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Constitutional Law -- Loss of Citizenship by Naturalized Citizen Residing Abroad

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CONSTITUTIONAL LAW—LOSS OF CITIZENSHIP BY NATURALIZED CITIZEN RESIDING ABROAD

The plaintiff, a German national by birth, became a naturalized citizen of the United States.[1] In 1956, she married a German national, and has resided in Germany since that time. In 1959, the plaintiff applied for a passport to enter the United States, but the State Department refused to issue her one, certifying that her citizenship had been lost under section 352(a)(1) of the Immigration and Nationality Act of 1952.[2] She sued for a declaratory judgment of her right to citizenship and for an injunction to prevent enforcement of the act. In the district court, a three judge panel,[3] one judge dissenting, ruled that her citizenship had been lost.[4] On appeal, *held*, reversed: section 352(a)(1) of the Immigration and Nationality Act bears no reasonable relationship to the power of Congress to regulate foreign affairs, and discriminates against naturalized citizens as a class in violation of fifth amendment due process of law. *Schneider v. Rusk*, 84 Sup. Ct. 1187 (1964).[5]

Although the Constitution provides that a person can acquire United States citizenship by one of two methods,[6] there is no provision in the Constitution concerning the loss of citizenship.[7] Rather, Congress has assumed the function of enacting specific conditions under which expatriation may occur.[8]

The first such enactment, in 1868,[9] declared that the right of expatriation was a natural and inherent right of all people. This provision removed the necessity of the sovereign's consent to effect expatriation.[10]

1. 8 U.S.C. § 1431(a)(1) (1958).

2. 8 U.S.C. § 1484(a)(1) (1958), which provides that:

(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. . . .

Residence is defined in § 1101(a)(33) of the act, 8 U.S.C. § 1101(a)(33) (1958), as a person's actual dwelling place in fact, and contemplates a continuity of stay, but not necessarily an uninterrupted physical presence in a foreign state.

3. 28 U.S.C. § 2282 (1958), as amended, 28 U.S.C. § 2284 (Supp. V, 1964), requires a three-judge panel when a party seeks to enjoin the enforcement of a federal statute.

4. Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1963).

5. The same question arose in an earlier case, but was never heard by the Supreme Court on its merits. Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

6. U.S. CONST. amend. XIV, § 1 provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

7. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159 (1963); United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

8. For a history of cases and Congressional enactments, see Appleman, *The Supreme Court on Expatriation: An Historical Review*, 23 FED. B.J. 351 (1963).

9. 15 Stat. 223 (1868).

10. 2 KENT, COMMENTARIES ON AMERICAN LAW 71-2 (14th ed. 1896).

The Nationality Act of 1907[11] was the first statute to enumerate specific acts for the commission of which a person could be expatriated. These included naturalization in a foreign state and the taking of an oath of allegiance to a foreign state. Under this act, a naturalized citizen was presumed[12] to be expatriated if he resided for two years in the country of his origin, or for five years in any other country. Further, an American female who married a foreign national was deemed to have lost her citizenship for the period of coverture.[13] While the original bill did not differentiate between native-born and naturalized citizens,[14] it was amended before passage to apply only to naturalized citizens,[15] although no valid reason was ever offered for this alteration.[16]

The Nationality Act of 1940[17] expanded the categories of activity which would result in loss of citizenship for both native-born and naturalized citizens.[18] These were obtaining naturalization in a foreign state, taking an oath of allegiance to a foreign state, and entering or serving in the armed forces of another state if the person was a national of that state or naturalization was required for such service. Accepting employment in another state for which only nationals were eligible, voting in a political election of a foreign state, and making a formal renunciation of American citizenship in a foreign state were grounds for expatriation. In addition, deserting the armed forces of the United States in time of war if convicted by a court martial and subsequently dismissed or dishonorably discharged, and committing treason, bearing arms against or attempting to overthrow the government by force, were grounds for loss of citizenship. More significant, though, was the provision calling for the automatic loss of citizenship of a naturalized citizen who resided for three years in the country of his origin or for five years in any other country.[19] Congress was apparently persuaded, partially because of the possibility of war, that expatriation of naturalized citizens residing abroad was a necessary measure. These citizens supposedly "accumulated wealth through the opportunities afforded in the United States," traveled

11. 34 Stat. 1228 (1907).

