

1970

## The Place of Foreign Law in Expatriation Cases

John K. Speer Jr.

---

### Recommended Citation

John K. Speer, *The Place of Foreign Law in Expatriation Cases*, 4 INT'L L. 139 (1970)  
<https://scholar.smu.edu/til/vol4/iss1/9>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## The Place of Foreign Law In Expatriation Cases

Foreign law is a second consideration in expatriation cases. First attention is given to applicable provisions of domestic law. This article, however, is concerned mainly with the foreign-law aspect of expatriation problems.

In the area of domestic law, in the United States, there are three recent key decisions on expatriation: *Afroyim v. Rusk*<sup>1</sup>, *Schneider v. Rusk*<sup>2</sup> and *Matter of Becher*<sup>3</sup>. Of pertinent domestic statutes there are a myriad.<sup>4</sup>

The facts and holdings in the three cases above tell something of the trend taken by the expatriation laws in the United States.

Beys Afroyim was a native of Poland, naturalized in the United States in 1926. He went to Israel in 1950, and voted there in an election in 1951 for the Knesset (Parliament). The Supreme Court held, on May 29, 1967, that Afroyim had not expatriated himself from United States citizenship by voting in a foreign election,<sup>5</sup> as he had not thereby manifested an intent to

---

\*A.B., Harvard University; M.A., University of Virginia; LL.B., Boston University; General Attorney, Immigration and Naturalization Service, Department of Justice. The views expressed in this article are those of the author and are not necessarily those of the Immigration & Naturalization Service or the Department of Justice.

<sup>1</sup>387 U.S. 253 (1967). See also *Matter of Picone*, 10 I. & N. DEC 139 (Atty. Gen. 1963), establishing that when foreign nationality is resumed passively—by mere operation of a foreign law—expatriation from United States citizenship, under Section 2 of the Act of March 2, 1907, 34 Stat. 1228, dates from the subsequent commission of an “overt, voluntary act, manifesting clearly and unambiguously a decision to accept foreign nationality.”

<sup>2</sup>377 U.S. 163, 84 S.Ct. 1184 (1964).

<sup>3</sup>I. & N. DEC., Interim Decision No. 1771 (Atty. Gen. 1967).

<sup>4</sup>See e.g. Act of March 2, 1907, §§ 2, 3, 34 Stat. 1228; Nationality Act of 1940, §§ 401, 404, 407, 409, 54 Stat. 1168-71; Immigration and Nationality Act of 1952, §§ 349, 350, 352, 401 (j), 65 Stat. 191, 66 Stat. 267 & 269, 8 U.S.C. 1481, 1482, 1484, 1935 note (1952). In connection with Section 401 (a) of the Nationality Act of 1940, 54 Stat. 1168-69, see *Perri v. Dulles*, 230 F.2d 259 (3d Cir., 1956).

<sup>5</sup>i.e. under Section 401(e) of the Nationality Act of 1940, 54 Stat. 1169; its successor is Section 349 (a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U.S.C. 1481 (a)(5) (1952).

relinquish his citizenship voluntarily. The Court set a test of "voluntary relinquishment" to be met in expatriation cases.<sup>6</sup>

Angelika Schneider was a native of Germany who derived United States citizenship in 1950, through her mother. She returned to the country of her birth in 1956, and resided there continuously for more than three years after 1957, thus expatriating herself under the provisions of the then current rule, by placing herself within Section 352 (a)(1) of the Immigration and Nationality Act.<sup>7</sup> On May 18, 1964, the Supreme Court determined that residence abroad could not alone constitute expatriation. This decision rendered Section 352 (a)(1) and (2) of the Immigration and Nationality Act and Section 404 (b) and (c) of the Nationality Act of 1940 unconstitutional.<sup>8</sup>

*Matter of Becher* is a decision of the Board of Immigration Appeals, binding on the Immigration and Naturalization Service, and persuasive in the courts. Sally Ann Becher, was a native-born United States citizen who went to Canada in 1944, became a Canadian citizen in 1947 by marriage to a Canadian citizen, and obtained a position teaching in Canada in 1955. It was argued by the Immigration and Naturalization Service that she lost United States citizenship under Section 349(a)(4)(A) of the Immigration and Nationality Act<sup>9</sup>, in accepting employment by the Government of Canada while a Canadian national. On August 21, 1967, the Attorney-General followed *Afroyim v. Rusk*, extending its rule to cases in which a dual national obtained such employment under a foreign government.

