. Supp. 510 (W.D. Wash. 1951) (voting in Japan under fear of losing ration card); *Arikawa v. Acheson*, 83 F. Supp. 473 (S.D. Cal. 1949) (voting in Japan in 1946 under influence of General MacArthur's appeal to all women to vote).

183 *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

184 *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D. N.Y. 1962).

185 369 U.S. 367 (1962). In a 5-3 decision, the Court held that a person outside the United States, who had been denied a passport on the ground that he had been expatriated, was not restricted to the procedures prescribed by 8 U.S.C. § 1503 (1958), 66 Stat. 273 (1952).

186 In Brief for Appellant, p. 46 n. 26, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term, the Government stated that the provision "has been liberally interpreted to the advantage of those who return . . . while the war or emergency still continues." Although this statement is somewhat misleading, it carries enough meaning to be relevant.

is also a citizen of that country. Certainly the rationale of the *Perez* case would not apply. The foreign country would not be able to complain that one of its own citizens had voted in its election. The Court did not consider this fact in *Perez*. There was no determination of whether Perez was a dual citizen or not. The Court, in both the majority¹⁸⁷ and dissenting¹⁸⁸ opinions, stated only that Perez was born in the United States and was taken to Mexico at an early age by his parents. Counsel for Perez stoutly denied that Perez had *voluntarily* taken on another citizenship,¹⁸⁹ but never explicitly stated whether Perez had or had not been born a dual citizen or had or had not gained dual citizenship derivatively through his parents:

The Government suggests that petitioner "appears" to be a dual national (Br., p. 35). The District Court made no finding, nor did the Immigration and Naturalization Service . . . , that petitioner has or had any citizenship other than the American one here in issue.

We should also correct the Government's statement (Br. p. 36) that "There is no reason to believe that [the petitioner] will be unable to live in Mexico." There is "reason to believe" quite the opposite—that petitioner can not take up life in Mexico if deported there. . . . [T]he District Court made no finding to support the Government's easy assumption that upon petitioner's deportation he can become a permanent inhabitant of Mexico.¹⁹⁰

This statement does not give us the answer. It says only that there is no evidence in the record that Perez was a dual citizen.

Petitioner's counsel cannot be blamed for lack of foresight. He certainly had no way of knowing that the Court would develop a new theory on which to base the justification of the statute. To him, the important tactic must have been to avoid the implication that Perez, being a dual citizen, had exercised his choice of citizenship by taking advantage of the right of Mexican citizenship to vote.¹⁹¹

The rationale of the majority opinion in *Perez* must be held to be applicable only to those who are *not* dual citizens—a result in direct opposition to the purpose of Congress.¹⁹²

(ii) Serving in a foreign armed force.¹⁹³

In *United States ex rel. Marks v. Esperdy*,¹⁹⁴ the Court held, on the authority of the *Perez* case, that 8 U.S.C. § 1481(a)(3), imposing expatriation on one who serves in the armed forces of a foreign country, was constitutional. The Court followed the *Perez* rationale:

¹⁸⁷ 356 U.S. at 46.

¹⁸⁸ *Id.* at 63 n. 2. The opinion implies that the dissenting Justices considered Perez not to be a dual citizen since it discusses statelessness. *Id.* at 64-65. The separate dissents of Justice Douglas, *id.* at 79-80, and Justice Whittaker, *id.* at 84-85, seem to imply the same.

¹⁸⁹ Brief for Petitioner, pp. 14, 20.

¹⁹⁰ Reply Brief for Petitioner, pp. 2-3 n. 2.

¹⁹¹ *But cf.* *Kawakita v. United States*, 343 U.S. 717 (1952) (dictum); *Jalbuena v. Dulles*, 254 F.2d 379 (3d Cir. 1958).

¹⁹² See note 90 *supra*. Appellee in *Rusk v. Cort* bases an argument on the assumption that Perez was a dual national. Brief for Appellee, pp. 36-37. The Government makes the same assumption. Brief for the Appellant, p. 41, *Kennedy v. Mendoza-Martinez*, No. 2, 1962 Term.

¹⁹³ 8 U.S.C. 1481(a)(3).

¹⁹⁴ 203 F. Supp. 389 (S.D. N.Y. 1962).

It would indeed seem obvious that service by a United States citizen in the armed forces of another nation . . . carries with it even greater danger of embroiling the international relations of the United States than would mere voting in a foreign election. This court will not deny to Congress the reasonable belief that under the present hazardous international circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassment in and jeopardy to our relations with other nations.¹⁹⁵

The analytical difficulties inherent in the *Perez* decision are more obvious in this case.

