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Constitutional Law - Involuntary Expatriation - Specific Intent to Relinquish Citizenship Required - Baker v. Rusk, 296 F. Supp. 1244 (1969)

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the new marijuana statutory scheme.[68] Moreover, the Court explicitly stated that the *Leary* decision is no bar to the enactment of future marijuana laws by Congress.[69]

As a result of the *Leary* case, other criminal statutory presumptions will no doubt come under the scrutiny of the courts. The presumption, for example, of federal narcotics statute 21 U.S.C. § 174, identical almost word for word with the *Leary* presumption, will probably be reexamined in the light of the new "rational connection" test. Merely because it could not be established that the majority of marijuana smokers know the origin of their marijuana, it does not necessarily follow that the majority of "hard" narcotics users do not know the origin of their drug. In surveying data relevant to narcotic drugs, the courts may well conclude that drug users are "more likely than not" to have knowledge of its importation, and uphold the validity of that presumption.

In judging the constitutionality of criminal statutory presumptions in the future, the following salient points, extracted from *Leary* and other decisions, should be considered: (1) There must be a rational connection between the fact presumed and the fact proved; (2) The connection is rational if the presumed fact follows the proved fact more than fifty per cent of the time; (3) An empirical approach must be taken to determine whether this relationship exists in fact; (4) Some deference should be paid to the capacity of Congress to judge the rationality of the connection; and (5) The presumption should be "permissive" rather than "mandatory" so that a jury may be satisfactorily instructed as to "reasonable doubt."

James Carroll

CONSTITUTIONAL LAW—INVOLUNTARY EXPATRIATION —SPECIFIC INTENT TO RELINQUISH CITIZENSHIP REQUIRED

Morris Louis Baker, born in 1905 in North Dakota and therefore an American citizen,[1] was taken to Canada as an infant in 1906. He re-

68. The Court's ruling as to the fifth amendment privilege not discussed in this case note, will probably have a more devastating effect on federal marijuana control than will its ruling as to the presumption. Although only subsection 26 U.S.C. § 4744 (a)(2) (1964) of the Marijuana Tax Act was invalidated, there is a strong likelihood that the entire Act is unconstitutional because it conflicts with the fifth amendment. *See, e.g.*, Santos v. United States, 417 F.2d 340 (7th Cir. 1969); *contra*, Buie v. United States, — F.2d — (2d Cir. 1969).

69. *Supra* note 45, at 54.

1. "All persons born or naturalized in the United States, and subject to the juris-

sided and was educated in Canada, and he was admitted to the Canadian Bar in 1926. Among the formalities necessary for admission to the practice of law in Canada were a written and oral oath swearing allegiance to the British monarch; the plaintiff voluntarily complied with these ceremonial prerequisites.[2] Baker returned to the United States in 1944, intending to reside there permanently. At that time, the Commissioner of Immigration ruled that notwithstanding his allegations that he had never obtained Canadian citizenship, voted in a Canadian election, nor intended to renounce his American citizenship, Baker "voluntarily" relinquished his United States citizenship by virtue of his swearing allegiance to a foreign state.[3] In 1967, he applied for a United States passport, but his application was denied upon the same ground—self-expatriation by voluntarily swearing allegiance to a foreign state. He thereupon brought an action seeking a declaratory judgment that he was indeed an American national. The court declared Baker a natural-born American citizen, holding that voluntary expatriation requires a specific intent to renounce citizenship. *Baker v. Rusk*, 296 F. Supp. 1244 (C.D. Cal. 1969).

In order to understand the present status of the doctrine of expatriation, it is necessary to understand the historical background of the doctrine and the three theories of citizenship which have shaped and influenced it: (1) the perpetual allegiance theory; (2) the Jeffersonian states' rights theory; and (3) the voluntary relinquishment theory. It is the purpose of this note to trace the evolution of the doctrine of expatriation through these concepts of citizenship, and, more particularly, to focus on the current "voluntary" abandonment test and demonstrate how *Baker v. Rusk* expands that standard.