Passing now from domestic to foreign law, one may examine foreign statutes, treaties, and judicial decisions, with some attention to the writings of publicists.

## Foreign Statutes

In general, foreign statutes to be considered in expatriation cases are those granting foreign citizenship according to the principle of *jus soli*, *jus*

---

<sup>6</sup>*Cf.* *Matter of Newton*, I. & N. DEC., Interim Decision No. 1732 (B.I.A. 1967), in which a dual national of Canada and the United States was held to have claimed voluntarily the benefits of Canadian nationality within Section 350 of the Immigration and Nationality Act of 1952, note 4, *supra*.

<sup>7</sup>66 Stat. 269, 8 U.S.C. 1484 (a)(1) (1952). This section states that "[a] person who has become a national by naturalization shall lose his nationality by 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. . . ." For the purposes of this section, derivation of citizenship through a parent was equated with naturalization.

<sup>8</sup>54 Stat. 1170; 66 Stat. 269, 8 U.S.C. 1484(a)(1) and (2) (1952).

<sup>9</sup>66 Stat. 267, 8 U.S.C. 1481 (a)(4)(A) (1952).

*sanguinis* or a combination of these,<sup>10</sup> including laws conferring derivative citizenship through a parent or parents<sup>11</sup> or through a spouse;<sup>12</sup> those according foreign citizenship by operation of law,<sup>13</sup> or by affirmative act, such as obtaining naturalization in a foreign state<sup>14</sup> or by opting for certain citizenship.<sup>15</sup> In addition, there are some comparatively unique statutes influencing determination of citizenship, among them the Cuban "Fifty Per

---

<sup>10</sup>*jus soli* (or *jure soli*) meaning nationality determined according to place of birth, and *jus sanguinis* (or *jure sanguinis*) standing for devolution of nationality by blood relationship. A plurality of nations employ a combination of these two principles. See JESSUP, A MODERN LAW OF NATIONS 73 (1949).

<sup>11</sup>See e.g., Argentine Nationality Law of Oct. 8, 1869, art. 1(2); Cuban Law on Aliens of 1870, art. 1(2); Italian Nationality Law of June 13, 1912, arts. 1(1), 1(2) and 3; Rumanian Nationality Law of Feb. 23, 1924, arts. 1 and 2; Chilean Constitution of Sept. 18, 1925, art. 5(2); 2 Cuban Constitution of 1940, art. 12 (b) and (c); French Nationality Law of Oct. 19, 1945, arts. 17 and 18; Yugoslav Nationality Act of July 1, 1946, art. 4. For tests of all but the Cuban statutes see FLOURNOY & HUDSON, NATIONALITY LAWS 10, 170, 497 (1929); U.N. Legislative Series, *Laws Concerning Nationality*, 154, 267, 268, 354-55 (ST/LEG/SER.B/4/Add.1) (U.N. Pub. Sales No. 1954, Vol. 1).

<sup>12</sup>See e.g., Greek Act of Oct. 29, 1856, art. 17, as amended by Decree of Sept. 13, 1926; Cuban Civil Code of 1889, art. 22; Yugoslav Nationality Law of Sept. 21, 1928, art. 10; Belgian Royal Decree of Dec. 14, 1932, art. 15; Greek Decree of Sept. 30, 1955, art. 4; Irish Nationality and Citizenship Act of 1956, § 8. For texts, see FLOURNOY & HUDSON, *supra*, note 11 at 194, 391; U.N. Legislative Series, *Laws Concerning Nationality*, *supra*, note 11 at 39, 188; U.N. Legislative Series, *Supplement to Laws Concerning Nationality* (1954), 46, 61 (ST/LEG/SER. B/9) (U.N. Pub. Sales No. 59, Vol. 3).

