Vanderbilt Law Review

Volume 12
Issue 3 *Issue 3 - Symposium on Professional Negligence*

Article 16

6-1959

Loss of Citizenship -- Statutory Expatriation

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LOSS OF CITIZENSHIP—STATUTORY EXPATRIATION

INTRODUCTION

There is no provision in the United States Constitution which expressly gives or denies Congress a right to deprive a person of, or prescribe a method whereby a person may lose, his citizenship. Yet in the Nationality Act of 1940[1] Congress provided for the involuntary expatriation of an American citizen upon the intentional commission of one or more of several specified acts.[2]

In 1957 three cases involving this statute reached the Supreme Court of the United States.[3] The constitutionality of the section providing for loss of citizenship by voting in a foreign election was upheld[4]; the one providing for loss of citizenship upon conviction of desertion from the military forces in time of war was declared unconstitutional[5]; and there was no decision on the constitutionality of the provision relating to loss of citizenship by reason of serving in a foreign military force, the case being remanded for additional action.[6] The opinions revealed a wide divergence of views among the current members of the Court on the issue of congressional power to provide for loss of citizenship.

One view, expressed by Mr. Chief Justice Warren and Mr. Justice Black, is that Congress absolutely lacks any power to deprive a person of his American citizenship. In *Perez v. Brownell*,[7] the Chief Justice stated:

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1. Nationality Act of 1940, 54 Stat. 1137, as amended, 8 U.S.C. §§ 1101-1503 (1952).

2. The acts enumerated in the statute are: (1) Obtaining naturalization in a foreign state upon own application; (2) Making a formal declaration of allegiance to a foreign state; (3) Entering, or serving in, the armed forces of a foreign state without prior authorization from the Secretary of State and Secretary of Defense; (4) Accepting employment under the government of a foreign nation where he acquires or has the nationality of such government or is required to declare allegiance to such government; (5) Voting in a political election in a foreign state or to determine sovereignty over foreign territory; (6) Making a formal renunciation of nationality before a diplomatic official of the United States in a foreign state; (7) Making in the United States a formal written renunciation of nationality when the United States is in a state of war; (8) Deserting the military of the United States in time of war if convicted thereof and being dismissed or dishonorably discharged as a result; (9) Committing any act of treason if convicted, or, being convicted of wilfully advocating the overthrow of the government by force and violence; and (10) Departing from or remaining outside of the jurisdiction of the United States during time of war for the purpose of avoiding military service.

3. Nishikawa v. Dulles, 356 U.S. 129 (1958); Perez v. Brownell, 356 U.S. 44 (1958); Trop v. Dulles, 356 U.S. 86 (1958).

4. 54 Stat. 1169 (1940), as amended, 8 U.S.C. § 1481(a)(5) (1952); Perez v. Brownell, 356 U.S. 44 (1958).

5. 54 Stat. 1169 (1940), as amended, 8 U.S.C. § 1481 (a)(8) (1952); Trop v. Dulles, 356 U.S. 86 (1958).

6. 54 Stat. 1169 (1940), as amended, 8 U.S.C. § 1481(a)(3) (1952); Nishikawa v. Dulles, 356 U.S. 129 (1958).

7. 356 U.S. 44 (1958).

> This government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence. I cannot believe that a government conceived in the spirit of ours was established with power to take from the people their most basic right.[8]

Mr. Justice Black echoed a similar feeling in *Trop v. Dulles*[9] and *Nishikawa v. Dulles*,[10] declaring in the latter:

> In my view the notion that citizenship can be snatched away whenever such deprivation bears some "rational nexus" to the implementation of a power granted Congress by the Constitution is a dangerous and frightening proposition.[11]

Mr. Justice Frankfurter exemplifies the opposite viewpoint. If any reasonable relationship, "nexus," can be found between the legislation and an express or implied power of Congress, he would uphold it as constitutional. Thus in *Perez v. Brownell*,[12] Frankfurter, speaking for the majority, sanctioned a loss of citizenship for voting in a foreign election on the ground that it was within Congress's power to regulate foreign affairs. On the strength of this power, he declared: "It cannot be said, then, that Congress acted without warrant when . . . it provided that anyone who votes in a foreign election of significance politically in the life of another country shall lose his American citizenship."[13] In *Trop v. Dulles*,[14] Frankfurter would have upheld loss of citizenship as a result of conviction for desertion from the military forces in time of war. Dissenting from the majority opinion which had declared the statute unconstitutional as imposing a cruel and unusual punishment, he declared:

> Possession by an American citizen of the rights and privileges that constitute citizenship imposes correlative obligations. . . . Can it be said that there is no rational nexus between refusal to perform this ultimate duty of American citizenship [*i.e.*, service in the armed forces] and legislative withdrawal of that citizenship?[15]

The other justices lined up on both sides. Justices Burton, Clark and Harlan followed Frankfurther's point of view in both cases while Black, Douglas and Whittaker agreed with the Chief Justice. This left Justice Brennan to, in effect, cast the deciding vote in both cases. He voted to uphold the provision of the statute which was based on the congressional power to regulate foreign affairs;[16] but could find

8. *Id.* at 64.
9. 356 U. S. 86 (1958).
10. 356 U. S. 129 (1958).
11. *Id.* at 139.
12. 356 U. S. 44 (1958).
13. *Id.* at 62.
14. 356 U. S. 86 (1958).
15. *Id.* at 121-22 (Dissent).
16. Mr. Justice Brennan voted with the majority in *Perez v. Brownell* and did not write a separate opinion.

no rational connection between congressional war powers and the provision providing for loss of citizenship upon a conviction for desertion from the armed forces.[17]

The only point on which the Court appears to be in general agreement is that the commission of the proscribed act must be voluntary. This does not mean that the citizen must voluntarily intend to lose his citizenship. Rather, it means that the person must have performed the act, such as voting in a foreign election, voluntarily. Loss of citizenship follows the commission of the voluntary act even though the person has no knowledge of the statute. It is a consequence which Congress attaches to the voluntary commission of the act irrespective of the individual's intention.[18]

A few decades ago the problem of loss of citizenship was not of much practical significance to the average American. The problem arose primarily in private litigation concerning the inheritance of property as most states followed the common law rule that an alien could not inherit property.[19] Thus if the heir was an alien, the property went either to other heirs or to the state. Statutes which