The theory of perpetual allegiance[4]—once a British subject, always a British subject—officially dominated the English concept of citizenship from the time of the Middle Ages to the late nineteenth century. This doctrine developed in response to a real need of feudal society—the

diction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

2. The first paragraph of such oath contained a provision that, "I will be faithful and bear true allegiance to His Majesty King George the Fifth . . . and . . . will defend him to the utmost of my power against all traitorous conspiracies . . . against his person, Crown, and Dignity. . . ."

3. Plaintiff was found to have forfeited his citizenship based upon 8 U.S.C. § 1481 (a) (2) (1965) which provides that "[a]ny American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

4. *See* Afroyim v. Rusk, 387 U.S. 253, 258 (1967); Roche, *The Expatriation Cases: "Breathes there the Man With Soul So Dead . . .?"* 1963 S. CT. REV. 325, 328.

need for manpower to till the fields and fill the ranks of William the Conqueror's armies. Under this theory there was no problem of expatriation, for expatriation was impossible by the very nature of the theory. In England this doctrine continued to control the concept of citizenship until 1870, when Parliament passed an act which conferred upon British subjects the right of renunciation of citizenship.[5]

For a limited period of time perpetual allegiance was acceptable to the American legal system; however, the doctrine proved to be of limited utility in the post-Revolutionary environment for two reasons, the first of which was dictated by political necessity, the second controlled by the demographic demands of a frontier nation. Until the American Revolution citizens of the colonies were British subjects; after the Revolution they were no longer British subjects.[6] Clearly, the idea of perpetual allegiance proved to be inconsistent with the patriotic revolutionary fervor which had broken all political ties with George III. Furthermore, since the best interests of the United States lay in expansion by immigration, this would only be politically feasible if new immigrants could divest themselves of all previous political ties. Perpetual allegiance thus became an obsolete doctrine.[7]

The states' rights theory supplanted the perpetual allegiance theory as the basis for citizenship. The essence of the states' rights, or Jefferson-

5. The Naturalization Act of 1870, 33 Vict. c. 14 Act, § 6, provides that "[A]ny British subject who has at any time before or may at any time after the passing of this Act, when in any foreign state, and not under any disability, voluntarily become naturalized in such state, shall from and after the time of his so having become naturalized in such foreign state be deemed to have ceased to be a British subject and be regarded as an alien. . . ." *See* Slaymaker, *The Right of the American Citizen to Expatriate*, 37 AM. L. REV. 191, 193 (1903). See also Talbot v. Jansen, 3 U.S. (3 Dall.) 131 (1795). In *Talbot*, the Court pointed out that expatriation was not a settled issue in 1795. Although a citizen could not dissolve the compact between himself and his country without the consent or default of the community, the government could relieve a citizen from his allegiance. *See* Shanks v. DuPont, 28 U.S. (3 Pet.) 241 (1830); Inglis v. Trustees of the Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99 (1830).

On the other hand, the right of expatriation is treated as a fundamental right in Stoughton v. Taylor, 13 F. Cas. 1179 (No. 7,558) (D.C. N.Y. 1818). In this case a naturalized American citizen entered the service of a foreign nation and completely renounced his American citizenship. He was found to have been released from his obligations. A citizen, domiciled in a foreign country, who took an oath of allegiance to the foreign sovereign was held not to be under the protection of the United States. Nonetheless, the transfer of allegiance had to be under bona fide circumstances of good faith. *See* The Santissima Trinidad: and the Saint Andre, 20 U.S. (7 Wheat.) 348 (1822); Stoughton v. Taylor, *supra.*

6. Treaty of Peace of 1783, 22 Geo. 3, c. 46.

7. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 ALBANY L. REV. 151 (1962).

ian, concept was that since the federal government was made up of the several sovereign states and not of the people as an entity, an individual was, therefore, a citizen of the United States by virtue of his citizenship in a given state. Since United States citizenship depended upon state citizenship, expatriation was a matter to be determined by state law. Hence Congress could not divest anyone of his national citizenship as this was a prerogative belonging solely to that individual's state.[8]