The *Marks* case demonstrates the fact that there is no automatic expatriation. If a foreign government complained of an American's service in a foreign armed force, the United States could not answer forthwith that the American was no longer a citizen. In this case, the Government sought to deport the relator on the ground that he had unlawfully entered the country as an alien. The Court held that this claim was not valid because the relator did not become an alien until the present judicial determination.¹⁹⁶

Again the question of dual nationals must be considered. It is recognized that a dual national has duties of allegiance to both of his countries.¹⁹⁷ Certainly the United States will not become embroiled against its will in controversy with the country in whose army the dual national serves voluntarily.¹⁹⁸ And a country against which the dual citizen's country might fight would not be justified in holding the United States responsible. Therefore, the conclusion is again reached that if alienation makes sense at all as a regulation of foreign affairs, it makes sense only in the case of one who has *only* American citizenship. This result also is in direct conflict with the congressional purpose.¹⁹⁹

(iii) Holding public employment in a foreign country.²⁰⁰

It seems absurd to think that a foreign government that hires an American citizen will then object to his employment as meddling in the affairs of that government. The remedy of that government, if it should object, is obvious—it can dismiss him and deport him. The statute applies only to those Americans who are also nationals of the foreign country and to those who take an oath

195 *Id.* at 395. But see 18 U.S.C. §§ 958-59 (1958), which proscribe as a criminal offense, in certain circumstances, service in foreign armed forces.

196 Although Section 356 of the Immigration and Nationality Act, 8 U.S.C.A. § 1488 states that it is the "performance" by a national of an expatriatory act which results in loss of nationality, whether the relator lost his citizenship can only be established finally by a judicial determination. . . . At the time of his entry into this country . . . the relator could not have obtained the entry documents as an alien without acknowledging an expatriation which had not yet been determined.

Id. at 396.

197 *Kawakita v. United States*, 343 U.S. 717 (1952) (dictum); *Jalbuena v. Dulles*, 254 F.2d 379 (3d Cir. 1958).

198 Expatriation will not result from involuntary service, *Nishikawa v. United States*, 356 U.S. 129 (1958), despite the fact that involuntary service would affect the foreign affairs of the United States in the same way as would voluntary service. In fact, involuntary service was the cause of intense international friction in the nineteenth century.

199 Section 401(c) of the Nationality Act of 1940, 54 Stat. 1168, provided for the expatriation of one who served in the armed forces of a foreign nation only if he were a citizen of that nation. The absence of such a qualification in the present provision only broadens the class attacked. It does not exclude dual nationals.

200 8 U.S.C. § 1481 (a) (4).

of allegiance to the country. Those in the former class would surely not be considered to be meddling, and the statute, if based on the power to regulate foreign affairs, certainly should not apply to them.

It is concluded that expatriation, as alienation, is not reasonably related to the regulation of foreign affairs because it is not effective in avoiding possible harm.

c) Is there an acceptable alternative to expatriation, as alienation, to prevent harm to the United States from American citizens who meddle in the affairs of a foreign nation?

In *Perez v. Brownell*, the Chief Justice, finding that Congress had no power to impose loss of citizenship against the will of a citizen, said that if Congress believed that there was danger in a citizen's voting in a foreign election, Congress could "proscribe such activity and assess appropriate punishment."²⁰¹ If the United States should make it a criminal offense to vote in a foreign country, it could answer an objecting government with an apology and a promise to punish the citizen. Despite the opinion in the *Perez* case, it seems clear that if Congress had in mind the problems of meddling stated by the Court, it used expatriation as a deterrent. As such, it would be subject to the objections raised in the *Trop* case.²⁰² A normal criminal deterrent would be more sensible, and equally effective. Serving in a foreign armed force is already proscribed by a criminal statute.²⁰³

d) May the Court require Congress to use an alternative?

In *Perez v. Brownell*, Justice Frankfurter, speaking for the majority, held that the Court was limited in its inquiry to whether or not expatriation was an effective means of avoiding international friction. No question of a possible alternative was raised. However, concurring in *Trop v. Dulles*, Justice Brennan (one of the majority in *Perez*) implied that the question in the *Perez* case had been whether Congress could have reasonably believed that there was no acceptable alternative, considering the harshness of expatriation and the importance of the national interest involved.²⁰⁴ He did not discuss the alternative offered by the Chief Justice, that of making voting in a foreign election a criminal offense, but apparently he found that it did not meet his standards.

On what basis did Justice Brennan decide that Congress might reasonably believe that the alternative was not an acceptable one? Congress itself gave no indication. Indeed, it has been shown that Congress never even considered that it was dealing with the problem (meddling in foreign affairs) the Court found to be so dangerous.²⁰⁵ Justice Brennan, by joining the majority in the *Perez* case, put himself in the position of inventing a congressional purpose which would validate the statute, and then having to decide whether Congress could

201 356 U.S. at 78 (dissenting opinion).

202 In addition, there would be a lack of due process unless proper criminal procedures were provided.

203 See 18 U.S.C. §§ 958-59.

204 356 U.S. at 106-07.

205 See notes 88-93 and accompanying text.

have believed that there was no acceptable alternative means if it had been legislating to achieve the purpose the Court invented for it.

In *Schneider v. State*,²⁰⁶ the state had passed a statute limiting the distribution of handbills to prevent the littering of the streets. The Court stated that the same purpose could be accomplished by prosecuting those who did the littering. That it might not be as effective a means as restricting the distribution was not a determining factor. The *Schneider* case presents an example of the usual application of the less-restrictive-alternative theory. Generally, the doctrine is applied to insure that conduct that is protected by the Constitution will not be inhibited as an incidental effect of the means used to regulate conduct that is not protected.²⁰⁷ In *Schneider*, the Court was protecting freedom of speech. In *Perez*, there was no protected activity involved, but there was a protected status — citizenship. Just as we have seen the protection of the first amendment give way when Congress has felt it was in the national interest,²⁰⁸ here the right to citizenship was withdrawn in the national interest.