17. In *Trop v. Dulles*, Mr. Justice Brennan wrote a concurring opinion, this time on the other side of the question.

18. There is also some divergence among the members of the Court on the question of burden of proof. The majority require the Government to prove the conduct was voluntary by clear, convincing and unequivocal evidence. In *Nishikawa*, the Court said: "Of course, the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily. Unless voluntariness is put in issue, the Government makes its case simply by proving the objective expatriating act. But here petitioner showed that he was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject. This adquately injected the issue of voluntariness and required the Government to sustain its burden of proving voluntary conduct by clear, convincing and unequivocal evidence." 356 U.S. at 136-37. While concurring in the result reached in this case that the Government had a burden of proof by clear, convincing and unequivocal evidence, Mr. Justice Frankfurter felt that the Court was laying down too rigid a formula for cases involving duress. "The Court should hestitate long before imposing on the Government, by a generalized, uncritical formula, a burden so heavy that the will of Congress becomes incapable of sensible, rational, fair enforcement." 356 U.S. at 141. Justices Clark and Harlan felt that the majority view was contrary to established rules of evidence and would impose an impossible task on the Government. "Although the Court recognizes the general rule that consciously performed acts are presumed voluntary . . . it in fact alters this rule in *all* denationalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in such cases from the duty of proving that their presumably voluntary acts were actually involuntary. One of the prime reasons for imposing the burden of proof on the party claiming involuntariness is that evidence normally lies in his possession." 356 U.S. at 144-45. "The Court remands the case presumably to give the Government the opportunity to show that Nishikawa's service with the Japanese Army was voluntary. Surely this is but an empty gesture. The Government can hardly be expected to adduce proof as to occurrences taking place in Japan more than 17 years ago which are now shrouded in obscurity beyond serious hope of detection." 356 U.S. at 146-47.

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

allow aliens to inherit are now in general force;[20] thus this area presents no significant problems at the present time.

With the development of the United States as a world power and the advent of modern transportation systems the problem has become one of much greater importance to most Americans. Today it arises primarily in disputes between the Government and a citizen. Anyone can be a world traveler and innocently perform acts in other nations which Congress has proscribed. The citizen may be totally unaware of the consequence which Congress has attached to the commission of the act. Yet, years later, when registering to vote,[21] applying for a passport,[22] or claiming some other right of a citizen,[23] the individual may be informed that he is not a citizen because of the commission of the proscribed act. Thus most situations where the question arises today are based on the denial by a department or agency of the government of a right or privilege claimed as a United States national. The Nationality Act applies to situations arising both within and without the geographical limits of the United States,[24] although there is a slight variance in the procedure involved depending on the location of the individual claiming such right.[25] Section 1503 of the Nationality Act[26] gives such a person a right to bring a declaratory judgment action against the head of the department or agency for a judgment declaring him to be a United States citizen.

What is the significance of loss of citizenship? Does it create a stateless person? In the case of a native-born citizen, it would appear to convert him into an alien in the land of his birth. In the case of a naturalized citizen there is the possibility that he may be able to readopt the citizenship of the country of his origin, depending on its laws. But he may have given up citizenship of his prior country to become an American citizen,[27] in which case he would have the same status as a denaturalized native-born citizen. If the individual is a dual national,[28] presumably he could go to the country of his second

20. ATKINSON, WILLS § 24 (2d ed. 1953).
21. See Mackenzie v. Hare, 239 U.S. 299 (1915).
22. See Trop v. Dulles, 256 U.S. 86 (1958).
23. For an example of another right claimed as a citizen, see Shaughnessy v. United States *ex rel* Mezei, 345 U. S. 206 (1953).
24. Under certain circumstances the act may be performed in the United States. See, *e.g.*, 54 Stat. 1169 (1940), as amended, 8 U.S.C. § 1481(a) (7) (1952).
25. 66 Stat. 273, 8 U.S.C. § 1503 (1952).
26. 34 Stat. 601 (1906), as amended, 8 U.S.C. § 1503 (1952).
27. Actually, when a person is naturalized in the United States, he is required to give an oath of allegiance to the United States. The petition for naturalization contains an averment that it is the applicant's intention to renounce all prior allegiance to any other nation. Whether or not this works as a renunciation of another citizenship, would of course, depend on the laws of such other country.
28. The term dual national has several situations to which it may apply. Basically, however, it means an individual who holds the nationality of two countries at the same time. Some of the situations where it may arise are:

nationality; or he may find acceptance in another country. It would seem to be extremely doubtful that Congress could confer citizenship of any other nation on a denaturalized citizen of the United States.

Most of the justices of the Supreme Court do not appear to be concerned with this aspect of expatriation. Mr. Chief Justice Warren, however, expressed the opinion that it would create a stateless person. In *Perez v. Brownell,* he stated: "Citizenship *is* man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen."[29] In *Trop v. Dulles,* he said: "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. . . . In short, the expatriate has lost the right to have rights."[30]

The case of *Shaughnessy v. Mezei,*[31] points out the situation in which an expatriated person may find himself. In this case an alien resided in this country for twenty-five years and then made a visit abroad. Upon his return to the United States he was barred from re-entry and no other country would accept him. He was summarily detained on Ellis Island and on a writ of habeas corpus the Supreme Court denied relief.[32] After four years of confinement the situation was remedied by executive grace.[33]

With this introductory background as a basis, the purpose of this note is to discuss generally the statutes involved, constitutional issues which are raised thereby and the present status of the law involving loss of citizenship. There are some related areas, such as denaturalization by judicial revocation of citizenship obtained by fraud,[34] denaturalization of dual nationals,[35] and loss of civil rights by reason of conviction of a felony,[36] which will not be discussed generally, but may be referred to collaterally from time to time.

An individual born in the United States of alien parents is a national of the United States and of the country of his parent's nationality; an individual born of American parents while living in another country may be a dual national if he acquires the nationality of such other country by reason of his birth there; and in some instances a child born in the United States of naturalized citizens parents may also acquire the citizenship of his parent's former nation.

29. 356 U.S. 44, 64 (1958).

30. 356 U.S. 86, 101-02 (1958).

31. 345 U.S. 206 (1953).

32. *Ibid.*

33. See N.Y. Times, Aug. 12, 1954, p. 10, col. 4.

34. 66 Stat. 269, 8 U.S.C. § 1451 (1952). See Maisenberg v. United States, 356 U.S. 670 (1958); Nowak v. United States, 356 U.S. 660 (1958); Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943).

35. 66 Stat. 269, 8 U.S.C. § 1482 (1952).