The importance of the states' rights theory in early American legal history is illustrated by the introduction of a proposed thirteenth amendment in 1810, which provided:

> If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any Emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them or either of them.[9]

The fact that federal legislators sought reform in the law of citizenship via a constitutional amendment, rather than a legislative enactment, indicates the prevalence of dual sovereignty, and the concomitant emphasis accorded to the Jeffersonian theory.[10] A further indication is given in the statement of Virginia Chief Justice Spencer Roane, a champion of states' rights. In *Murray v. McCarthy* he concluded:

> It is clear to me that the Commonwealth of Virginia has never delegated to Congress the exclusive power to legislate on the subject of the great natural right of expatriation as relative to the Commonwealth.[11]

Though prevalent, the states' rights view of citizenship was by no means universal in its acceptance conceptually. Chief Justice Marshall, as his private correspondence showed, was as strongly attached to the doctrine of perpetual allegiance as was his predecessor Ellsworth. In a letter to Pickering in 1814, Marshall stated that, "[perpetual allegiance] is a question upon which I never entertained a scintilla of doubt; and have never yet heard an argument which ought to excite a doubt in any sound and reflecting mind."[12] The Chief Justice, however, while on the bench,

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8. Afroyim v. Rusk, *supra* note 4, at 278-79. *See* Roche, *supra* note 4, at 335.

9. Ames, *Proposed Amendments to the Constitution*, 2 REP. AMER. HIST. ASS. 187 (1896).

10. The proposal received the necessary two-thirds in the House of Representatives without debate and passed in the Senate, but fell one state short of the three-quarters necessary for ratification. *See* Ames, *supra* note 9, at 187.

11. Murray v. McCarthy, 16 Va. 505, 508 (1811).

12. Letter from John Marshall to Timothy Pickering, April 8, 1814, *cited* in 4 BEVERIDGE, LIFE OF JOHN MARSHALL 54 (1919). *See also* Williams' Case, 29 F. Cas. 1330, 1331 (No. 17, 708) (D.C.D. Conn. 1799).

avoided contronting the dominant Jeffersonian theory of states' rights and citizenship.[13] The conflict of ideas represented by Jefferson on one hand and Marshall on the other was not finally resolved until the adoption of the fourteenth amendment which destroyed the last vestiges of the states' rights theory of citizenship. Since national citizenship was no longer vicariously derived through citizenship in one of the several states, the focus in expatriation cases turned from the states to the federal government. In light of the fourteenth amendment grant of national citizenship to "all persons born or naturalized in the United States," could Congress by legislation take away that citizenship?

Controversy as to whether citizenship had been placed beyond the scope of congressional power began during the post-Civil War era. Post-Civil War legislation would seem to dispute any limitation of congressional power in this area: The Wade-Davis Bill of 1864,[14] which was not signed by President Lincoln, would have provided for the involuntary expatriation of deserters from the Union Army; the Enrollment Act of 1865[15] also stated that deserters from the Union Army had, thereby, forfeited their citizenship; another measure dealing with expatriation, the Relief Act of 1867,[16] provided that soldiers who had deserted after the Civil War was over would not lose their citizenship. Notwithstanding these precedents, the controversy concerning congressional power in the area of citizenship has continued in one form or another to the present.

The third theory of citizenship and expatriation—the voluntary abandonment concept—overlapped the states' rights theory, but did not actually become significant until after the latter's decline. Voluntariness of abandonment involves several problems: Can a citizen, whether born in the United States or naturalized there, unilaterally relinquish his citizenship? Or must the federal government consent to the abandonment? And can Congress, in effect, involuntarily expatriate a citizen by determining that when a citizen commits certain overt acts—for example, voting in a foreign election, or swearing allegiance to a foreign power—he thereby "voluntarily" relinquishes his citizenship, regardless of his subjective intent?

The right of voluntary abandonment *with consent* of the sovereign was

13. For a good insight into Jeferson's view of citizenship, *see* Letter from Thomas Jefferson to Albert Gallatin, June 26, 1806 in 8 WORKS OF JEFFERSON 458-60 (Ford ed. 1906).