The *Perez* majority opinion implied that there was no right to citizenship in the sense that there is a right to freedom of speech. Despite his reference to the alternative theory, Justice Brennan indicated that he was in agreement with the majority when he said that "*Perez v. Brownell* did not raise questions under the First Amendment, which of course would have the effect in appropriate cases of limiting congressional power otherwise possessed."²⁰⁹ It is unfortunate that Justice Brennan did not further analyze his position in the *Perez* case, since his opinion intimates a restriction on the apparently limitless scope of power granted to Congress by that case's majority opinion. The force and direction of the limitation need explication.

"Perhaps the most basic postulate of judicial review is that the legislature possesses a generous choice of means."²¹⁰ The *Perez* and *Trop* cases demonstrate that the postulate may be given very different meanings. In the *Perez* case, Justice Frankfurter declared that: "The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose."²¹¹ The determination of the limits of the scope was restricted to an examination of the theoretical possibility of the means chosen achieving the legitimate end. In the *Trop* case, he stated that there is no limitation on the war power "other than what the Due Process Clause commands."²¹² Justice Douglas interpreted this concept to mean that,

it (is) possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution,

206 308 U.S. 147 (1939).

207 See FREUND, *THE SUPREME COURT OF THE UNITED STATES* 60-87 (1961).

208 See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959).

209 *Trop v. Dulles*, 356 U.S. at 106 n.2. Only Justice Whittaker would have required an alternative, but his objection went to the lack of danger in fact. *Perez v. Brownell*, 356 U.S. at 84-85. If he had held the view that nondangerous voting in foreign elections was protected activity, his opinion would have been parallel to the *Schneider* decision.

210 FREUND, *op. cit. supra* note 207, at 61.

211 356 U.S. at 60.

212 356 U.S. at 120-21.

provided the action taken is moderate and does not do violence to the sensibilities of a majority of this Court.²¹³

To others, the fact that the legislature possesses a generous choice of means by which to regulate indicates that the legislature will be required to choose that means that will be least restrictive of individual liberty. This was clearly the position of Chief Justice Warren in the *Perez* case.²¹⁴

Under a due process test, the relevant factors are the seriousness of the danger to the United States from the citizen's conduct, the possibility of an effective alternative remedy, and the existence of evidence of transfer of allegiance. If the danger is great, and no effective alternative is available, a number of the Justices would not be shocked by the imposition of expatriation, as alienation, despite the fact that there was no transfer or lack of allegiance.

In the *Perez* case, the majority found that there was serious danger to the United States from a citizen's voting in a foreign election,²¹⁵ that there was no effective alternative,²¹⁶ and that the conduct indicated a transfer of allegiance.²¹⁷ The dissenters held the opposite view. Therefore, despite the different theoretical approaches posed in the opinions, there would have been the same disagreement even if all the Justices had adopted the due process rationale.

The important difference between the majority and the dissenters lies in the approach employed to determine the validity of the legislative assumptions concerning the seriousness of the danger, the existence of an effective alternative means of regulation, and whether the conduct implies a transfer of allegiance. The majority spoke only of the belief of Congress. However, in determining the reasonableness of Congress' belief, empirical evidence should be examined. Justice Frankfurter did not seem to recognize a distinction between the logical and the reasonable. When he examined the statute for a rational nexus, he determined only whether there was a logical possibility that the means prescribed would achieve the desired end. When he talked of limiting congressional belief to the reasonable, he appears to have been talking of no limitation at all. A reasonable belief is one based on empirical evidence. But if one is of the opinion that collecting evidence and drawing conclusions from it is purely a legislative function, then any conclusion the legislature reaches will be considered reasonable.

This approach has its greatest validity in questions of broad policy. For example, in the *Perez* case, the dissenters (with the possible exception of Justice Whittaker) indicated that they would accept a legislative judgment that a citizen's voting in a foreign election was dangerous to the United States.

In deciding whether there is an effective alternative to expatriation, however, the validity of this approach is subject to greater doubt. There seems to be no reason for making the assumption that the legislature examined and rejected as unworkable all possible alternative means of regulation; the assump-

²¹³ 356 U.S. at 82-84.

²¹⁴ 356 U.S. at 78.

²¹⁵ More precisely, it decided that Congress might reasonably believe that there was a serious danger.

²¹⁶ More precisely, as stated by Justice Brennan explaining the decision, that Congress might reasonably believe there was no acceptable alternative. *Trop v. Dulles*, 356 U.S. at 106-07.

²¹⁷ Again, that Congress has so interpreted this conduct, "not irrationally." *Perez v. Brownell*, 356 U.S. at 60-61.

tion was not made in the *Schneider* case.²¹⁸ And the Court has recently held that California could not regulate narcotics traffic—certainly unprotected activity—by punishing one for addiction, pointing out that “there are . . . countless [other] fronts on which those evils may be legitimately attacked.”²¹⁹ In that case it was clear that the legislature of California had rejected the alternative means of regulation. The Court in *Perez* should have considered the alternative of criminal proscription suggested by the Chief Justice, and explained why it was not satisfactory.