<sup>13</sup>See e.g. Italian Nationality Law of June 13, 1912, art. 9(3); Swedish Nationality Law of May 23, 1924, art. 4; Irish Nationality and Citizenship Act of Apr. 10, 1935, § 2(4)(a). For texts, see Flournoy & Hudson, *supra*, note 11 at 364-65, 546; U.N. Legislative Series, *Laws Concerning Nationality*, *supra*, note 11 at 248, 269.

<sup>14</sup>See, generally, BRIGGS, THE LAW OF NATIONS 159-60 (1st ed. 1947). Cf. Rumanian Constitution of Mar. 28, 1923, art. 8, regarding employment by the Rumanian Government, discussed in 3 HACKWORTH, DIGEST OF INT'L. LAW 215 (1942). See also Article III of Treaty with Great Britain, May 13, 1870, 16 Stat. 775, T.S. No. 130. Cf. also affirmative act of taking an oath of allegiance to the Irish Free State in Dec. 1922, discussed in *id.* at 211.

<sup>15</sup>See, e.g., Italian Nationality Law of June 13, 1912, art. 3 (2); Rumanian Nationality Law of Feb. 23, 1924, arts. 47-53, 60-63; Yugoslav Nationality Act of July 1, 1946, art. 36, as amended by Act of Dec. 2, 1947, art. 1. For texts of these laws see FLOURNOY & HUDSON, *supra*, note 11 at 363, 503-04, 506; U. N. Legislative Series, *Laws Concerning Nationality* *supra*, note 11 at 267-68, 561, 562-63. Cf. Czech Constitutional Law of July 1, 1926, § 1. For text see FLOURNOY & HUDSON, *supra*, note 11 at 205-06. But cf. Yugoslav Act of Dec. 1, 1948, art. 1, to Amend and Supplement the Yugoslav Nationality Act of July 1, 1946, in U. N. Legislative Series, *Laws Concerning Nationality*, *supra*, note 11 at 563, denying an option to disloyal persons. With regard to Koreans in Japan see Oda, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 AM. J. INT'L. L. 35, 48-49, 51 (1967).

Cf. the effect on nationality of art. 1, Law No. 42 of Dec. 16, 1930 of the Dominican Republic, declaring that "commencing on the date of publication of the present law, it is absolutely prohibited for any alien to be designated to fill any public posts, whether these be in the administrative branch or municipal." Articles 2 and 3 of this law contained specified exceptions to Article 1. Troncoso de la Concha, *Elementos de Derecho Administrativo Con Aplicacion a las Leyes de la Republica Dominicana* 73 (3rd ed. 1949).

Cent" Law,<sup>16</sup> the Israeli "Law of Return,"<sup>17</sup> and a Mexican restriction on land ownership.<sup>18</sup>

Also appropriate for consideration under this heading are foreign statutes providing for loss of foreign nationality.<sup>19</sup>

## Treaties

Section 357 of the Immigration and Nationality Act states that "nothing in this title [III] shall be applied in contravention of the provisions of any treaty or convention to which the United States has been a party and which has been ratified by the Senate upon the effective date of this title. . . ."<sup>20</sup> Title III contains, inter alia, provisions relating to loss of nationality.

The nationality conventions, bearing on expatriation, to which the United States is a signatory, fall into two categories: (1) the so-called Bancroft Treaties,<sup>21</sup> under which a naturalized United States citizen loses

<sup>16</sup>Decree #2583 of Nov. 8, 1933, art. 1, [1933] *Decretos sobre la Jornada Maxima de 8 Horas y su Reglamento General; Decreto-Ley Provisional de Nacionalizacion del Trabajo; Reglamento para la Organizacion Sindical* 16, placed "compulsory obligation on all natural or juridical persons or those acting as employers and engaged in agricultural, industrial or mercantile enterprises to utilize in such enterprises at least fifty per cent native Cuban workers or employees and to devote at least fifty per cent of their payroll to the wages of such workers." Translated in GALBO & VON SOBOTKER, A STATEMENT OF CUBAN LAW IN MATTERS AFFECTING BUSINESS AND ITS VARIOUS ASPECTS AND ACTIVITIES 71-72 (1946).