36. The loss of civil rights by reason of conviction of a felony is commonly referred to as "civil death." Under strict common law rule an extinction of

HISTORICAL DEVELOPMENT

In early history there was apparently no reason why an individual could not withdraw from society, although it was probably not economically feasible.[37] However with the rise of the feudal system men became chained to the soil on which they were born. From this system sprang the idea of allegiance and the oath of fealty, binding the individual to a superior and to land. With the consequent breaking down of the feudal system many of its ideas were discarded, but one which remained was the doctrine of perpetual allegiance. The common law view developed that allegiance was immutable and no person could give it up without permission of his sovereign.[38]

Despite this common law view there was an early feeling in the United States that an individual could voluntarily expatriate himself.[39] But it was not until 1868 that Congress formally announced that it was the traditional policy of the United States that a person has the natural and inherent right to divest himself of his allegiance to the United States.[40]

Although there is no constitutional provision relating to expatriation, the power of Congress to establish uniform rules of naturalization led to the early argument that there was an implied power to provide for denaturalization. However Chief Justice Marshall, by way of dicta, destroyed this argument when he stated: "The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."[41] Again by way of dicta the Supreme Court, in 1898, stated: "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."[42]

During the 1860's Congress enacted the first legislation which pro-

all civil rights followed civil death and a person civilly dead could perform no legal function. The common law rule has been largely abrogated by statute. It creates a problem similar to loss of citizenship, that is, a person who may not have any rights but who would still be a citizen. See 16 AM. JUR. *Death* §§ 2-11 (1938).

37. "The right of expatriation is antecedent and superior to the law of society. It is implied, likewise, in the nature and object of the social compact, which was formed to shield the weakness, and to supply the wants of individuals—to protect the acquisitions of human industry, and to promote the means of human happiness. Whenever these purposes fail, either the whole society is dissolved, or the suffering individuals are permitted to withdraw from it." Talbot v. Janson, 3 U.S. (3 Dall.) 133, 139 (1795).

38. "The general doctrine is that no person can by any act of their own, without the consent of the government, put off their alleginace and become aliens." Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 245 (1830).

39. See Letter from Thomas Jefferson to Albert Gallatin, June 26, 1806 in 8 WRITINGS OF THOMAS JEFFERSON 458 (Ford ed. 1897).

40. Act of July 27, 1868. R.S. § 1999.

41. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

42. United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

vided for automatic loss of citizenship upon the performance of specified acts.[43] During the rest of the nineteenth century the Department of State made rulings on questions of forfeiture of citizenship in its conduct of foreign affairs.[44] There was no express authority for this action other than in some instances treaties[45] had been signed with foreign nations concerning citizenship; and the Act of 1868[46] lent some support. Congress, however, did not act again until 1906 despite the pointing out by the executive department of the unsatisfactory condition of the law regarding denaturalization.[47] Then an act was passed which provided that naturalization could be revoked where it had been obtained by fraud or procured illegally.[48] The following year Congress enacted the Expatriation Act of 1907,[49] which was actually the first general statute on the subject. It set out three specific acts,[50] the commission of which would result in expatriation. There were only minor changes and amendments until Congress passed the Nationality Act of 1940.[51] After some subsequent modification, this entire statute was re-enacted as the Immigration and Nationality Act of 1952,[52] in which form it remains substantially unchanged at the present.

CONSTITUTIONAL BASIS

The primary constitutional issue raised in this area is the source of congressional power to expatriate citizens. The early argument that the power to regulate naturalization carried with it the implied power to provide for denaturalization had been disapproved by the Supreme Court.[53] The earliest attack on a statute passed by Congress concerning expatriation was made in *Huber v. Reily*.[54] The statute was sustained against the objections that it was (1) an ex-post facto law; (2) an attempt by Congress to regulate the suffrage in the

43. Act of March 3, 1865, 13 Stat. 487, as amended, 8 U.S.C. § 1481(a)(8) (1952).
44. See Perez v. Brownell, 356 U.S. 44, 49 (1958).
45. *E.g.*, Treaty with North German Confederation, 15 Stat. 615 (1868); Naturalization Treaty with Great Britain of 1870, 16 Stat. 775.
46. See note 40 *supra*.
47. See, *e.g.*, 7 MESSAGES AND PAPERS OF THE PRESIDENTS 284, 291 (Richardson ed. 1897).
48. 34 Stat. 596 (1906), as amended, 8 U.S.C. § 1451 (1952).
49. Expatriation Act of 1907, 34 Stat. 1228, as amended, 8 U.S.C. § 1481 (1952).
50. The three acts set out in the statute were: (1) accepting naturalization in a foreign country; (2) taking a formal oath of allegiance to a foreign country; and (3) marriage of a United States woman citizen to a foreign national.
51. Nationality Act of 1940, 54 Stat. 1137, as amended, 8 U.S.C. § 1481 (1952).
52. Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. §§ 1101-1503 (1952).
53. See notes 41-42 *supra*, and accompanying text.
54. 53 Pa. 112 (1866).

states; and (3) an infliction of pains and penalties without a trial and conviction by due process of law. In a later case[55] the Supreme Court quoted *Huber v. Reily* with approval, though the constitutional issue was not raised.

The power to regulate foreign affairs was used as a basis in the 1907 Act, and the Supreme Court upheld this as a valid exercise of congressional power in 1915,[56] stating:

> As a government, the United States is invested with all 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.[57]

Subsequent legislation has been based on this power to regulate foreign affairs.

In *Perez* the Supreme Court upheld the provision providing for loss of citizenship by voting in a foreign election as a valid exercise of the power to regulate foreign affairs.

> The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act 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.[58]

The dissenters[59] in *Perez* felt that the statute encompassed conduct that failed to show any connection with allegiance or transfer of loyalty from the United States to any other nation.

In *Trop v. Dulles*,[60] the majority of the Court held that Congress had exceeded its power by inflicting a cruel and unusual punishment on the individual by providing for loss of citizenship upon conviction for desertion from the military service in time of war. Mr. Justice Black in concurring felt that it was beyond congressional power to place the power to denaturalize citizens in the hands of the military authorities. Mr. Justice Brennan could find no rational connection between the war power and the loss of citizenship. The dissenters[61] would not characterize denaturalization as a cruel and unusual punishment. They also felt that Congress was acting within the scope of its war powers in enacting this legislation.