14. Act of March 3rd, 1865, 13 Stat. 487, 490; *see also* Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 26 n.7, 61 n. 200 (1950).

15. Enrollment Act of 1865, 13 Stat. 490.

16. Relief Act of 1867, 15 Stat. 14.

given judicial recognition as early as 1830;[17] however, the concept of *unilateral* voluntary expatriation, did not achieve legislative dominance in this country until after the Civil War with the passing of the Expatriation Act of 1868.[18] This Act, however, only affirmed the right of an immigrant to relinquish his foreign nationality and become an American citizen by naturalization, and did not allow an American to denationalize. Thus, vestiges of the perpetual allegiance theory seemed to attach to United States citizenship, absent governmental consent to expatriation. It was not until the Expatriation Act of 1907[19] that Congress gave statutory validity to the theory that an American national could relinquish his American citizenship *without consent* of the government. The Expatriation Act of 1907 was passed in response to the quantity of denationalization law which had been amassed by administrative decisions since 1868. Doubts as to the will of the Congress of 1868 were resolved, and the nation had, for the first time since the Peace Treaty of 1783,[20] systematized immigra-

17. Shanks v. DuPont, *supra* note 5. Ann Scott, the mother of the defendants, had married a British officer in 1781 and had gone to England with him where she lived until her death in 1801. The court held that, "[T]he general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens." Shanks v. DuPont, *supra* note 5, at 246-47. The court ruled that Ann Scott had become a British subject, not by the commission of the specific affirmative act of marrying a British citizen or residing in England, but by virtue of the exercise of her own free will pursuant to the Treaty of Peace of 1783, 22 Geo. 3, c. 46. The Treaty of Peace provided that all persons "whether natives or otherwise, who then adhered to the American States, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown, were deemed and held subject of that crown." The Treaty of 1783 and the Supreme Court in *Shanks* use the test of to whom the individual "adheres," as the test of where citizenship would lie.

18. Expatriation Act of 1868, 15 Stat. 223. This Act was to aid the executive department in protecting naturalized American citizens when they were abroad. The act did not apply to Americans seeking to denationalize themselves, as a careful reading of the statute will show. Thus, vestiges of the perpetual allegiance theory, at least insofar as concerning Americans seeking to denationalize, seemed to linger on. *See* Roche, *supra* note 4, at 330-31; Maxey, *supra* note 7, at 161. Although the Expatriation Act of 1868 did not provide for voluntary abandonment of citizenship by Americans, subsequent treaties with western European nations gave substantial recognition to the principle of universal voluntary expatriation. Typical of these treaties was that with the North German Confederation, which provided that a citizen of any signor country could transfer allegiance to the sovereignty of any other co-signor. 15 Stat. 615 (1868). The Expatriation Act of July 27, 1868, 15 Stat. 223, provided that, "the right of expatriation is a natural and inherent right of all people . . . any declaration, instruction, opinion, order or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government." See Roche, *Loss of American Nationality: The Years of Confusion*, 4 WEST. POL. Q. 268, 274-77 (1951).

19. Expatriation Act of 1907, 34 Stat. 1228.

20. Peace Treaty of 1783, 22 Geo. 3, c. 46.

tion and nationality procedures. The statute established operational standards by which the United States government could determine whether an American citizen had voluntarily abandoned his citizenship, and required inquiry into the citizen's subjective intent. Examples of overt actions which would conclusively reveal such voluntary abandonment were the taking of a formal oath of allegiance to a foreign government or the assumption of a new nationality. Criteria for determining when a citizen had become a citizen of a foreign power or had lost his properly acquired United States citizenship were established. The 1907 Act provided that, "[a]ny American woman who marries a foreigner shall take the nationality of her husband."[21] This provision was interpreted by the Supreme Court in 1915, in *Mackenzie v. Hare*,[22] which established the principle that Congress may set standards to determine whether an American citizen has abandoned his citizenship through the commission of certain voluntary acts, without regard to his actual subjective intent.[23]

Congress again dealt with the area of citizenship with the Nationality Act of 1940.[24] Standards for both voluntary and involuntary expatriation were drawn.[25] The concept of voluntary expatriation was changed very little from its original form; however, provisions were added which would result in involuntary expatriation. In contrast to the Expatriation Act of 1907, the Nationality Act of 1940 did not inquire into the undis-

21. Expatriation Act of 1907, 34 Stat. 1228-29 (1907). She would, however, regain her American citizenship upon the termination of her marriage. *Cf.* Shanks v. DuPont, *supra* note 5.

