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The Involuntary Expatriation of Statutory Americans

I.

During World War II, thousands of GIs in the uniform of the United States armed forces were naturalized abroad under the Second War Powers Act.[1] Many prominent United States citizens were not born within the jurisdiction of the United States. George Romney was born in Mexico. Senator Barry Goldwater was born in the territory of Arizona before it became a state. Franklin D. Roosevelt Jr. was born in Canada.[2] All of these loyal Americans will be shocked and amazed to learn that since April 5, 1971, when the Supreme Court of the United States decided the case of *Rogers v. Bellei,* (No. 24, Oct. Term, 1970), they possess a citizenship of inferior quality.

In the words of the majority opinion of the Supreme Court, they were not born in the United States, they were not naturalized in the United States and they are simply not Fourteenth-Amendment-first-sentence citizens. Their failure to possess constitutional citizenship, it would appear, permits Congress to prescribe forfeiture of citizenship upon the basis of foreign residence. This authority is denied to Congress in the cases of those born or naturalized in the United States and subject to our jurisdiction. *Schneider v. Rusk,* 377 US 163 (1964). To understand the latest pronouncement of the Supreme Court, analysis is required of our citizenship and expatriation laws and their background.

II.

Our expatriation laws had a simple beginning. While a law for the acquisition of United States citizenship by naturalization was enacted as early as 1790, it was not until nearly a century later, in 1868, that the first

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[1]56 Stat. 182, 187; Act of March 27, 1942; *Naturalization of Aliens in Our Armed Forces,* 1 & N MONTHLY REV., Sept. 1943; *Hazard, My Naturalization Work in the Pacific War Theater,* 1 & N MONTHLY REV., March, 1945.

[2]*See,* Gordon, *Who Can Be President of the United States: The Unresolved Enigma,* XXVIII MARYLAND L. REV. 1 (1968).

expatriation statute was enacted. Prior to its enactment, it was contended that in conformity with the English common law, citizenship was immutable.[3] On July 27, 1868, Congress enacted a joint resolution declaring that expatriation was "a natural and inherent right of all people,"[4] an assertion which "seems a logical concomitant of the extensive practice of naturalization in this country."[5]

Until the passage of the 1907 Expatriation Act, Congress did not provide any legislative guide for administrative action in declaring citizenship forfeit. Pursuant to a 1906 joint resolution, three State Department officials had submitted a report to Congress[6] which resulted in the enactment of the 1907 Act.[7] This Act provided that no person should be allowed to expatriate himself when the United States was at war, and prescribed expatriation when a citizen (1) was naturalized in a foreign state in conformity with its laws; (2) took an oath of allegiance to a foreign state; and (3) married a male foreigner and took his nationality. Naturalized Americans residing abroad for two years in their country of origin or five years elsewhere did not lose citizenship, but were deprived of diplomatic protection.

The Nationality Act of 1940, based on recommendations of the Secretary of State, the Attorney General and the Secretary of Labor[8] became effective on January 13, 1941.[9] The grounds of expatriation were increased to ten. Foreign military or civil service, voting in foreign elections, renunciation before a United States consul abroad and in limited cases in the United States, treason, draft dodging, and in the case of naturalized citizens foreign residence, were added as grounds of expatriation.

The provision for the expatriation of naturalized citizens who reside in the country of their birth or former nationality was proposed because of the large number of naturalized citizens residing abroad. It was urged that by the expatriation of these "nominal" citizens who resided abroad for insufficient reasons, the difficulty and embarrassment to the United States

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[3] 9 OP. ATTY GEN. 356 (1859); *Tsiang, The Question of Expatriation in the United States Prior to 1907* (1942) p. 45.

[4] 15 Stat. 223; re-enacted in Revised Statutes, secs 1999, 2000, 2001. We reaffirmed this declaration at the Conference for the Codification of International Law, held at The Hague in 1930. *See* III HACKWORTH, DIGEST OF INTERNATIONAL LAW 161-165 (1942). Article 15(2) of the Universal Declaration of Human Rights provides that no one shall be denied the right to change his nationality.

[5] *Tsiang, op. cit. supra,* note 3 at 112.

[6] *Citizenship of the United States, Expatriation and Protection Abroad,* H. DOC. No. 326, 59th Cong. 2d Sess.

[7] 34 Stat. 1228.