<sup>17</sup>The Law of Return of July 6, 1950, as amended in 1954, recites that "every Jew has the right to come to this country [Israel] as an 'oleh' [permanent immigrant]. . . unless the Minister of Interior is satisfied that the applicant [for an oleh's visa] (1) is acting against the Jewish people or (2) is likely to endanger the public health or security of the State [or] is a person with a criminal past likely to endanger public welfare"; and Section 1 of the Israeli Nationality Law of Apr. 1, 1952 provided that Israeli nationality is acquired, among other ways, "by return." See U. N. Legislative Series, *Laws Concerning Nationality*, supra, note 11 at 263; U. N. Legislative Series, *Supplement to Laws Concerning Nationality*, supra, note 12 at 66-67.

<sup>18</sup>According to Article 27, Section 1, of the Mexican Constitution of Jan. 31, 1917, ". . . in a zone (faja) of one hundred kilometers along the [Mexican] frontier and of fifty on the seashores, under no circumstances can foreigners acquire direct dominion over lands and waters." See WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 14 (2d ed. 1938); 2 PEASLEE, CONSTITUTIONS OF NATIONS 422 (1st. ed. 1950). For the effect of this provision on determining nationality, in the light of Section 350 of the Immigration and Nationality Act, 66 Stat. 269, 8 U.S.C. 1482 (1952), concerning dual nationals, see Matter of V-, 7 I. & N. DEC. 218 (B.I.A. 1956) and Matter of Sanchez-Monreal, 10 I. & N. DEC. 630 (B.I.A. 1964). Cf. Matter of G- Q-, 7 I. & N. DEC. 195 (B.I.A. 1956).

<sup>19</sup>See e.g. Greek Law #120 of 1913 (effective Jan. 15, 1914), cited in HACKWORTH, supra, note 14 at 177, and Czechoslovak Constitutional Decree of Aug. 2, 1945, art. 5. For text of Czech Decree see U. N. Legislative Series, *Laws Concerning Nationality* supra, note 11 at 111.

<sup>20</sup>66 Stat. 272, 8 U.S.C. 1489 (1952). The effective date of Title III was December 27, 1952.

<sup>21</sup>These treaties were inaugurated in 1868. See BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 548-49 (1915).

United States citizenship merely by re-establishing residence in his country of origin<sup>22</sup> and (2) the type exemplified by the "Pan American Convention of 1906,"<sup>23</sup> under which United States citizenship is lost, and original nationality is resumed, by a naturalized United States citizen who re-establishes residence in his country of origin.

For consideration beyond the foregoing are any applicable foreign accords, such as peace treaties with provisions affecting citizenship, including peace treaties affording protection to citizenship of minorities within certain countries.<sup>24</sup>

Many foreign nationality laws contain references to peace treaties affecting the nationality of their populations. The post-World War I treaties of Saint Germain-en-Laye,<sup>25</sup> Neuilly-sur-Seine,<sup>26</sup> Trianon,<sup>27</sup> Rapollo<sup>28</sup> and Lausanne,<sup>29</sup> adverted to in part in, or incorporated by reference into, the