22. 239 U.S. 299 (1915).

23. *Id.* at 311-12.

24. Nationality Act of 1940, 54 Stat. 1137, *as amended* 8 U.S.C. § 1481 (1965).

25. Maxey, *supra* note 7, at 169-70. "Voluntary" expatriation, simply stated, is loss of citizenship by one's own act, specifically designed by the person to bring that effect about, and with full knowledge of the consequences of his act. "Involuntary" expatriation is the deprivation of one's citizenship against his will and without his consent. A third type of expatriation, whereby the individual commits, without knowledge of the consequences, specified acts which are conclusively deemed by law to be an expatriation, has been characterized as "involuntary" by most commenators. These two types of involuntary expatriation have been interwoven and largely confused in the Nationality Act of 1940. *See* Roche, *supra* note 4, at 355. Provisions for voluntary expatriation listed in 8 U.S.C. § 1481(a) (1965) are: naturalization in a foreign state by one's own application; taking an oath of allegiance to a foreign state; making a formal renunciation of United States citizenship while in a foreign state; or making a formal renunciation of citizenship in the United States in time of war and with the approval of the Attorney General. Conduct which will result in involuntary expatriation is listed in 8 U.S.C. § 1481(a) as: serving in a foreign army; serving as an official of a foreign government; voting in a foreign political election; deserting the military forces of the United States in time of war; committing treason against, attempting by force to overthrow, or bearing arms against the United States; or draft-dodging.

closed intent to relinquish citizenship by a citizen who had voluntarily committed one of the acts listed in the statute. This revealed a fundamental change in the concept of citizenship. The "right to have rights"[26] became nothing more than the revocable privilege to have rights.[27]

The constitutionality of the right of Congress to expatriate an American national has been examined in a number of cases interpreting the various citizenship statutes, and has resulted in several different interpretations by the Supreme Court. One line of thought theorized that Congress had no power whatsoever to revoke the citizenship of a United States citizen. The origin of this view may be found in Chief Justice Marshall's dictum in *Osborn v. Bank of the United States*, wherein he stated:

> [A naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. *The simple power of the legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it*, so far as respects the individual.[28]

In *United States v. Wong Kim Ark*,[29] the Court was faced with the question whether a person born in the United States of alien parents is an American citizen. Utilizing Chief Justice Marshall's dictum in *Osborn*, the Court declared that, "no act or omission of Congress . . . can affect citizenship acquired as a birthright, by virtue of the [fourteenth amendment of the] Constitution itself."[30] The Court further held that the fourteenth amendment established that a person born in the United States had a "complete right to citizenship."[31] In support of its conclusion that the fourteenth amendment established a sufficient and complete right to citizenship, the Court cited the Civil Rights Act of 1866 which stated that "all persons born in the United States . . . are . . . citizens."[32] The Court argued that, "the same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave too important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the Fourteenth Amendment."[33]

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26. *See* Perez v. Brownell, 356 U.S. 44, 64 (1958).

27. Immigration and Nationality Act of 1952, 66 Stat. 267, *as amended* 8 U.S.C. § 1481 (1964). The Immigration and Nationality Act of 1952 as a comprehensive codification of all previous legislation regulating expatriation contained essentially the same provisions as the Expatriation Act of 1940.

28. 22 U.S. (9 Wheat.) 737, 927 (1824) (emphasis added).

29. 169 U.S. 649 (1898).

30. *Id.* at 703.

31. *Id.*

32. Act of April 9, 1866, 14 Stat. 27.

33. *Supra* note 29, at 675.