In determining whether the conduct involved a transfer of allegiance from, or a lack of allegiance to, the United States, it is even more difficult to accept Justice Frankfurter’s approach. Allegiance is a state of mind, not an objective act. To say that Congress can determine in advance that an act provides conclusive evidence of a citizen’s allegiance is to say that in many cases “Congress [can] . . . turn white to black. . . .”²²⁰ The determination of a citizen’s allegiance can be made only in each case. In the *Nishikawa* case, Justice Black declared that,

whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality.²²¹

Even if the Court is not willing to go so far as to require intent to expatriate, it may require that the trier of fact determine that there was in fact a transfer of allegiance from, or a lack of allegiance to, the United States. This approach would be in accord with *Kawakita v. United States*.²²²

It is true that such a requirement will provide an additional obstacle to answering an objecting nation conclusively that the offending person is not an American citizen. However, a judicial trial is necessary for a determination of whether the citizen did act as alleged, whether he acted voluntarily or under duress, and whether the election in question was a “political” election,²²³ the army served in was the army of a foreign nation,²²⁴ or the employment was one for which an oath of allegiance was required. The additional requirement would not be significant.

e) Summary and conclusion

In the regulation of foreign affairs, the only right of citizenship that it is reasonable to withdraw is the right to diplomatic protection. The withdrawal of that right is as effective as withdrawal of citizenship itself. In those cases

²¹⁸ *Schneider v. State*, 308 U.S. 147 (1939).

²¹⁹ *Robinson v. California*, 370 U.S. 360, 367-68 (1962).

²²⁰ *Perez v. Brownell*, 356 U.S. at 84 (Douglas, J., dissenting).

²²¹ *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958) (concurring opinion).

²²² 343 U.S. 717 (1952). Transfer of allegiance should be no more difficult to prove than intent.

²²³ Justice Frankfurter stated in *Perez* that, “Specific applications [of the term ‘political’] are of course open to judicial challenge, as are other general categories in the law, by a ‘gradual process of judicial inclusion and exclusion.’” 356 U.S. at 60.

²²⁴ *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389, 394-95 (S.D. N.Y. 1962).

that are concerned with meddling in foreign affairs, such as the *Perez* case, withdrawal of the right to diplomatic protection is relevant to permit the host country to punish illegal meddling. Withdrawal of citizenship is unreasonable because it cannot achieve the end to which it is directed. The United States cannot answer an objecting nation conclusively that the offender is not an American citizen. A more effective way to prevent international friction from conduct deemed dangerous is to deter the conduct by the imposition of traditional criminal penalties. And an effective alternative means to prevent international friction should be used instead of alienation, since the latter destroys a constitutionally protected status—citizenship.

3. *The War Power*

The first step in determining whether Congress may call on the war power to justify the imposition of expatriation must be to decide whether expatriation can (or whether Congress could reasonably believe that expatriation can) aid in successfully waging war. In *Trop v. Dulles*, the majority decided that expatriation was prescribed as a consequence of desertion in order to deter desertion. Four of the majority held that its use violated the eighth amendment. Justice Brennan, concurring in the result, held that expatriation could not be an effective deterrent, and could in no other way substantially aid the war power. Justice Frankfurter, speaking for the dissenters, found that it was not for the Court "to deny that Congress might reasonably have believed the morale and fighting efficiency of our troops would be impaired if our soldiers knew that their fellows who had abandoned them in their time of greatest need were to remain in the communion of our citizens."²²⁵

The reasons for Justice Brennan's desertion from the *Perez* majority are instructive. He said: "It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done."²²⁶ He later added: "And as a deterrent device this sanction [expatriation] would appear of little effect. . . ."²²⁷ Unlike the majority opinion in the *Perez* case, Justice Brennan here examined what the harm actually apprehended by Congress was — not what it reasonably might have been. However, after finding that the actual purpose could not support the statute, he examined Justice Frankfurter's suggestion. He admitted that it "may find some — though necessarily slender — support in reason." However, he found that "any substantial achievement . . . of Congress' legitimate purposes under the war power seems fairly remote," and that "it is at the same time abundantly clear that these ends could more fully be achieved by alternative methods not open to these objections."²²⁸ Thus, when alternatives exist, Justice Brennan will require their use if the rational nexus is weak, and the penalty harsh.

Justice Frankfurter's opinion is highly unrealistic. Just what is meant by the statement that the deserters would "remain in the communion of our

²²⁵ 356 U.S. at 122.

²²⁶ *Trop v. Dulles*, 356 U.S. at 109-10.

²²⁷ *Id.* at 112.

²²⁸ *Id.* at 114.

citizens"? First, they could go to jail. Second, they could receive dishonorable discharges. Third, they might be shot. Fourth, they could lose all G.I. benefits. Fifth, they could lose all rights normally lost by felons, such as the right to vote, to hold public office, and to practice certain professions.