---

<sup>22</sup>See e.g. Naturalization Convention With Sweden and Norway, May 26, 1869, 17 Stat. 809, T.S. No. 350; Naturalization Convention With Denmark, July 20, 1872, 17 Stat. 941, T.S. No. 69; Naturalization Treaty With Haiti, Mar. 22, 1902, 33 Stat. (pt. 2) 2101, T.S. No. 432; Naturalization Convention With Peru, Oct. 15, 1907, 36 Stat. (pt. 2) 2181, T.S. No. 532; Naturalization Convention With El Salvador, Mar. 14, 1908, 35 Stat. (pt. 2) 2038, T.S. No. 503; Naturalization Convention With Brazil, Apr. 27, 1908, 36 Stat. (pt. 2) 2444, T.S. No. 547; Naturalization Convention With Honduras, June 23, 1908, 36 Stat. (pt. 2) 2160, T.S. No. 525; Naturalization Convention With Uruguay, Aug. 10, 1908, 36 Stat. (pt. 2) 2165, T.S. No. 527; Naturalization Convention With Nicaragua, Dec. 7, 1908, 37 Stat. (pt. 2) 1560, T.S. No. 566; Naturalization Convention With Portugal, May 7, 1908, 35 Stat. (pt. 2) 2802, T.S. No. 513; Naturalization Convention With Costa Rica, June 10, 1911, 37 Stat. (pt. 2) 1603, T.S. No. 570.

Note Section 2 of the Act of March 2, 1907, 34 Stat. 1228, enacting into law of the United States a presumption, found in some "Bancroft Treaties," that when a naturalized citizen resides for two years in the foreign country from which he came, he ceases to be a citizen of the United States.

<sup>23</sup>Treaty Concerning Status of Naturalized Citizens, Aug. 13, 1906, 37 Stat. (pt. 2) 1653, T.S. No. 575, a multipartite treaty in force now between the United States of America and nine Latin-American countries. For comment see BORCHARD, *supra*, note 21 at 549.

<sup>24</sup>See e.g. Treaty of Versailles, signed June 28, 1919, providing, in articles 3, 4, 6 and 91, for adoption of Polish nationality by certain minorities in Poland, reserving their right, however, to opt for other nationality. Text of these articles is in 3 U. S. Treaties and 3378-79, 3717-18.

<sup>25</sup>Signed Sept. 10, 1919. For text of arts. 4 and 6 (concerning Czechoslovak and Yugoslav nationalities and arts. 64, 65 and 230 (concerning Austrian nationality) and reference to arts. 81 and 230 see FLOURNOY & HUDSON, *supra*, note 11 at 647-48, 650.

<sup>26</sup>Signed Nov. 27, 1919. For text of arts. 51 and 52 (regarding Bulgarian nationality) see FLOURNOY & HUDSON, *supra*, note 11 at 648-49.

<sup>27</sup>Signed June 4, 1920. For text of arts. 56, 57 and 213 (concerning Hungarian nationality) and reference to arts. 65 and 213 see FLOURNOY & HUDSON, *supra*, note 11 at 649-50. For text of art. 61 (regarding Rumanian nationality) see HACKWORTH, *supra*, note 14 at 215; 3 REDMOND, TREATIES 3565 (1923).

<sup>28</sup>Signed Nov. 12, 1920. For text see 18 L.N.T.S. 388-403.

<sup>29</sup>Signed July 24, 1923. For text of nationality provisions see 28 L.N.T.S. 28-36. See Article 2, para. 7, of the Treaty of Lausanne, providing for acquisition of Greek citizenship by certain Turkish nationals, discussed in HACKWORTH, *supra*, note 14 at 212. Cf. also Czechoslovak Constitutional Decree of Aug. 2, 1945, art. 5. For text of Czech Decree see U.N. Legislative Series, *Laws Concerning Nationality*, *supra*, note 11 at 111.

nationality laws of Czechoslovakia,<sup>30</sup> Italy,<sup>31</sup> Yugoslavia<sup>32</sup> and Hungary,<sup>33</sup> contained provisions for determination of, or choice of, nationality of peoples following the demises of the Austro-Hungarian and Ottoman Empires.<sup>34</sup>

### Foreign Decisions

Decisions of foreign national courts and even international tribunals may supplement foreign nationality laws and treaties in determining citizenship status. A number of such decisions have explored the question as to whether a person held one or more of several nationalities.<sup>35</sup> Amplifying the statutes, decisions and treaties are the writings of publicists to which it may be necessary to refer occasionally.<sup>36</sup>

---

<sup>30</sup>See Czechoslovak Constitutional Law of Apr. 9, 1920, art. 20. For text refer to FLOURNOY & HUDSON, *supra*, note 11 at 205.