The thesis that Congress may not provide for involuntary expatriation is also expressed by Chief Justice Warren's dissenting opinion in the multi-opinioned case, *Perez v. Brownell*, involving expatriation for voting in a foreign political election:

> Citizenship is man's basic right for it is nothing less than the right to have rights. . . .[34]
>
> [T]he citizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. . . .[35]
>
> [A] government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.[36]

In *Trop v. Dulles*,[37] companion case to *Perez* and also a multi-opinioned case involving expatriation of a deserter, Chief Justice Warren wrote the opinion of the Court, which generally adopted the view of his dissent in *Perez*. He reasoned:

> If this statute taking away citizenship is a congressional exercise of the war power, then it cannot rationally be treated other than as a penal law, because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power.[38]

Calling it "a form of punishment more primitive than torture,"[39] Warren determined that the statute was violative of the principles of the eighth amendment.[40]

In the consolidated cases of *Rusk v. Cort* and *Kennedy v. Mendoza-Martinez*,[41] both of which involved draft evaders leaving the United States, the Court expressly ruled that the fifth, sixth and fourteenth amendments prevented forcible destruction of citizenship by Congress. While acknowledging the power of Congress in the field of foreign affairs, Justice Goldberg pointed out that it would be unnecessary to treat the powers of Congress and the constitutional guarantee of the right to citizenship as mutually exclusive,[42] because any legislation imposing the loss of citizenship for evading the draft would be regarded as penal in purpose and effect. Thus, automatic denationalization procedures without the protection of the fifth and sixth amendments were obviously unconstitu-

34. *Supra* note 26, at 64.
35. *Supra* note 26, at 65.
36. *Supra* note 26, at 65.
37. 356 U.S. 86 (1958).
38. *Id.* at 97.
39. *Id.* at 101.
40. *Id.* at 99.
41. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
42. *Id.* at 164.

tional.[43] Justices Douglas and Black, in concurring, expressed the same ideas they had articulated in *Trop*—that citizenship was not subject to general governmental powers.[44]

In *Afroyim v. Rusk*[45] Justice Black, in the majority opinion, denied congressional power to involuntarily expatriate a citizen. *Perez* was specifically overruled, and the reasoning of Chief Justice Warren's dissent in *Perez* was adopted.[46] Justice Black gave a historical review of the circumstances surrounding the adoption of the fourteenth amendment and post-amendment legislation to support his argument. He stated that "any doubt as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the amendment itself."[47] He then made the sweeping assertion that his interpretation of the amendment "comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire fourteenth amendment was adopted to guarantee."[48]

Another judicial interpretation of the constitutional power of Congress to deprive an American of his citizenship is the point of view adopted in *Mackenzie v. Hare*.[49] The case involved the loss of citizenship for American women by virtue of their marrying aliens.[50] The Court reached the conclusion that although the expatriation must be voluntary, in the sense that the act committed must have been voluntarily done, Congress has the power to determine specifically which acts shall be conclusively deemed by law to constitute "voluntary" expatriation.[51] In reference to the Expatriation Act of 1907, the Court stated:

> 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.[52]

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43. *Id.* at 165-66.

44. *Id.* at 186.

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

46. *Id.* at 269.

47. *Id.* at 261-62.

48. *Id.* at 267.

49. *Supra* note 22.

50. *See supra* notes 17, 20, 21.

51. Duress is specifically exempted from the holding. A number of Japanese Americans had committed acts under duress which would otherwise have resulted in expatriation. *See* Uyeno v. Acheson, 96 F. Supp. 510 (W.D. Wash. 1951); Acheson v. Kuniyuki, 189 F.2d 741 (9th Cir. 1951), *cert. denied* 342 U.S. 942 (1952).

52. *Supra* note 22, at 311-12.