Even following the due process analysis, the danger seems so small,²²⁹ and the alternatives already in existence so inclusive, that it is certainly shocking to take away *all* the rights of citizenship — particularly when there is no evidence of a transfer or lack of allegiance. Upon closer examination, one is even more shocked. The only right of citizenship relevant to the "communion of our citizens" argument of Justice Frankfurter is the right to remain in the United States. Essentially, he was supporting the power of Congress to prescribe banishment as a regulatory device.

Expatriation for treason requires no different analysis. Banishment may be less shocking in the case of treason, however, since that necessarily shows a transfer or lack of allegiance. But it is difficult to see how banishment would aid in the successful prosecution of the war. Quite to the contrary, it would enable the traitor to aid the enemy with impunity. The safest place for the country to put a traitor during the war is prison. If, at the close of the war, Congress wishes to release the traitor and deport him, it cannot then support this action under the war power. It may, however, declare that a treasonable act is evidence of a transfer of allegiance, and provide its consent to the citizen's voluntary expatriation.

It has been suggested that alienation of those who go to or remain in a foreign country to avoid the draft is justified by the war power.²³⁰ It seems sufficient answer to point out that once expatriated, the citizen is no longer subject to service in the armed forces, and that the country precludes all chance of his services should he reform.

D. THE POWER TO PUNISH

Trop v. Dulles is the only case in which expatriation has been treated as a punishment. Four Justices considered that the imposition of expatriation as a punishment for desertion violated the eighth amendment.²³¹ Justice Brennan, concurring in the result, declared that expatriation was not a valid punishment.

The eighth amendment holding was probably meant to apply to all use of expatriation as punishment — that is, that expatriation, per se, is an invalid punishment. However, in future cases its precedential value may be limited by three possible arguments. First, expatriation might not be cruel or unusual as applied to crimes that show a transfer or lack of allegiance. Desertion to the enemy, treason, sedition, or subversion might be such cases, though desertion may only show cowardice, or, as in *Trop*, it may only be a technical matter. (*Trop* was convicted as a deserter for breaking out of a stockade and attempting to return to the fight.) A second possible reading of the opinion may be that in *Trop's* case the violation was of such a minor nature that the penalty was

²²⁹ *I.e.*, the danger that our troops in the field will be demoralized if they think that deserters will "remain in the communion of our citizens."

²³⁰ See note 115 *supra* and accompanying text.

²³¹ Chief Justice Warren and Justices Black, Douglas and Whittaker. The four dissenting Justices did not consider expatriation to be a punishment in this case.

too harsh; that a more flagrant violation would not be handled in the same manner. This would be a misreading of the Chief Justice's opinion, however, for it is quite clear that he was directing his remarks to the use of expatriation, per se, as a punishment. Third, statelessness being a major burden, the rationale might not apply to a dual national.

Justice Brennan's opinion is quite different. He spoke of expatriation only as applied to desertion. He found that expatriation does not satisfy any of the three functions of a punishment—deterrence, rehabilitation, or insulation of the criminal from society. Rehabilitation will never be accomplished by expatriation, he declared, since it is the very antithesis of rehabilitation, making an outcast of the offender.²³²

The determining fact in Justice Brennan's deciding that expatriation was not a deterrent to desertion was that the penalties of death or long imprisonment were prescribed for desertion in wartime. He was of the opinion that if these possibilities did not deter desertion, expatriation would not.²³³ Two questions arise concerning the future value of this position: 1) is it applicable to crimes for which Congress *could* have established imprisonment or the death penalty, but did not do so; and 2) how harsh must a penalty be in order to be considered of such deterrent force that expatriation could add nothing.

1) Is the legislature or the adjudicating body given a free choice of punishment? Could Congress impose expatriation as the sole penalty for desertion? There would then be no argument that it was superfluous as a deterrent. Or was Justice Brennan saying that before imposing expatriation, Congress must use the usual battery of punishments available to it? If this was his notion, it was not very different from holding expatriation to be a cruel and unusual punishment, and invalid per se.

2) If Justice Brennan would permit Congress to impose expatriation as a punishment in lieu of the death penalty or imprisonment, the question then would arise whether in addition *some* imprisonment can be imposed. At what point, then, does the deterrent effect of imprisonment make the deterrent effect of expatriation superfluous? And why does not the deterrent effect of expatriation make *any* imprisonment superfluous? These problems raise unanswerable questions. It must be conceded that Justice Brennan's opinion can only be read logically as a refusal to allow expatriation as a punishment unless more traditional punishments would not serve as effective deterrents. And, since imprisonment and the death penalty are available as traditional punishments, expatriation may never be imposed. This is supported by his indication that new punishments are valuable only if directed to constructive ends.²³⁴

Justice Frankfurter, speaking for the dissenters in *Trop*, attacked the notion that expatriation was cruel and unusual punishment (assuming, *arguendo*, that it was punishment) on five grounds:

1) The death penalty for desertion is not cruel and unusual punishment,

²³² *Trop v. Dulles*, 356 U.S. at 111.

²³³ *Id.* at 112. It is not clear that existent penalties for desertion have been effective deterrents; "during World War II as many as 21,000 soldiers were convicted of desertion and sentenced to be dishonorably discharged." *Ibid.* n.8. Justice Brennan added that statelessness, since no one knows its ramifications, would probably not be an effective deterrent.