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55. Kurtz v. Moffitt, 115 U.S. 487 (1885).
56. Mackenzie v. Hare, 239 U.S. 299 (1915).
57. *Id.* at 311.
58. 356 U.S. 44, 60 (1958).
59. The dissenters were Chief Justice Warren and Justices Black, Douglas and Whittaker.
60. 356 U.S. 86 (1958).
61. In this case the dissenters were Justices Frankfurter, Clark, Burton and Harlan.

SPECIFIC ACTS WHICH RESULT IN LOSS OF CITIZENSHIP

Obtaining naturalization in a foreign state[62]

This provision was first enacted in 1907, and, with some modification, remains in effect at the present time.[63] What will constitute naturalization in a foreign country? This will be determined by the law of such foreign country subject to the limitation that the conduct must be voluntary. Whether an act is voluntary must be determined by an objective rather than a subjective standard.[64] Thus a foreign law which automatically bestows citizenship upon individuals would not cause expatriation unless the individual indicated his willing acceptance of such citizenship.[65] Of course it should be realized that inaction may be deemed to be a voluntary act.[66] In *Savorgnan v. United States*,[67] the plaintiff voluntarily complied with the requirements of Italian law by obtaining Italian citizenship in order to marry an Italian citizen. The Supreme Court held that she lost her citizenship.

One particularly acute problem under the statute as originally enacted was its effect on minor children, when their parents obtained foreign naturalization, or were expatriated in any other manner. Under common law a child has the nationality of his parents and the State Department in effect followed this view by holding that it would be inconsistent to allow a child to retain his American citizenship when the parent had lost his by expatriation. Accordingly the act of the parent was deemed to have denaturalized the child also. The ninth circuit followed this view in 1934.[68] It was not until in 1939

62. "Loss of Nationality by Native-born or naturalized citizens; voluntary action (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 a 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 naturalization 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 . . . ." 8 U.S.C. § 1481(a)(1) (1952).

63. 66 Stat. 267, 8 U.S.C. 1481(a)(1) (1952).

64. Savorgnan v. United States, 338 U.S. 491 (1950).

65. *Ibid.*

66. See Sebastiano v. United States, 103 F. Supp. 278 (N.D. Ohio 1951).

67. 338 U. S. 491 (1950).

68. United States v. Reid, 73 F.2d 153 (9th Cir. 1934).

that the State Department altered it's view following the Supreme Court decision in *Perkins v. Elg*,[69] stating that: "Expatriation . . . has no application to the removal from this country of a native citizen during minority. In such a case . . . voluntary action . . . is lacking."[70] This decision resulted in an amendment to the statute which compelled dual nationals to make an election of one nationality or the other upon reaching their majority.[71]

One other problem should be noted here. The statute reads "obtaining naturalization in a foreign state." Does "in" mean physically within the foreign state? Under the 1907 statute there was no requirement of subsequent removal from the United States. Apparently the mere obtainment of foreign citizenship, no matter where the acts occurred, was sufficient to cause loss of citizenship.[72] This issue was raised in *Savorgnan v. United States*,[73] and the Supreme Court held that it meant naturalization "into" the citizenship of a foreign state, the site of the naturalization proceeding being immaterial. In 1940 the matter was settled by Congress when it enacted Section 403 of the Nationality Act[74] which provides in effect that expatriation by commission of some of the enumerated acts, when performed in the United States or its possessions, would occur only if and when the national subsequently took up residence outside the United States or its possessions. Thus at the present time a person may perform an act which under section 1481 provides for loss of citizenship; but, by virtue of section 1483, the expatriation will be held in abeyance until the individual takes up residence abroad. In this connection residence does not mean domicile;[75] rather, "the test . . . is whether, at any time during that period, she did, in fact, have a 'principal dwelling place' or 'place of general abode' abroad."[76]

Taking an Oath or Declaration of Allegiance to a Foreign State[77]

This provision was first included in the 1907 Statute and remains in effect at the present time.[78] It is analogous to the preceding section in that the obtainment of foreign naturalization also frequently involves taking an oath or affirmation of allegiance to the foreign state. Signing of an instrument containing an oath of allegiance is

69. 307 U.S. 325 (1939).
70. *Id.* at 334.
71. 54 Stat. 1168-69 (1940).
72. Mackenzie v. Hare, 239 U.S. 299 (1915).
73. 338 U.S. 491 (1950).
74. 66 Stat. 269, 8 U.S.C. § 1483 (1952).
75. Savorgnan v. United States, 338 U.S. 491 (1950).
76. *Id.* at 506.
77. "(a) . . . .
"(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof . . . ." 8 U.S.C. § 1481(a)(2) (1952).
78. 66 Stat. 267, 8 U.S.C. § 1481(a)(2) (1952).

the taking of an oath within the statutory meaning.[79] The oath must be voluntary.[80] For example, individuals entering the military service of a foreign nation usually take an oath of allegiance to such nations. If the individual was drafted against his will, the oath, as well as the military service, is involuntary and he will not be deemed to have expatriated himself;[81] but it is otherwise if he voluntarily enlists.[82] Here again, in determining whether the act was voluntary, an objective test is used.[83] The secret or undisclosed intent of the individual has no legal effect on the issue of denaturalization. In *Savorgnan* the citizen signed a writing which was in Italian. She could not read it and it was not explained to her. She was held legally bound by this act.

If by reason of extraordinary circumstances amounting to true duress, an American national is forced into formalities of citizenship of another country, there is no expatriation as there is when American citizenship is forsaken as a matter of expediency for material considerations.[84]

Legal disability will prevent expatriation despite the oath of allegiance to a foreign nation. By way of example, a minor does not expatriate himself by taking an oath of allegiance to a foreign nation.[85] Military service[86] and voting in a foreign election,[87] subsequent to the subject's eighteenth birthday are not confirmations of a prior oath of allegiance. Similarly a citizen judicially declared insane was held not to have lost his citizenship by subsequently taking an oath of allegiance to Great Britain.[88] The saving provisions of section 1483 apply to cases under this section of the statute also.