12. "*Provided however*, [t]hat said presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States. . . ." *Ibid.* "[W]e are prompted to say that it is a presumption easy to preclude and easy to overcome." United States v. Gay, 264 U.S. 353, 358 (1924).

13. Mackenzie v. Hare, 239 U.S. 299 (1915), concerned this provision which was repealed by 42 Stat. 1022 (1922).

14. Comment, *Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad*, 49 CORNELL L.Q. 52, 61-2 (1963).

15. 41 CONG. REC. 1463, 1464-65 (1907); 49 CORNELL L.Q. 52, 64 (1963).

16. 49 CORNELL L.Q. 52, n.91 (1963). Two ostensible reasons were that a naturalized citizen who resides abroad is not really "one of us" and that a foreigner who does not intend permanently to cast his lot with us should not be permitted to fraudulently acquire protection of the American flag. 41 CONG. REC. 1463, 1464 (1907).

17. 54 Stat. 1137 (1940).

18. 54 Stat. 1168-69 (1940).

19. 54 Stat. 1170 (1940).

abroad, spent their money abroad, bore no responsibilities of citizenship, but nevertheless demanded the protection afforded other citizens.[20]

Two 1944 amendments,[21] applicable to native-born and naturalized citizens, added as grounds for loss of citizenship remaining outside the United States in time of war or national emergency for the purpose of avoiding military training or service, and a formal renunciation of citizenship in a foreign state in time of war.

With the exception of a 1954 amendment,[22] the present law concerning loss of citizenship is embodied in the Immigration and Nationality Act of 1952,[23] and is basically the same as its predecessors with respect to the grounds for expatriation. This act no longer requires that an individual who serves in the armed forces of another state be a national of that state in order to be expatriated,[24] and raises a presumption that the act of remaining outside the United States in time of war or national emergency is for the purpose of avoiding military training or sevrice.[25]

The power of Congress to expatriate involuntarily has been upheld on the basis of its power to regulate foreign affairs[26] and to raise armies and navies.[27] The exercise of this power, however, requires the existence of a reasonable relationship between the means—withdrawl of citizenship—and the end which is within the power of Congress to achieve.[28] In *Perez v. Brownell*,[29] a majority of the Court decided that voting in a Mexican political election was connected sufficiently to the power of Congress over foreign affairs to justify the loss of citizenship. The Court reasoned that the citizen, by participating in such an election, could encourage activities contrary to the interests of his government. These activities might be interpreted erroneously as official policies of the gov-

20. 86 CONG. REC. 11944 (1940) (remarks of Mr. Dickstein).

21. 58 Stat. 677, 746 (1940).

22. 8 U.S.C. § 1481(a)(9) (1958), which provides for loss of citizenship if a person is convicted of willfully advocating the overthrow of the United States government by force. See 18 U.S.C. § 2385 (1958).

23. 8 U.S.C. § 1481, 1484 (1958); H.R. REP. No. 1365, 82d Cong., 2d Sess. 305 (1952), 2 U.S. CODE CONG. & AD. NEWS 1743 (1952), indicates that the provisions which concerned loss of citizenship by naturalized citizens were made part of the 1952 legislation without adverse comment; see also Schneider v. Rusk, 84 Sup. Ct. 1187, 1195 (1964).

24. 8 U.S.C. § 1481(a)(3) (1958).

25. 8 U.S.C. § 1481(a)(10) (1958) (the same statute was held unconstitutional on procedural grounds in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), *infra* note 44).