²³⁴ *Id.* at 111.

therefore expatriation — being less harsh than the death penalty — cannot be cruel and unusual punishment.²³⁵ This position is untenable, for surely there are punishments short of death that would be considered cruel and unusual. The dissenters would probably not approve torture or mutilation, for example.

2) The opinion pointed out that "the seriousness of abandoning one's country when it is in the grip of mortal conflict precludes denial to Congress of the power to terminate citizenship here, unless that power is to be denied to Congress under any circumstance."²³⁶ As applied to the facts of the case, that statement is too strong. But limited to the abstract notion that there is no more serious crime than desertion in wartime, it is unexceptionable. And there is no question that the Chief Justice's opinion strongly implies agreement.

3) There is historical basis for expatriation. "In this country, desertion has been punishable by loss of at least the 'rights of citizenship' since 1865."²³⁷ The distinction is not insignificant, and is treated elsewhere.

4) If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner [*Mackenzie v. Hare*, 239 U.S. 299 (1915); *Savorgnan v. United States*, 338 U.S. 491 (1950)], and thus certainly not "cruel and unusual," it seems more than incongruous that such loss should be thought "cruel and unusual" when it is the consequence of conduct that is also a crime.²³⁸

It is difficult to disagree with that statement. It is directed at only one of the Justices, however.²³⁹ Justice Brennan did not base his opinion on the eighth amendment. Three of the Justices who did base their opinions on the eighth amendment also disagreed with the interpretation of the *Mackenzie* and *Savorgnan* cases presented by Justice Frankfurter.²⁴⁰

5) Considering the expatriate as an alien vis-à-vis the United States, the dissenters did not feel that his lot is at all bad so long as he is in the United States; and that speculation as to his fate in other countries is not sufficient justification for striking down the act.²⁴¹ The implication of this position is that Congress could constitutionally provide banishment as a punishment in general. This position is directly opposite to that of the majority of the Court. There is no rational basis for choosing one side or the other. What is involved is a matter of personal evaluation. Even if one is of the opinion that this sort of evaluation generally should be left to Congress, one must agree that there are limits on Congress, and that the Court must decide when those limits are reached.²⁴²

The dissenters made no attempt to examine whether expatriation would in fact be a workable punishment, as Justice Brennan did. Nor did they examine

²³⁵ 356 U.S. at 125: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"

²³⁶ *Id.* at 125-26.

²³⁷ *Id.* at 126. See pp. 4-5 *supra*.

²³⁸ *Id.* at 126.

²³⁹ Justice Whittaker, who agreed that expatriation violated the eighth amendment in *Trop*, never registered his interpretation of the *Mackenzie* and *Savorgnan* cases. However, his memorandum in *Perez* implied agreement with Justice Frankfurter's interpretation.

²⁴⁰ Compare *Perez v. Brownell*, 356 U.S. at 51-52, 61 (Frankfurter, J.), with *id.* at 69-73 (Warren, C. J., dissenting). In a concurring opinion in *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958), Justices Black and Douglas stated that they would overrule *Mackenzie* and *Savorgnan* if they were to be interpreted according to Justice Frankfurter's opinion.

²⁴¹ *Trop v. Dulles*, 356 U.S. at 127.

²⁴² A thorough study of the problem may be found in the comment, *The Expatriation Act of 1954*, 64 YALE L. J. 1164, 1189-99 (1955).

whether the purposes of expatriation are consistent with punishment in general. This is a reflection of their belief that citizenship is not a protected constitutional right. It leads to the position that expatriation may be imposed as a punishment for any crime. These problems are avoided when expatriation is defined, in such circumstances, as disfranchisement.

E. PROCEDURAL CONSIDERATIONS

Regardless of the reasons for the imposition of expatriation, the issue comes before the courts in an action initiated by an individual who has been denied a right of citizenship. The reason for the imposition of expatriation will, however, determine the nature and the scope of the judicial inquiry.

The reasons for the imposition of expatriation have generally been thought to fall into two categories: punishment and regulation. This distinction has been used to define procedural rights, and to determine the constitutional validity of statutes in respect to the prohibitions against *ex post facto* laws, bills of attainder, and cruel and unusual punishments. If expatriation is defined in the particularistic fashion suggested in this article, that is, affecting only the relevant right(s) of citizenship in each case, regulatory expatriation would mean disfranchisement or the withdrawal of diplomatic protection; banishment as a regulatory device should be considered a violation of due process. Penal expatriation, if it meant anything,²⁴³ would mean banishment; banishment as a punishment should be considered a violation of the eighth amendment. If, instead of being defined as loss of the relevant right(s) of citizenship, expatriation is defined as alienation or loss of nationality, the only relevant additional aspect it takes on is banishment.

No procedural problems arise when the provision prescribing expatriation is considered penal. The citizen is protected by the requirements for criminal trials set forth in the Bill of Rights and is protected from cruel and unusual punishments, bills of attainder, and *ex post facto* laws. When the citizen is disfranchised upon conviction for a felony, he has had similar protection.²⁴⁴ Problems arise, however, when Congress seeks to deny rights of citizenship using civil procedures.