Entering, or Serving in, the Armed Forces of a Foreign State Without Prior Authorization[89]

This act was first proscribed in 1940, and remains so at the present

79. Savorgnan v. United States, 338 U.S. 491 (1950).
80. *Ibid.*
81. See Gensheimer v. Dulles, 117 F. Supp. 836 (D.N.J. 1954); Scardino v. Acheson, 113 F. Supp. 754 (D.N.J. 1953); Paracchini v. McGrath, 103 F. Supp. 184 (S.D.N.Y. 1952). *But see* Alata v. Dulles, 221 F.2d 52 (D.C. Cir. 1955).
82. United States *ex rel* De Cicco v. Longo, 46 F. Supp. 170 (D. Conn. 1942); McCampbell v. McCampbell, 13 F. Supp. 847 (W.D. Ky. 1936); *Ex parte* Griffin, 237 Fed. 445 (N.D.N.Y. 1916).
83. Savorgnan v. United States, 338 U.S. 491 (1950).
84. Perri v. Acheson, 105 F. Supp. 434 (D.N.J. 1952), *rev'd on other grounds*, 206 F.2d 586 (3d Cir. 1953).
85. Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953); Di Girolamo v. Acheson, 101 F. Supp. 380 (D.D.C. 1951); Tomasicchio v. Acheson, 98 F. Supp. 166 (D.D.C. 1951).
86. Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953).
87. Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955).
88. McCampbell v. McCampbell, 13 F. Supp. 847 (W.D. Ky. 1936).
89. "(a) ....
"(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 auth-

time. Prior to 1940, mere service in a foreign military force would not alone be sufficient to cause expatriation. However if such service also involved taking a voluntary oath of allegiance to the foreign nation expatriation would have resulted under the 1907 statute.[90]

There is little authority on what constitutes "serving" and "armed forces" as these terms are used in the statute. An interpreter working for a Japanese corporation which was under the control of the military was held not to be "serving" in the Japanese army.[91] The Italian Fascist militia (Mussolini's Black Shirts) was held not to be a part of the Italian army.[92]

Here too, the acts must be voluntary. Conscription by the foreign government is considered to establish prima facie that entry and service were involuntary,[93] but it must be raised as a defense.[94] This places the burden on the government to prove that the act was voluntary.[95] The standard of proof required is "clear, convincing and unequivocal" evidence.[96] As a practical matter this will preclude the Government from proving voluntariness in most of the cases due to the passage of time and the fact that the activity usually takes place in a foreign area.

The lower federal courts have split on the issue of whether or not this provision of the statute is constitutional.[97] In the two cases which have reached the Supreme Court, a majority have avoided the question, finding it unnecessary to consider this issue.[98]

There are two stated exceptions or situations to which the statute is not applicable. If prior consent of the Secretary of State *and* the

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orized 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 . . . ." 8 U.S.C. § 1481(a)(3) (1952).

90. United States *ex rel.* Rojak v. Marshall, 34 F.2d 219 (W.D. Pa. 1929).

91. Kawakita v. United States, 343 U.S. 717 (1952).

92. Di Girolamo v. Acheson, 101 F. Supp. 380 (D.D.C. 1951).

93. Nishikawa v. Dulles, 356 U.S. 129 (1958). Prior to this case there had been a split in the circuit courts. The Second and Third Circuits in Augello v. Dulles, 220 F.2d 344 (2d Cir. 1955), Lehman v. Acheson, 206 F.2d 592 (3d Cir. 1953) and Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953), held that proof of conscription precluded a finding that foreign service was voluntary. On the other hand, the District of Columbia Circuit in Alata v. Dulles, 221 F.2d 52 (D.C. Cir. 1955), and Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953), held that involuntariness could not be inferred from the mere fact of conscription.

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

95. *Ibid.*

96. Nishikawa v. Dulles, 356 U.S. 129 (1958); Schneiderman v. United States, 320 U.S. 118 (1943).

97. Constitutional: Nishikawa v. Dulles, 235 F.2d 135 (9th Cir. 1956), *rev'd on other grounds*, 356 U.S. 129 (1958). Unconstitutional: Okimura v. Acheson, 99 F. Supp. 587 (D.C. Hawaii 1951), *vacated and remanded on other grounds*, 342 U.S. 899 (1952).

98. See cases cited in note 97 *supra*.

Secretary of Defense is obtained, foreign military service will not cause loss of citizenship. Also if one enters foreign military service prior to his eighteenth birthday it will operate as an expatriation only if there exists an option to secure a release upon attainment of age eighteen and he fails to exercise such option. In addition the saving provision of section 1483 also applies, though it is unlikely that a person would serve in foreign military service while in the United States. It should be noted that section 1483(b) does not apply to minors in foreign military service.

Accepting Official Employment Under a Foreign Government[99]

Another of the 1940 provisions still having force, this section contains alternate prerequisites to loss of citizenship, either of which will result in expatriation. If a person has or acquires the nationality of a foreign state, expatriation will result. Likewise, if a person accepts, serves in, or performs the duties of any office, post or employment under the foreign government for which an oath or declaration of allegiance is required, there will be an expatriation.

There is very little case law on this provision of the statute, but generally the same rules set out under prior sections as to voluntariness, burden of proof, and evidence would apply. However, there are two additional factors which enter these cases. Economic compulsion is considered to be duress and thus employment accepted for economic reasons is not a voluntary act;[100] and a minor cannot expatriate himself under this section as he is legally unable to make a valid choice.[101] If a minor obtains employment and works beyond his eighteenth birthday, section 1483(b) gives him six months in which to assert his United States citizenship or he will be deemed to have expatriated himself under section 1481(a)(4).

It must be shown that the employment is open only to nationals of the foreign country.[102] It was held in *Kamada v. Dulles*,[103] that the statute applied only where the performance of the employment required absolute allegiance to the employing government. Working

99. "(a) . . . .
"(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 . . . ." 8 U.S.C. § 1481 (a) (4) (1952).

100. See Doreau v. Marshall, 170 F.2d 721 (3d Cir. 1948); Kamada v. Dulles, 145 F. Supp. 457 (N.D. Cal. 1956); Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953).

101. See Fletes-Mora v. Rogers, 160 F. Supp. 215 (S.D. Cal. 1958).

102. *Ibid.*

103. 145 F. Supp. 457 (N.D. Cal. 1956).

in the Mexican post office[104] and teaching in the Japanese public school system[105] have been held not to result in loss of citizenship. The saving provision of section 1483(a) applies here also. Presumably, a person could accept an office, post or employment under a foreign government and remain in the United States, thus providing the basis for subsequent expatriation if he establishes a foreign residence.

Voting in a Foreign Political Election[106]

This provision, effective since 1940, was held constitutional in *Perez v. Brownell*,[107] as being within the scope of congressional power to regulate foreign affairs.