[8] *Hearings before the House Committee on Immigration and Naturalization* on H.R. 6127, superseded by H.R. 9980, 76 Cong. 1st Sess. (1940).

[9] 54 Stat. 1174.

in its efforts to extend protection to other naturalized citizens in meritorious cases, would be lessened.

On the other hand, it was recognized that this provision for the loss of citizenship although fully warranted, "may appear to be somewhat drastic."[10] The expatriation provision for naturalized citizens residing abroad for five years in any foreign country was added as a result of the testimony of a State Department official who believed that there were too many naturalized Russian and German Zionists going to Palestine.[11] It was concluded that "as proceedings in the courts would be cumbersome, long-drawn-out and expensive to the government, the termination of nationality should be automatic, resulting directly from the fact of foreign residence."[12]

The Immigration and Nationality Act of 1952 continued the expatriating provisions of the 1940 Act with some changes.[13] It added a provision authorizing expatriation of persons who acquired dual nationality at birth and "voluntarily sought or claimed benefits" of their foreign nationality and resided in the foreign state for three continuous years after the age of 22.[14] The Act also creates a conclusive presumption that an expatriating act is performed voluntarily if, at the time of the act, a person was a national of the state in which the act was performed and had been in the state for a period aggregating ten years or more immediately prior to such act.[15] This provision is of questionable constitutionality.[16] A 1954 amendment added conviction for rebellion, insurrection, seditious conspiracy and advocating the unlawful overthrow of the Government as further grounds of expatriation.[17]

From the days when people believed in the English doctrine of immutable allegiance, to the time when we merely declared that a person had a right to cast off his citizenship, we proceeded to a point at which our statutory laws provided more grounds than any other country in the world for loss of citizenship.[18] By a series of Supreme Court decisions, the expatriation laws of the United States were seriously restricted.[19]

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[10]*Hearings on H.R. 6172, op. cit.* 495; *Senate Misc. Report 2150,* 76th Cong. 3d Sess. p. 4.

[11]*Hearing on H.R. 6127, op. cit.* 140-141.

[12]*Id.*, at 495.

[13]8 USC 1481 *et seq.*

[14]*Id.*, 1482.

[15]*Id.*, 1481(b).

[16]*Manley v. Georgia,* 279 US 1 (1928); *Schlesinger v. Wisconsin,* 270 US 239 (1925); *Heiner v. Donnan,* 285 US 312 (1931).

[17]8 USC 1481(a)(9) *as amended* by 68 Stat. 1146.

[18]*See: Laws Concerning Nationality,* United Nations Legislative Series (1954).

[19]*See: Duvall, Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship,* 56 VIRGINIA L. REV. 408 (1970).

In *Trop v. Dulles,* 356 US 86 (1958) expatriation on the basis of a desertion conviction was found to be cruel and unusual punishment in contravention of the Eighth Amendment. *Kennedy v. Mendoza-Martinez,* 372 US 144 (1963), declared unconstitutional provisions for expatriation based on departure from the United States to evade military service. It was held that punishment was thereby inflicted without the procedural safeguards of the Fifth and Sixth Amendments. *Schneider v. Rusk,* 377 US 163 (1964) invalidated the expatriation section providing for loss of citizenship by a naturalized American who resided for three years in the country of his birth or former nationality. The Court said:

> This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' * * * A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.[20]

Afroyim v. Rusk, 387 US 253 (1967) involved a naturalized citizen who voted in an Israeli legislative election. Expatriation on this basis was declared unconstitutional, and the prior holding to the contrary in *Perez v. Brownell,* 356 US 44 (1958) was overruled. The Court delcared:

> We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.[21]

The cases culminating with *Afroyim,* restored expatriation to a voluntary basis. It has been said that "the practical effect of *Afroyim* will be to reduce the number of final determinations of expatriation, to increase the number of citizens with dual nationality, and to facilitate the involvement of US citizens in the community life and processes of foreign states without jeopardizing their citizenship."[22]

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[20]377 US at 168-169.
[21]387 US at 268.
[22]Duvall, *op. cit. supra,* note 19 at 451.

III.

Until passage of the Civil Rights Act of 1866 (14 Stat. 27) and adoption of the Fourteenth Amendment, there were no provisions in our written laws defining the citizenship status of those born in the United States. These provisions, incorporating the doctrine of *jus soli,* were said to be declaratory of the common law, inherited from England.[23] The Fourteenth Amendment also provided that persons naturalized in the United States and subject to its jurisdiction were to be recognized as citizens.