The Supreme Court has ruled that in order for the government to expatriate a citizen, it must prove by "clear, convincing and unequivocal evidence" both that the alleged expatriating act was performed,²⁴⁵ and that it was performed voluntarily.²⁴⁶ Congress has attempted to overrule these holdings by

243 *Quaere* whether either disfranchisement or withdrawal of diplomatic protection could ever be imposed as punishment. Even if there is no insulative or rehabilitative effect, and an insignificant deterrent effect, could not Congress express the moral disapproval of the community by withdrawing these rights? See note 171 *supra*.

244 Any sanction whose imposition as punishment would violate the eighth amendment should be considered a violation of due process when imposed as regulation. A sanction that would constitute a bill of attainder when penal should be considered a denial of equal protection when regulatory. The application of the sanction *ex post facto* is more troublesome. The provision prescribing loss of nationality for voting in a foreign election was not effective in expatriating those at whom it was aimed since it was believed to have prospective application only. CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES, Pt. 1, at 67, 76th Cong., 1st Sess. (H.R. Comm. Print). *Quaere* whether this result was constitutionally required.

245 *Gonzales v. Landon*, 350 U.S. 920 (1955).

246 *Nishikawa v. Dulles*, 356 U.S. 129, 139 (1958).

providing that the alleged act need be proved by only a preponderance of the evidence, and that there is a rebuttable presumption that the act was performed voluntarily — rebuttable by a preponderance of the evidence.²⁴⁷ The Court has not specifically stated that its decisions were constitutionally required. However, they were certainly not based upon statutory direction. The concept of the burden of clear, unequivocal, and convincing evidence is one that comes from suits in equity for cancellation of contracts on grounds of fraud or misrepresentation. It was carried over to cancellation of land grants,²⁴⁸ and then to cancellation of naturalization on the ground that the naturalization was gained fraudulently.²⁴⁹ From that point, it was easy to say that denationalization should require at least the same weight of evidence as denaturalization. There is no question that Congress designed the Act of 1961 to overrule the *Gonzales* and *Nishikawa* decisions.²⁵⁰ The Court will have to decide squarely on constitutional grounds when the Act is challenged.

The constitutional decision will have implications beyond the issue of burden of proof. At stake are all the procedural rights normally accorded the defendant in a criminal trial. Should the trier of fact be permitted to draw an unfavorable inference from the citizen's failure to testify?²⁵¹ Or, if the alleged expatriating act is also a criminal act, should the trier of fact be permitted to draw an unfavorable inference from the citizen's refusal to answer questions that might tend to incriminate him? Is the inference sufficiently strong to satisfy the required weight of evidence?²⁵² And may unlawfully seized evidence be introduced over the objection of the citizen?²⁵³ Must he be confronted by adverse witnesses?²⁵⁴ Is he entitled to a jury trial?²⁵⁵ Must the action be initiated by indictment?²⁵⁶ And, if acquitted on an associated criminal charge, may he be retried to impose expatriation?²⁵⁷

There is precedent for treating these cases as "quasi-criminal," rather than either as criminal or civil, as was done in the *Gonzales* and *Nishikawa* cases.²⁵⁸ Significantly, when legislating to overrule the *Gonzales* and *Nishikawa* cases, Congress took care, at the advice of the Department of Justice, to make the statute prospective.²⁵⁹

It is hoped that the Court will continue to apply procedural safeguards

247 Act of Sept. 26, 1961, 75 Stat. 656, 8 U.S.C. § 1481 (c) (Supp. III 1962).

248 See *Maxwell Land-Grant Case*, 121 U.S. 325 (1887).

249 *Baumgartner v. United States*, 322 U.S. 665 (1944); *Schneiderman v. United States*, 320 U.S. 118 (1943).

250 H.R. REP. NO. 1086, 87th Cong., 1st Sess. 40-41 (1961).

251 See *Lees v. United States*, 150 U.S. 476 (1893); *Boyd v. United States*, 116 U.S. 616 (1886).

252 See *United States v. Regan*, 232 U.S. 37 (1914).

253 See *Boyd v. United States*, 116 U.S. 616 (1886); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923) (dictum). See also Note, *Administrative Arrest Pending Deportation Proceedings*, 12 SYRACUSE L. REV. 184 (1960).

254 See *United States v. Zucker*, 161 U.S. 475 (1896).

255 See *Hepner v. United States*, 213 U.S. 103 (1909).

256 See *Stockwell v. United States*, 80 U.S. (13 Wall.) 531 (1871).

257 See *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Coffey v. United States*, 116 U.S. 436 (1886).

258 See cases cited notes 251-57 *supra*. These cases analyzed the quasi-criminal sanction as calling for certain procedures, neither all criminal nor all civil, that were suited to the particular statute. *Helvering v. Mitchell*, 303 U.S. 391, 400 n.3, 404 n.12 (1938), put a damper on this developing trend.

259 H.R. REP. NO. 1086, 87th Cong., 1st Sess. 40-41 (1961).

where appropriate — as in *Gonzales* and *Nishikawa* — rather than according to artificial classifications. Consistent with this development would be the practice of dealing with expatriation itself on a less abstract basis, fashioning the procedural safeguards to accord with the true nature of the specific substantive right(s) being challenged.