What is a political election? It has been defined as "the act of choosing by vote a person to fill an office, which office pertains to the conduct of government."[108] The Supreme Court, in discussing congressional use of the term in the area of regulation of foreign affairs, stated: "[C]lasses of elections—nonpolitical in the colloquial sense—as to which participation by Americans could not possibly have any effect on the relations of the United States with another country are excluded by any rational construction of the phrase."[109] If an election is political its scope is immaterial; thus, municipal[110] as well as national elections are included within the ambit of proscribed activity. The lower federal courts are not in agreement as to whether or not an election held in American occupied territory following the end of World War II is a political election.[111] There is also disagreement on the question of whether or not occupied territory is a foreign state.[112] The Supreme Court has not ruled on either of these points.

In the *Savorgnan* case, the Supreme Court by way of dictum stated that the statute provided that voting in a foreign election operated per se as an act of expatriation.[113] However the subsequent cases have not been in accord; instead they have applied the general rule that no conduct results in expatriation unless voluntary.[114] Few cases have

104. Fletes-Mora v. Rogers, 160 F. Supp. 215 (S.D. Cal. 1958).
105. Kamada v. Dulles, 145 F. Supp. 457 (N.D. Cal. 1956).
106. "(a) ....
"(5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory ...." 8 U.S.C. § 1481(a)(5) (1952).
107. 356 U.S. 44 (1958).
108. Kuwahara v. Acheson, 96 F. Supp. 38, 41 (S.D. Cal. 1951).
109. Perez v. Brownell, 356 U.S. 44, 59 (1958).
110. Bisceglia v. Acheson, 196 F.2d 865 (D.C. Cir. 1952).
111. Political election: Acheson v. Wohlmuth, 196 F.2d 866 (D.C. Cir. 1952), *cert. denied*, 344 U.S. 833 (1952); Acheson v. Kuniyuki, 189 F.2d 741 (9th Cir. 1951), *cert. denied*, 342 U.S. 942 (1952). *Contra, In re* Reidner, 94 F. Supp. 289 (E.D. Wis. 1950); Brehm v. Acheson, 90 F. Supp. 662 (S.D. Tex. 1950).
112. See cases cited in note 111 *supra*.
113. Savorgnan v. United States, 338 U.S. 491 n.17 (1950) (dicta).
114. Perez v. Brownell, 356 U.S. 44 (1958).

considered the problem where the voter was a dual national, but those which have, held there was no loss of American citizenship.[115] If a person under age eighteen votes in a foreign election, he will not be deemed to have expatriated himself if he asserts his claim to American citizenship within six months after attaining age eighteen under section 1483(b). Also, voting in a foreign state after attaining majority is not considered an affirmation of an oath of allegiance taken during minority.[116]

Formal Renunciation of Citizenship While Abroad[117]

Since 1940 the statute has provided for loss of citizenship where a citizen makes a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state. This was enacted for the benefit of dual nationals who were living in a foreign country and had no other way to divest themselves of their American citizenship. Section 1481(a)(2) would not assist them as they were already nationals of the foreign state, thus they could not renounce their United States citizenship by taking an oath of allegiance to such foreign state. This does not apply to Americans under eighteen years of age who take advantage of the saving provision of section 1483(b). Of course section 1483(a) would not apply here as the statute specifically refers to an oath taken in a foreign state. The oath of renunciation must, of course, be voluntary and duress would vitiate applicability.

Formal Renunciation in the United States[118]

This provision was first enacted into statute in 1944 as a wartime measure. It provides that during wartime a citizen will lose his American citizenship by a renunciation in the United States. The renunciation is subject to the approval of the attorney general for security reasons. The only appreciable application of the statute related to the Nisei problem during World War II. Several thousand Japanese-Americans renounced their United States citizenship under this provision. Following the end of the war many of them regretted

115. See Terada v. Dulles, 121 F. Supp. 6 (D.C. Hawaii 1954); Okimura v. Acheson, 111 F. Supp. 303 (D.C. Hawaii 1953).

116. Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955).

117. "(a) ....

"(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 . . . ." 8 U.S.C. § 1481(a)(6) (1952).

118. "(a) ....

"(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 . . . ." 8 U.S.C. § 1481(a)(7) (1952).

making the renunciation. Habeas corpus proceedings were instituted on the claim that they were being unlawfully held as aliens as the oaths were obtained under duress. The ninth circuit held that the renunciations were null, void and cancelled, being based on mental fear, intimidation and coercion.[119]

A native-born minor cannot renounce his American citizenship[120] and parental renunciation will not affect the minor's citizenship status.[121]

Desertion from the Military Forces of the United States[122]

This provision dates from 1865.[123] The original statute provided for loss of rights of citizenship and the right to become a citizen. The meaning of the phrase "rights of citizenship" was unsettled until the 1940 amendment made it clear that the loss was of citizenship itself. A 1912 amendment limited application of the statute to acts of desertion in time of war.[124] A 1944 amendment added that a conviction of desertion was also a prerequisite;[125] but provided further that citizenship could be restored if the deserter was restored to active duty during wartime with the consent of the military authorities. There is no distinction between desertion overseas or in the United States. In *Huber v. Reily*,[126] the supreme court of Pennsylvania upheld the constitutionality of the statute; and in *Kurtz v. Moffitt*,[127] the United States Supreme Court quoted *Huber v. Reily* with approval, though the constitutional issue was not raised.

The constitutionality of the statute was not directly passed on by the Supreme Court until 1958, and in *Trop v. Dulles*,[128] it was held unconstitutional. One Trop was convicted of desertion and given a dishonorable discharge during World War II. In 1952 he was denied

119. Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949).
120. McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951), *cert. denied*, 342 U.S. 832 (1951).
121. See Perkins v. Elg, 307 U.S. 325 (1939).
122. "(a) ....
"(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 restoring such nationality or citizenship heretofore or hereafter so lost . . . ." 8 U.S.C. § 1481(a)(8) (1952).
123. Act of March 3, 1865, 13 Stat. 487.
124. 37 Stat. 356 (1912).
125. 58 Stat. 4 (1944), as amended, 8 U.S.C. § 1481(a)(8) (1952).
126. 53 Pa. 112 (1866). See not 54 *supra*, and accompanying text.
127. Kurtz v. Moffitt, 115 U.S. 487 (1885).
128. 356 U.S. 86 (1958).

a passport on the ground that he had lost his citizenship by reason of the conviction. In 1955 he sought a declaratory judgment that he was a United States citizen. The district court granted a Government motion for summary judgment[129] and the second circuit affirmed.[130] On a writ of certiorari, the Supreme Court reversed. The Court speaking through Mr. Chief Justice Warren characterized the statute as penal and held it unconstitutional as inflicting a "cruel and unusual" punishment in violation of the eighth amendment.[131] The Court could find no rational connection between desertion and allegiance to a foreign state, and thus would not sustain the statute as being within the congressional power to regulate foreign affairs. The concurring opinions felt that forfeiture of citizenship should not be within the control of the military authorities and also that it was beyond the scope of the war powers of Congress. The dissenters[132] contended that the statute was a proper exercise of the war power and also that even if it was a penal statute, it could not be considered as inflicting a "cruel and unusual" punishment. Thus, at the present time this provision of the statute is invalid.