Mackenzie became the first case to hold that Congress could denationalize a citizen without his consent,[53] as well as determine what conduct would constitute abandonment or renunciation of citizenship, both of which are to be regarded as separate and distinct from the citizen's own right to unilaterally expatriate.[54]

Justice Frankfurter, writing the majority opinion in *Perez v. Brownell*, adopted the basic premise of *Mackenzie*—that Congress has the power to determine which acts shall constitute voluntary expatriation. He explained the source of his authority to be the congressional power to regulate foreign affairs. His thesis is developed as follows:

> [Congress has the power to] enact legislation for the effective regulation of foreign affairs. . . . The Government must be able not only to deal affirmatively with foreign nations . . . it must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests. . . . Since Congress may not act arbitrarily, a rational nexus must exist between the content of the specific power in Congress and the action of Congress in carrying that power into execution. . . . The critical connection . . . is the fact that it is potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem.[55]

Justice Frankfurter expressly refuted the notion that the conduct of the citizen need indicate a desire for expatriation; *only the act itself need be voluntary.*

In dissenting in *Trop v. Dulles*,[56] Justice Frankfurter, using the same rational nexus theory as in *Perez*, easily found a logical connection between "refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship."[57] In arguing that the statute was regulatory, not penal in nature, Frankfurter argued that it could by no means be considered cruel and unusual punishment when compared with the death penalty.[58]

A third judicial view of expatriation legislation lies midway between Justice Frankfurter's "rational nexus" theory, which would permit virtually unlimited denationalization powers, and the fourteenth amendment arguments typified by *Afroyim*, which would allow Congress no power at all in this field. In separate dissenting opinions in *Perez*, Justice

53. Agata, *Involuntary Expatriation and Schneider v. Rusk*, 27 U. PITT. L. REV. 1, 6 (1965).

54. *See* 36 U. CIN. L. REV. 690, 691-93 (1967) for a complete categorization of statutory prohibitions.

55. *Supra* note 26, at 57-60.

56. *Supra* note 37.

57. *Supra* note 37, at 112.

58. *Supra* note 37, at 125.

Douglas and Chief Justice Warren expressed "dilution of allegiance" to be the standard for any congressional action involving denationalization. Douglas pointed out that, just as any right may be waived by the citizen, "the waiver must first be a voluntary act and second an act consistent with a surrender of the right granted."[59] Chief Justice Warren stated that "citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country."[60] Justice Douglas, writing for the majority in *Schneider v. Rusk*,[61] adopted Justice Stewart's argument expressed in *Mendoza-Martinez* that, whereas involuntary expatriation could be legislated by Congress, it could only provide for such denationalization if the action by the citizen is necessarily incompatible with "undivided loyalty to this country."[62] An allegiance test, however, would result in legislative interpretation of what acts would be in derogation of undivided allegiance. This wide latitude, limited to be sure by first amendment freedoms, would result in considerable congressional powers to denationalize. Hence, this theory seems inconsistent with the absolutist views of Douglas, Black and Warren expressed elsewhere in the same opinions and in other cases.

It is particularly common in expatriation cases for the majority and dissenting opinions to rely on the same cases. This situation occurs because many expatriation cases have been decided by five to four margins. In considering *Afroyim* on appeal from the federal district court,[63] the court of appeals found the facts to be indistinguishable[64] from those of *Perez*, for it had been stipulated that Afroyim had voluntarily voted in a political election of a foreign country, which was a violation of Section 401 (e) of the Nationality Act of 1940.[65] However, there were some rather apparent differences in the factual situations of *Perez* and *Afroyim* which might possibly have been used by the Court to differentiate the cases. While Perez was a native-born American, Afroyim was a naturalized citizen.[66] Another basis on which the Court might have distinguished the

59. *Supra* note 26, at 83.

60. *Supra* note 26, at 68.

61. 377 U.S. 163 (1964).

62. *Id.* at 168.

63. 250 F. Supp. 686 (S.D. N.Y. 1966).

64. 261 F.2d 102 (2d Cir. 1966).

65. 8 U.S.C. § 1481 (1964).

66. Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969), *juris. noted* 90 S. Ct. 69 (No. 179, 1969 Term), may differentiate between the power of Congress to divest a naturalized citizen of his citizenship and its power to expatriate a native-born American.

cases was the motivation for remaining outside of the United States, for Perez stayed in Mexico for the purpose of avoiding the draft. Evidently the Court does not attach any importance to motivation, for the same Court, in the companion case of *Trop v. Dulles*, found constitutional objections to a statute expatriating a soldier guilty of desertion in time of war, an opprobrious deed in the eyes of most people.[67] Thus the Court ignored such distinctions and found the cases were indistinguishable; thereafter the five to four decision in *Perez* was construed as specifically overruled by the five to four decision in *Afroyim*. The proposition of the *Perez* majority—that Congress may expatriate a citizen who engages in conduct which might interfere with the nation's regulation of foreign affairs,[68] such as by voting in a foreign election—was replaced by the thesis of the *Afroyim* majority: Congress has no power to involuntarily expatriate a citizen[69] by determining that certain overt acts constitute voluntary relinquishment of citizenship.

Baker followed the reasoning of the *Afroyim* line of cases rather than that of the *Perez* chain. Judge Gray, in delivering the *Baker* decision, quoted Justice Black's majority opinion in *Afroyim* when stating that Baker, like all persons born in the United States, has "a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship."[70] Furthermore, Judge Gray maintained that if the statute could not provide for automatic loss of citizenship as a matter of law, it merely raised an issue of fact as to whether in taking the oath Baker intended to relinquish his United States citizenship.[71]

Baker v. Rusk is significant in that it extends the doctrine expressed in *Afroyim v. Rusk* in two different ways. First, an additional section of the United States Code is construed in light of *Afroyim*:

> Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, *or when he has taken an oath of allegiance to any foreign state.*[72]

The court modified this provision by holding that in order to expatriate himself by swearing allegiance to a foreign state, the American citizen must *specifically intend* to relinquish his American citizenship.

Second, and more important, the "fundamental ambiguity"[73]—that

67. *Supra* note 37.
68. *Supra* note 26.
69. Afroyim v. Rusk, *supra* note 45.
70. Baker v. Rusk, 296 F. Supp. 1244, 1245 (C.D. Cal. 1969).
71. *Id.* at 1246.
72. 8 U.S.C. § 1481(a)(2) (1964) (emphasis added).
73. *Supra* note 45, at 269.

"voluntary" has come to mean many things, including "involuntary"—which is referred to in Justice Harlan's dissent in *Afroyim*, is more nearly resolved. Resolution of this ambiguity is essential to any ordered concept of citizenship law, as the jurisprudential value of a given case is dependent upon the utility of the standards contained therein, and the predictability as to future cases gained thereby. As Justice Harlan pointed out: "Voluntariness is not here a term of fixed meaning . . . . [I]t has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship."[74] Judge Gray selects the approach requiring specific intent to renounce one's citizenship. His test is a "fact" test, whereby the law is to be determined on a case-by-case basis.

In criticism of this approach it might be pointed out that *Afroyim* did not specifically overrule *Savorgnan v. United States*,[75] wherein the Court specifically rejected the notion "that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them."[76] Although Judge Gray's fact test for voluntariness leads to law decided on a case-by-case basis, each case turning on the factual question of specific intent, *Baker* offers an operational definition for the previously ambiguous language of *Afroyim*.

No single theory of expatriation has dominated in any phase of our national development. This pattern has continued to the present in the multi-opinioned, five to four decisions and volatile dissents of the more recent Supreme Court cases in this area. In a vigorous dissent to the *Afroyim* majority, Justice Harlan condemned the Court's approach as "*ipse dixit*, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power."[77] The issue of voluntary expatriation is far from resolved. The liberal branch of the Court traditionally contends that the right to citizenship cannot be restricted by Congress: this line of thought would continue to apply the *Afroyim* rule. The more conservative branch of the Court, however, has argued that denationalization is within the purview of congressional authority over foreign affairs; were this line of though pursued, *Perez* would be reinstated. Along what lines the 1970 Court will divide remains to be seen.

Robert Ward

74. *Supra* note 45, at 269.
75. 338 U.S. 491 (1950).
76. *Id.* at 499-500.
77. *Supra* note 45, at 293.