IV. CONCLUSION

It is concluded that expatriation, if taken to mean literally loss of citizenship (alienation), is unconstitutional. The power to take away a person's citizenship is not expressly granted to the federal government; it was considered an inherent power of the government neither at the time the Constitution was ratified, nor at the time the fourteenth amendment took effect. Nevertheless, the power to withdraw citizenship might be thought to have become an attribute of the federal government if it were a necessary power. But unless the power to banish a citizen is necessary for the proper and effective exercise of its sovereign duties, the federal government cannot be said to have the power to withdraw one's citizenship against his will, because banishment is the only significant aspect added to expatriation by interpreting it as alienation (loss of citizenship) rather than as loss of the rights of citizenship. It is the concept of banishment that should concern the courts in their determinations of the constitutionality of expatriation.

Where possible, the courts should interpret the statutes as withdrawing only other rights of citizenship — the political franchise and diplomatic protection. This interpretation has both historical and theoretical justification. It is in harmony with the practical needs of the government, and, at the same time, the citizen is not deprived of rights that are wholly irrelevant to the problem created by his conduct.

APPENDIX. I

EXPATRIATION STATUTES

8 U.S.C. § 1481 (1958), as amended, 8 U.S.C. § 1481(c) (Supp. III, 1962), 66 Stat. 267 (1952), as amended:

(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by —

(1) obtaining naturalization in a foreign state upon his own application, upon an application filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: *Provided*, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday: *And provided further*, That a person who shall have lost nationality prior to January 1, 1948, through the nat-

uralization in a foreign state of a parent or parents, may, within one year from the effective date of this chapter, apply for a visa and for admission to the United States as a nonquota immigrant under the provisions of section 1101 (a) (27) (E) of this title; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof; or

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or (B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(6) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(7) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court-martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship under the terms of this chapter or previous laws by reason of desertion committed in time of war, restoration to active duty with such military, air, or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military, air, or naval authority shall be deemed to have the immediate effect of restor-

ing such nationality or citizenship heretofore or hereafter so lost; or

(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18 or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court-martial or by a court of competent jurisdiction; or

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

(b) Any person who commits or performs any act specified in subsection (a) of this section shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act.

(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.

8 U.S.C. § 1482 (1958), 66 Stat. 269 (1952):

A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall —

(1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States

diplomatic [*sic*] or consular officer in a manner prescribed by the Secretary of State; and

(2) have his residence outside of the United States solely for one of the reasons set forth in paragraphs (1), (2)—(7), or (8) of section 1485 of this title, or paragraph (1) or (2) of section 1486 of this title: *Provided, however,* That nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years.

8 U.S.C. § 1484 (1958), 66 Stat. 269 (1952):

(a) A person who has become a national by naturalization shall lose his nationality by —

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 1485 of this title, whether such residence commenced before or after the effective date of this chapter;

(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 1485 and 1486 of this title, whether such residence commenced before or after the effective date of this chapter.

(b) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 1485 of this title shall not be counted in computing quantum of residence.

(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of sections 1485 and 1486 of this title shall not be counted in computing quantum of residence.

APPENDIX II

Americans Expatriated In The Fiscal Years Ending June 30.¹

	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961	TOTAL
Residence abroad	694	1424	1084	711	2657	1557	1063	1776	2223	2592	1017	962	1151	18911
Foreign Naturalization	754	1096	836	622	1677	1544	841	829	616	565	383	625	619	11007
Oath of Allegiance to a Foreign Country	430	369	147	123	152	220	233	237	248	230	64	— ²	— ²	2453
Service in Foreign Armed Force	1459	721	565	370	700	696	269	356	423	378	171	— ³	— ³	6108
Employment by a Foreign Government	99	163	73	56	67	134	84	112	146	125	78	259 ³	271 ³	1667
Voting in a Foreign Election	4515	1693	1401	1136	2651	2222	1237	1436	1515	1748	992	1239	1290	23125
Renunciation	356	149	228	136	398	425	331	167	250	213	188	279 ²	288 ²	3408
Desertion	4	4	2	—	—	—	2	—	3	7	—	—	—	22
Draft Evasion	259	109	69	59	45	134	139	69	61	45	13	—	—	1002
Other	5	64	38	2	3	6	3	5	79	5	6	13	50	279
TOTAL	8575	5792	4443	3265	8350	6938	4202	4987	5564	5908	2912	3377	3669	67982
In 1945-1946, 1,113 Americans were expatriated.														
In 1946-1947, 11,408 were expatriated. 4,500 were naturalized in Japan, and 150 were employed by the Japanese Government.														
In 1947-1948, 6,779 were expatriated, most of them for residence abroad.														
TOTAL EXPATRIATED, JULY 1, 1945 to JUNE 30, 1961.														
														87282

1 All figures are from the annual reports of the Commissioner of Immigration and Naturalization.

2 The figures for expatriation by oath are included in the figures for expatriation by renunciation.

3 The figures for employment by a foreign government include those for service in a foreign armed force.