Committing an Act of Treason or Advocating the Overthrow of the Government by Force or Violence[133]

This provision applied only to treason at the time of enactment in 1940. But in 1954 it was amended[134] to provide for forfeiture of citizenship of persons convicted of advocating the overthrow of the government by force and violence. Cases of treason are relatively few and the leading one is *Kawakita v. United States*,[135] decided in 1952. Kawakita was a native-born citizen of the United States and a national of Japan. While visiting Japan as a student, war broke out and he became an interpreter for a Japanese industrial concern. Upon his return to the United States he was recognized by a former prisoner of war, and indicted for treason. The overt acts related to his treatment of prisoners of war while working in Japan. The defense was based on two grounds. First, he had expatriated himself by reason of his

129. See Trop v. Dulles, 356 U.S. 86, 88 (1957).
130. Trop v. Dulles, 239 F.2d 527 (2d Cir. 1956).
131. U. S. CONST. amend. VIII.
132. Justices Frankfurter, Clark, Burton and Harlan.
133. "(a) ....
"(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 wilfully performing any act in violations 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 . . . ." 8 U.S.C. § 1481(a) (9) (Supp. II 1954).
134. 68 Stat. 1146 (1954).
135. 343 U.S. 717 (1952).

activities in Japan, and second, a dual national can only be guilty of treason to the country wherein he resides. The Supreme Court rejected both contentions and affirmed a death sentence.[136] Recognizing that a dual national owes duties to the country of his residence, the Court said this did not mean that he did not also owe allegiance to the United States. As he had breached that allegiance, he was guilty of treason even though he also owed allegiance to Japan.

The decision, in effect, places a dual national in the position of making an election where interests conflict or else relying on the defense of coercion or compulsion if subsequently charged with treason. There was no issue of the constitutionality of the statute raised in the case.

The added provision concerning advocating overthrow of the government by force or violence of this statute could make this section become quite important. There has been no litigation on it to date. It should be noted that under a literal reading, sections 2381[137] and 2385[138] do not specifically provide for loss of citizenship, but merely loss of civil rights. However, Congress has apparently made no such distinction.[139]

This section states no age limitation. This raises the question of whether age is irrelevant to the commission of these crimes. Another problem implicit under all the provisions of the statute is presented, *i.e.*, would forfeiture result in creating the status of a stateless person in the case of a native-born or naturalized citizen? Congress could hardly impose some other nationality on the individual. Would a presidential pardon reinstate nationality?[140]

Departing From or Remaining Outside of the United States in Time of War[141]

This provision was first enacted in 1912 as a part of the statute providing for loss of citizenship by reason of desertion from the military

136. President Eisenhower later commuted the death sentence to life imprisonment and a $10,000.00 fine. See N.Y. Times, Nov. 3, 1953, p. 56, col. 5.

137. 18 U.S.C. § 2381 (1952).

138. 18 U.S.C. § 2385 (1952).

139. See Perez v. Brownell, 356 U.S. 44, 73 (1958) (dissent).

140. The idea usually expressed is that citizenship can be restored only through normal naturalization proceedings. See, *e.g.*, Petition of Sproule, 19 F. Supp. 995 (S.D. Cal. 1937); *In re* Chamorra, 298 Fed. 669 (N.D. Cal. 1924).

141. "(a) ....

"(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." 8 U.S.C. § 1481(a)(10) (1952).

forces. It was repealed in 1940,[142] but then re-enacted into statute in 1944[143] and remains in force at the present time.

It should be noted that it applies both to those departing from or remaining outside of the jurisdiction of the United States during time of war or national emergency for the purpose of avoiding military service. There is no age limitation in the statute itself and the prevailing view seems to be that Congress intended it to apply to anyone, including minors eligible for service in the military forces.

A departure prior to the effective date of the statute (September 27, 1944) would not be punishable. However remaining beyond this date would be a separate proscribed offense.[144] As under other provisions of the statute, the act must be voluntary in order to result in expatriation.

The provision has been upheld as constitutional in a circuit court case,[145] but so far the Supreme Court has not ruled on it. The point was raised in *Perez v. Brownell*,[146] but left open.

Other Acts

The above enumerated acts are those which are set out specifically in section 1481(a) of the current statute. A brief mention should be made of some other situations where the general problem is or has been involved. A provision of the 1907 statute,[147] no longer in force, provided that an American woman lost her citizenship by reason of her marriage to an alien. In 1915 the Supreme Court sustained the validity of this provision in *Mackenzie v. Hare*.[148] There, the wife was held to have lost her citizenship even though she continued to reside in the United States. The Court based its decision on two grounds—the voluntary act of the citizen and the ancient principle of unity of husband and wife. In 1922, Congress passed the so-called "Cable Act"[149] which provided for independent citizenship of American women, thus altering the rule laid down in *Mackenzie*. The actual effect of the 1907 statute had been held to mean that a woman's citizenship was merely in abeyance during the period of the marriage. The effect of the later act of Congress has been that marriage to an alien alone does not expatriate an American woman, but of course, marriage coupled with another prohibited act such as giving an oath of allegiance to a foreign state would result in expatriation.[150]

142. 37 Stat. 356 (1912).
143. 58 Stat. 746 (1944), as amended, 8 U.S.C. § 1481(a)(10) (1952).
144. Vidales v. Brownell, 217 F.2d 136 (9th Cir. 1954).
145. Perez v. Brownell, 235 F.2d 364 (9th Cir. 1956).
146. 356 U.S. 44 (1958).
147. 34 Stat. 1228 (1907).
148. 239 U.S. 299 (1915).
149. 42 Stat. 1021 (1922). The last remnants of the effect of marriage on loss of citizenship were eliminated in 1931. 46 Stat. 1511 (1931).
150. Savorgnan v. United States, 338 U.S. 491 (1950).

There are additional statutes which relate specifically to loss of nationality by dual nationals[151] and naturalized citizens.[152] These deal with residences in a foreign state. In the case of a dual national, it provides for loss of citizenship after a specified period of residency in the state of his second nationality. As to naturalized citizens, the statute also deals with residence in the state of which he was formerly a citizen prior to attaining citizenship in the United States.