26. Perez v. Brownell, 356 U.S. 44, 58 (1958); Mackenzie v. Hare, 239 U.S. 299, 311 (1915):

> As a government the United States is invested with the attributes of sovereignty. As it has the character of nationality, it has the powers of nationality, especially those which concern its relations and intercourse with other countries.

27. U.S. CONST. art. 1, § 8, cls. 12, 13, 14; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963).

28. Schneider v. Rusk, 84 Sup. Ct. 1187, 1189 (1964); Perez v. Brownell, 356 U.S. 44, 60 (1958); Trop v. Dulles, 356 U.S. 86, 92-3 (1958).

29. 356 U.S. 44 (1958).

ernment, and prove embarrassing in the conduct of foreign relations.[30] The most recent case to uphold expatriation as an exercise of the foreign relations power was *United States ex rel. Marks v. Esperdy*,[31] in which the Court concluded that service in Fidel Castro's revolutionary army was more likely to have a deleterious effect on our relations with other countries than voting in a foreign political election.[32]

In loss of citizenship cases, the Supreme Court has been able to achieve little unanimity of philosophy. Three justices[33] believe that Congress has no power to expatriate a citizen against his will, and that expatriation can be effected only by voluntary renunciation of nationality and allegiance.[34] A majority of the Court has adopted the *Perez*[35] view, which requires that there be a reasonable relationship of loss of citizenship to the Congressional power source.

In the instant case,[36] a majority of five justices followed *Perez*, reasoning that returning to one's country of origin for three years was not likely to be a source of embarrassment to the conduct of foreign relations serious enough to justify expatriation.[37] Equally important was the Court's determination that the statute[38] constituted invidious discrimination against naturalized citizens as a class. Naturalized citizens now will be able to reside abroad for unlimited periods of time without fear of expatriation, and a highly criticized and unjust provision no longer exists.[39] In addition, this decision will prevent expatriation of approximately fifteen-hundred naturalized citizens each year.[40] Since section 352(a)(1)[41] of the 1952 act has been declared invalid, section 352(a)(2)[42] which imposes the same sanction for residence in any other country for five years should be invalid under the same rationale.

30. *Id.* at 49, 59.

31. 315 F.2d 673 (2d Cir. 1963), *aff'd per curiam by an equally divided court*, 84 Sup. Ct. 1224 (1964).

32. *Id.* at 675, referring to the opinion of the lower court in 203 F. Supp. 389, 395 (S.D.N.Y. 1962).

33. Chief Justice Warren, and Justices Black and Douglas.

34. Schneider v. Rusk, 84 Sup. Ct. 1187, 1189 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963); Perez v. Brownell, 356 U.S. 44, 79-80 (1958); Trop v. Dulles, 356 U.S. 86, 93 (1958).

35. See *supra* note 28 and accompanying text.

36. Schneider v. Rusk, 84 Sup. Ct. 1187, 1189 (1964).

37. *Id.* at 1189, 1190. The court adopted the view of the dissenting district court judge which indicated that the United States would have to bear the administrative burden of protecting the rights of naturalized citizens who reside abroad.

38. *Id.* at 1190.

39. Report of the PRESIDENT'S COMMITTEE ON IMMIGRATION AND NATURALIZATION 239 (1953). This report indicated that the provisions for loss of citizenship, which were limited in their application to naturalized citizens, created a second class citizenship in the United States. The committee felt that it was unfair for a native born citizen to be able to reside abroad for an indefinite period of time, while a naturalized citizen could only remain abroad for a maximum of five years.

40. Comment, 49 CORNELL L.Q. 52, 53 (1963).

41. See note 2 *supra*.

42. 8 U.S.C. § 1484(a)(2) (1958).