The principle of *jus sanguinis,* citizenship derived through the nationality of parents, likewise had English antecedents. Since 1708, foreign-born children of natural-born British subjects were considered natural born subjects of the kingdom "to all intents, constructions and purposes whatsoever."[24] The statutory law of England, and leading British authorities, considered a person born abroad who acquired citizenship at birth, to be a natural-born subject.[25]

In 1790, the First Congress enacted legislation providing that "the children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States shall be considered as natural-born." 1 Stat. 103. There were subsequent enactments in 1795[26] and in 1802.[27] In 1855, Revised Statutes §1993 was enacted declaring persons born abroad to citizen fathers to be citizens of the United States, provided the father had resided in the United States.[28] The Act of March 2, 1907 required citizens born on foreign soil to register an intention to reside in the United States on reaching the age of 18, and to take an oath of allegiance upon reaching majority, in order to receive protection while they resided abroad.[29]

On May 24, 1934, section 1993 of the Revised Statutes was amended to grant citizenship to children born abroad of citizen parents regardless of the sex of such parents, provided one citizen parent had resided in the United States prior to the birth of the child. If one of the parents was an alien and the other a citizen, the right of citizenship was declared not to descend unless the child resided for five years in the United States after his 18th birthday and unless he took an oath of allegiance.[30] This was followed

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[23]*United States v. Wong Kim Ark,* 169 US 649, 688 (1898); Van Dyne, *Citizenship of the United States,* pp. 1, 7 (1903).

[24]7 Anne, c.5 § 3 (1708). For the modern English rule, see LAWS CONCERNING NATIONALITY, *op. cit., supra,* note 18 at 470.

[25]Gordon, *op. cit., supra,* note 2 at p. 7.

[26]1 Stat. 415.

[27]2 Stat. 155.

[28]*See* Weedin v. Chin Bow, 274 US 657 ( ); Montana v. Kennedy, 366 US 308 ( ).

[29]34 Stat. 1229.

[30]48 Stat. 797.

by the Nationality Act of 1940 which required the parent to have ten years' residence in the United States, at least five of which were after attaining the age of 16.

In order to retain citizenship, the child was required to reside in the United States for five years between the ages of 13 and 21. The retention requirement was made inapplicable where a parent at the time of the child's birth was residing abroad in the Government service, in the service of an official international agency in which the United States participated, or in the employment of an American educational, scientific, philanthropic, religious, commercial or financial organization having its principal place of business in the United States, and for which the parent received substantial compensation. These provisions regarding retention of citizenship were made applicable to a child born abroad after May 24, 1934.[31]

Section 301 of the Immigration and Nationality Act of 1952 as amended (8 USC 1401) requires that prior to the child's birth, the parent have been physically present in the United States for periods of not less than ten years, at least five of which were after attaining 14 years of age. Retention of citizenship acquired at birth is dependent on the child's return to the United States, and five years physical presence in the United States between the ages of 14 and 28. Omitted from the 1952 Act, now in force, is any dispensation for children of parents pursuing activities beneficial to our foreign policy or to the best interests of the United States.

IV.

Aldo Mario Bellei's parents were married in the United States in 1939. His mother was born in the United States, and had the requisite residence here. His father was an Italian citizen. Shortly after the marriage, the parents left for Italy where Aldo was born on December 22, 1939. Bellei became a citizen of both the United States and Italy at birth. In due course, he registered for United States military service under the Selective Service Act. He came to the United States on short trips in 1948, 1951, 1955 and 1962, traveling on American passports. When he failed to take up United States residence at age 23, he was advised by the State Department, that he had lost his American citizenship.

Bellei then brought suit to declare the citizenship retention provisions of the 1952 Immigration and Nationality Act unconstitutional, and therefore that he had not lost his citizenship. A three-judge district court, relying upon *Schneider v. Rusk* and *Afroyim v. Rusk,* declared the statute invalid. *Bellei v. Rusk,* 296 F.Supp. 1247 (Dist. of Col. 1969). A direct appeal was

[31]54 Stat. 1139; section 201(g) of the Nationality Act of 1940.

taken to the Supreme Court, before which the case was argued initially in January, 1970, and then re-argued on November 12, 1970.