Conclusion

It is common knowledge that naturalization in the United States has become increasingly more difficult during the past few decades. It is not generally realized, however, that at the same time it has become increasingly easier for one to lose his citizenship. Is there a logical connection between these two developments? The reasons generally advanced for the change in attitude towards immigration are many; the closing of the frontier and the attitude of American labor toward cheap immigration labor are usually given as the most important. The same reasons would have no bearing on loss of citizenship; therefore the two trends are probably not correlative. Perhaps however, the basic idea is that American citizenship is so highly valued that only the select can attain it and to keep the standards high a penalty of loss should be imposed on those who disregard the limits set by Congress.

Basically there are two trends of thought on the loss of citizenship.[153] One is that citizenship is a right which cannot be taken away by congressional fiat. The advocates of this position proclaim that United States citizenship is a constitutional birthright under the fourteenth amendment. Citizenship is regarded as a basic right, because it is nothing less than the "right to have rights." Taking away citizenship creates a stateless person. Government derives its powers from the consent of the governed and is without power to sever the relationship that gives rise to its existence. If Congress can determine that one act results in loss of citizenship, what is to prevent it from saying that any act would result in expatriation? Once a citizen, always a citizen, for better or for worse. If the Congressional purpose is to deter persons from commission of the proscribed acts, it does not seem to have accomplished the desired result.[154] The adherents of this approach would allow a person to voluntary relinquish his citizenship,

151. 66 Stat. 269, 8 U.S.C. § 1482 (1952); 66 Stat. 272, 8 U.S.C. § 1487 (1952).

152. 66 Stat. 269, 8 U.S.C. § 1484 (1952).

153. See notes 7-17 *supra*, and accompanying text.

154. For example, despite the provision for loss of citizenship on conviction of desertion approximately 21,000 soldier were convicted of desertion during World War II. See Trop v. Dulles, 356 U.S. 86, 112, and n.8 (1958).

but insist no one else can take it away from him. They can be classified as alarmists.

The other theory is that Congress can provide for the loss of American citizenship despite the lack of an express power in the Constitution to do so. The basis of the power seems to be the fact that the United States government is "invested with all the attributes of sovereignty."[155] Consequently it has the inherent power to regulate foreign affairs,[156] and can thus provide for loss of citizenship as a consequence of the commission of an act that is "potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations."[157] The act must, of course, be voluntary but almost any act can be characterized as voluntary without too much difficulty. The adherents of this view are strangely silent on how some acts which Congress has proscribed, such as desertion from the military service in the United States, can have any effect on foreign affairs. It is also claimed to be within congressional power as it works as a deterent to others. There are some who maintain that Congress derives its power in this area through the war powers, but so far the Supreme Court has not approved this reasoning.

Of the ten acts which Congress has proscribed, the Supreme Court has only had occasion to consider four. As has been noted, one was held constitutional,[158] one unconstitutional,[159] one was specifically left open,[160] and the Court has avoided ruling on the fourth,[161] although lower courts have held it unconstitutional.[162] There is only a remote possibility that some of the other sections will ever be ruled on; but others may come up for a ruling in the near future, particularly if the Government seeks to enforce them.

There are both statutory and judicial safeguards for the citizen. Section 1483 sets out some statutory restrictions, and the courts have placed a heavy burden on the Government by requiring it to prove its case by clear, convincing and unequivocal evidence. Further, the act must be a voluntary one performed by the citizen himself, and duress will be a good defense. The citizen must, however, inject involuntariness into the case, or the government will prevail merely by proving the commission of the proscribed acts. In many cases the courts have created a practically insurmountable barrier for the

155. Mackenzie v. Hare, 239 U.S. 299, 311 (1915).
156. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).
157. Perez v. Brownell, 356 U.S. 44, 60 (1958).
158. 8 U.S.C. § 1481(a)(1). Perez v. Brownell, 356 U.S. 44 (1958).
159. 8 U.S.C. § 1481(a)(8). Trop v. Dulles, 356 U.S. 86 (1958).
160. 8 U.S.C. § 1481(a)(10). Perez v. Brownell, 356 U.S. 44 (1958).
161. 8 U.S.C. § 1481(a)(3). Nishikawa v. Dulles, 356 U.S. 129 (1958); Acheson v. Okimura, 342 U.S. 899 (1952) (per curiam).
162. See note 97 *supra*.

Government due to passage of time and the fact that the acts complained of occurred in a foreign nation.[163]

One other point should be noted. There is a possibility that a citizen may perform one of the proscribed acts under section 1481, but have expatriation held in abeyance due to the saving provisions of section 1483. A person may have committed one of the acts and years later, having completely forgotten it, take up residence abroad. Section 1483 would then come into operation and the individual would be deemed to have expatriated himself as there is no time limit imposed under this section. In order to avoid possible hardship in this area, it would seem plausible that Congress could pass legislation requiring officials of the State Department to forewarn citizens upon their departure from the United States. The official could make inquiry of the citizen as to the possible commission of any of the proscribed acts and if the individual admits having performed any, the official would then be required to warn him of the possible consequences if he departs from the United States. Actually, Congress could make it a requirement whether or not the individual admits having committed any of the proscribed acts. Such a provision could conceivably prevent future incidents such as outlined in *Shaughnessy v. Mezei.*[164]

Whatever the merits may be of either side of this issue, the fact remains that Congress has enacted this legislation and the Supreme Court has held at least a part of it constitutional. In view of the present constituency of the Court, it could reasonably be assumed that any further decisions, at least in the near future, will be by closely divided votes. None of the four on either side of the issue appear to be willing to concede anything to the other point of view. Thus the outcome of a case could conceivably turn on the vote of a single justice.

Even though Congressional power to provide for involuntary expatriation was upheld in *Perez,* the other decisions weaken and reduce the effectiveness of the statute. In view of the burden of proof which the Court has placed on the Government, duress or involuntariness will undoubtedly be a prevailing factor in many future cases. This will, in effect, preclude application of the statute in many instances; however, this is probably the price that should be paid for the protection of the individual citizen in the doubtful cases.

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163. See, *e.g.,* Nishikawa v. Dulles, 356 U.S. 129 (1958). In this case the acts complained of took place some seventeen years prior to the action in a then hostile foreign nation.

164. 345 U.S. 206 (1953). See note 31 *supra,* and accompanying text.