<sup>31</sup>See Italian Nationality Laws of Jan. 29, 1922 (art. 4), June 7, 1923 (art. 1), Oct. 15, 1925 (art. 1), Mar. 13, 1927 (art. 1) and May 12, 1927 (art. 1 (b)). For texts see FLOURNOY & HUDSON, *supra*, note 11 at 369-70, 371-72, 373, 375.

<sup>32</sup>See Yugoslav Law of Nationality of Sept. 21, 1928, art. 53 (2). For text refer to FLOURNOY & HUDSON, *supra*, note 11 at 399.

<sup>33</sup>See Hungarian Nationality Act of Dec. 24, 1948, art. 25, in U.N. Legislative Series, *Laws Concerning Nationality*, *supra*, note 11 at 224. Cf. Hungarian Nationality Act of Dec. 24, 1948, arts. 26 and 27 in *ibid.*; Treaty With Hungary, art. 1, Aug. 29, 1921, 42 Stat. (pt. 2) 1951, T.S. No. 660.

<sup>34</sup>Cf. Treaty of Versailles, art. 4 (regarding Polish nationality) and art. 278 (regarding Germany), signed June 28, 1919, and Treaty of Paris, art. 4 (regarding Rumanian nationality), signed Dec. 9, 1919, provisions of which are recited in FLOURNOY & HUDSON, *supra*, note 11 at 646, 649; also respectively in 3 U. S. TREATIES AND CONVENTIONS 3449, 3717, and in 5 L.N.T.S. 340-41.

<sup>35</sup>See e.g. Carlos Klemp Claim (German-Mexican Mixed Claims Commission, apr. 11, 1927), reprinted in 24 AM. J. INT'L. L. 10-24 (1930); *Stoeck v. Public Trustee* [1921] 2 Ch. 67; *In re Chamberlain's Settlement* [1921] 2 Ch. 533; *Lynch (Great Britain v. Mexico)*, [1929] Decisions and Opinions of Commissioners 20 (1931); *Apostilides v. Turkish Government*, 8 Rec. des decis. des trib. arb. mixtes 373 (1928), [1927-1928] Ann. Dig. 312-13 (No. 207); *De Born v. Yugoslavia*, 5 Rec. des decis. des trib. arb. mixtes 501 (1926), [1925-1926] Ann. Dig. 277-78 (No. 205); *Barthez de Montfort v. Treuhander Hauptverwaltung*, [1925-1926] Ann. Dig. 279 (No. 206); *Canevaro Case*, in *Scott, Hague Court Reports* 284 (Perm. Ct. Arb. 1912); *The Flutie Cases*, United States-Venezuelan Arbitration under a Protocol of Feb. 17, 1903, in *Ralston, Venezuelan Arbitration of 1903*, 38; *Rajdberg v. Lewi*, *Supr. Ct. of Pol.* 1927, [1927-1928] Ann. Dig. 314-15 (no. 209); *Tellech (United States v. Austria and Hungary)*, *Hudson's Cases* 324 (1929); *Lettermerck v. Prefect of the Seine*, Ct. App. of Paris 1925, *Hudson's Cases* 329 (1929); *Gaceta de Foro*, Feb. 1919, 880 (Argen.); *Gaceta de Foro*, Apr. 1919, 243 (Argen.); *Fallos de la Suprema Corte de Justicia* 92;55 (1901) (Argen.); *Fallos de la Suprema Corte de Justicia* 219:315 (1951) (Argen.).

<sup>36</sup>See e.g. *Wilson & Clute, Commonwealth Citizenship and Common Status*, 57 AM. J. INT'L. L. 566 (1963); O'Connell, *State Succession and Problems of Treaty Interpretation*, 58 AM. J. INT'L. L. 41, 58-59 (1964); Ginsbergs, *Soviet Citizenship Legislation and Statelessness as a Consequence of the Conflict of Nationality Laws*, 15 INT'L. & COMP. L. Q. 1 (1966); Romero del Prado, *Ciudadanía y naturalización doctrina, legislación, jurisprudencia* (1930).