On April 5, 1971, by a 5-4 vote, the Supreme Court reversed, upholding the constitutionality of the statute and the loss of Bellei's citizenship. The majority opinion, written by Justice Blackmun, distinguishes the *Schneider* and *Afroyim* cases, involving naturalized citizens, on the ground that naturalized citizenship is recognized in the Fourteenth Amendment. The opinion states:

> The central fact in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he had not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen.

Treating the case as a problem in dual nationality, the court held further:

> The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair.

Moreover, the court believed that conditions precedent and subsequent should be considered indistinguishable. It said:

> We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all, on the asserted 'premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive' *Schneider v. Rusk,* supra, 377 U.S. at 165, and on the announcement that Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *Afroyim v. Rusk, supra,* 387 U.S. at 257. But as pointed out above, these were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to "persons born or naturalized in the United States."

The majority opinion provoked two vigorous dissents. Justice Black, joined by Justices Douglas and Marshall, stated:

> The holding (in *Afroyim v. Rusk*) was clear. Congress could not until today, consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. Now this Court, by a vote of five to four through a simple change in its composition, overrules that decision. * * * * * * the Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court.

> I cannot accept the Court's conclusion that the Fourteenth Amendment protects the citizenship of some Americans and not others.
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> Bellei was not 'born in the United States,' but he was constitutionally speaking, 'naturalized in the United States.' Although those Americans who acquire their citizenship under statutes conferring citizenship on the foreign-born children of citizens, are not popularly thought of as naturalized citizens, the use of the word 'naturalize' in this way has a considerable constitutional history. * * * Rather than the technical reading adopted by the majority, it is my view that the word 'in' as it appears in the phrase 'in the United States' (in the Fourteenth Amendment) was surely meant to be understood in two somewhat different senses: one can become a citizen of this country by being born *within* it or being naturalized *into* it.
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> I would not depart from the holding in *Afroyim* that every American citizen has Fourteenth Amendment citizenship. Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his citizenship until he voluntarily renounces or relinquishes it."

Justice Brennan's dissent, in which Justice Douglas concurred, is equally caustic. It states:

> Since the Court this Term has already downgraded citizens receiving public welfare, *Wyman v. James*, 400 U. S.—(1971), and citizens having the misfortune to be illegitimate, *Labine v. Vincent*,— U. S.—(1971), I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James and Labine*, the Court's opinion makes evident that its holding is contrary to earlier decisions. Concededly petitioner was a citizen at birth not by constitutional right, but only through operation of a federal statute. In the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" includes those naturalized through operation of an Act of Congress, wherever they may be at the time. Congress was therefore powerless to strip Bellei of his citizenship; he could lose it only if he voluntarily renounced or relinquished it. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

Conclusion

It is clear, as the dissenting members of the Supreme Court note, that the Court which decided *Schneider* and *Afroyim*, would have sustained the citizenship of Bellei. Although the majority attempted to deny it, the Bellei decision does create a second class citizenship for those born abroad. Treating this as a case involving a dual national, leaves many unanswered questions. Bellei registered for the draft and on four occasions travelled on American passports. Was not this sufficient manifestation of his desire to elect American citizenship? Why should five years' residence in the United States between the ages of 14 and 28, be the only way to elect? Would it really have made a better or more complete citizen of Bellei? Will the Court reach a contrary conclusion when a case arises involving someone who is not a dual national?

The case represents retrogression in the doctrine that expatriation can only result from voluntary action by a citizen. It espouses the outmoded notion, rejected by *Schneider,* that foreign residence by a citizen demonstrates disloyalty. As the *amicus* brief of the American Wives of Europeans and the American Bar observed:

> Whatever validity the residence requirement may have had as a test of allegiance and identification for foreign-born children of one citizen-parent when it was originally inserted, it has no validity today. The circumstances of 1970 are not those of 1934. The revolution in transportation and communication has rendered obsolete whatever validity may have once attached to residence as a test of allegiance. In a world of jet aircraft, of television via satellite, of unprecedented economic, political and cultural interdependence, with large numbers of persons serving their governments and private institutions overseas, the fact of residence in one country does not necessarily imply allegiance to that country or preclude allegiance to the country of which they are citizens.

It is to be hoped that at some future date, the principles of voluntary expatriation will again protect statutory citizens, and that loss of citizenship will then again be responsive to present-day world conditions.