As pointed out by the majority opinion,[43] there are other limitations on the power of Congress to expatriate a citizen against his will. If the applicable statute is found to be penal in nature,[44] rather than regulatory, citizenship may not be taken away without fifth and sixth amendment procedural safeguards.[45] Assuming that the statute is penal, expatriation may be considered cruel and unusual punishment,[46] although this characterization has been limited so far to the person who has no other nationality.[47]

Three justices[48] emphasized, in dissent, the legislative history of section 352,[49] and stated that protection of naturalized citizens residing abroad was a source of "international friction" in the conduct of foreign relations. However, they offered no convincing reasons why residence abroad of native-born citizens would not cause similar difficulties.

In an attempt to uphold the statute's discriminatory effect on the rights of naturalized citizens, the dissenting justices pointed to wartime situations and to cases in which aliens have been restricted in their activities.[50] However, neither of these factors seem particularly appropriate, because aliens do not have the same rights as citizens,[51] the country is not at war and because wartime restrictions have proved harsh by comparison with peacetime regulations.[52] The dissenting opinion has

43. Schneider v. Rusk, 84 Sup. Ct. 1187, 1190 (1964).

44. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963). Without conclusive evidence of Congressional intent bearing on the nature of the statute, the court considers the following factors: (1) whether the sanction involves a permanent disability or restraint; (2) whether the sanction historically has been considered as penal; (3) whether *scienter* is an element of the offense; (4) whether the statute seeks retribution and deterrence; (5) whether the behavior is already a crime; (6) whether an alternative purpose can be reasonably assigned to the provision; and (7) whether the consequence is excessive in the light of the alternative assigned.

45. *Id.* at 167 ("a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses").

46. U.S. CONST. amend VIII provides: "nor [shall] cruel and unusual punishment be inflicted." In Trop v. Dulles, 356 U.S. 86, 101-02, 110 (1958), the court considered expatriation under 8 U.S.C. § 1481(a)(8) (1958). This statute provided that a person could lose his citizenship for desertion of the armed forces in time of war. The court viewed expatriation as a destruction of the individual's political existence, which stripped the citizen of his status in the national and international community. The court was also influenced by what it termed the "unknowable" consequences of expatriation.

47. Trop v. Dulles, *supra* note 46, at 101, referring to the court of appeals opinion in 239 F.2d 527, 530 (2d Cir. 1956): "[P]unitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such."

48. Justices Clark, Harlan and White. Justice Brennan did not participate in the decision.

49. Schneider v. Rusk, 84 Sup. Ct. 1187, 1192-93 (1964).

50. *Id.* at 1194.

51. Harisides v. Shaughnessy, 342 U.S. 580, 586 (1952): "[T]he alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen." See WASSERMAN, IMMIGRATION LAW AND PRACTICE 31 (1961) for a reflection of the plenary power of Congress to exclude aliens.

52. Korematsu v. United States, 323 U.S. 214, 219-20 (1944):

Citizenship has its responsibilities as well as its privileges, and in time of war,

merit in its suggestion that expatriation statutes are based on acts deemed by Congress to indicate a lack of allegiance to the United States.[53] Without the element of discrimination between native-born and naturalized citizens, Congress probably could enact a statute, based on acts and circumstances similar to the ones in the instant case, which would be constitutional.

The instant case demonstrates the fact that a citizen can be expatriated against his will as long as the loss of citizenship bears a reasonable relationship to the particular Congressional power source.[54] The opinion also indicates that strong evidence of that relationship will be necessary to convince the Supreme Court of its existence,[55] which is perhaps a reflection of the Court's increasing reluctance to effect expatriation. The foreign relations power cannot be used to expatriate a naturalized citizen merely for living abroad for a stated period of time, and legislation in this area which discriminates against naturalized citizens as a class will not survive the requirement of fifth amendment due process of law.[56]

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the burden is always heavier. Compulsory exclusion of large groups of citizens [Japanese] from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.

53. Schneider v. Rusk, 84 Sup. Ct. 1187, 1194 (1964).

54. *Id.* at 1189.

55. *Id.* at 1190.

56. *Ibid.*