The Supreme Court and the Power of Congress to Expatriate - From the Objective to the Subjective Test of Voluntariness: A Shift in Predominance

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Although the Supreme Court once defined expatriation as the voluntary renunciation or abandonment of citizenship, the law of expatriation has developed with complexity. Difficulty has arisen primarily from the existence of two opposing views regarding the extent of Congress' power under the Constitution to expatriate an American citizen against his will. One view provides that Congress has the power, in performing its other duties, to deprive a person of his citizenship even without his consent; thus expatriation is simply a means through which Congress may implement its other powers. The other view denies Congress any general power to take away a person's citizenship against his will.

During the eighteenth and nineteenth centuries, the principal question was not whether Congress possessed the power to expatriate, but instead whether the individual had the power to expatriate himself. Congress finally answered this question in favor of the individual, declaring that expatriation was a natural and inherent right of every person. Thus an individual's right to expatriate himself became an unencumbered reality.

The concept of forcible expatriation appeared in 1907 when Congress provided for the expatriation of a person upon his voluntary performance of certain acts statutorily defined as grounds for loss of citizenship. This power of Congress was not seriously questioned by the Supreme Court until 1958 when strong dissents in Perez v. Brownell shook the constitutional foundation of forcible expatriation. Thereafter, the Court began its meticulous assault on the concept by striking down one-by-one the various expatriation provisions of the statutes.

Recently in Afroyim v. Rusk the Court held that Congress lacks the power to expatriate a person against his will for voting in a foreign election. Moreover, the Court flatly stated that Congress has no general constitutional power express or implied to take away a person's citizenship.

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5 Act of March 2, 1907, ch. 2134, 34 Stat. 1228.
without his assent. When read alone, this “no-power” statement indicates that the concept of forcible expatriation has been completely discarded. However, the Afroyim opinion leaves some doubt as to whether the Court really intended to find that Congress has no power to expatriate a person against his will and thus to restore the pre-1907 situation whereby a person could lose his citizenship only through voluntary renunciation. Yet it appears that this decision has significantly altered the scope of expatriation.

With emphasis devoted primarily to a consideration of forcible expatriation, the purpose of this Comment is to trace the expanding-contracting development of the law of expatriation and to analyze its present status in the United States.

I. THE HISTORICAL DEVELOPMENT OF EXPATRIATION

Pre-Statutory Development. Voluntary expatriation was unknown to the early English common law. Under the principle of perpetual allegiance, the English citizen through his own conduct could not break his ties with his country even with the sovereign’s consent. However, through the Declaration of Independence, American colonists proclaimed their right to dissolve their former ties with England and thereby refuted the English doctrine of perpetual allegiance.

After the formation of the new nation, the question of the individual’s power to renounce his citizenship was soon raised. For many years, however, the Supreme Court avoided expressing an opinion directly upon the issue. In the first case to touch upon the subject, the Court indicated that the individual possessed the right to renounce his citizenship voluntarily, but differences of opinion developed over the manner in which the right was to be exercised. The earliest view was that a person could not expatriate himself without a bona fide change of domicile, which apparently

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9 Id. at 237.
10 Klubock, Expatriation—Its Origin and Meaning, 38 Notre Dame Lawyer 1, 2 (1962). It was not until 1870 that Parliament first allowed the British subject to expatriate himself. R. Flournoy & M. Hudson, Nationality Laws 59 (1929).
11 The first paragraph of the Declaration of Independence provides:
When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation. (Emphasis added).
12 Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795).
13 See Inglis v. Trustees of the Sailor’s Snug Harbor, 28 U.S. (3 Pet.) 99, 120 (1830); Osborn v. United States Bank, 22 U.S. (9 Wheat.) 718, 827-8 (1824); The Santissima Trinidad & The St. Ander, 20 U.S. (7 Wheat.) 283, 347 (1822); M’Ilvaine v. Cox’s Lessee, 8 U.S. (4 Cranch) 209, 212 (1808); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 120 (1804); Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 161 (1791) (opinion of Justice Iredell); id. at 169 (opinion of Justice Rutledge).
14 Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 162 (1795) (opinion of Justice Iredell):
That a man ought not to be a slave, that he should not be confined against his will to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country and may live comfortably in another, are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognize.
15 Id. at 162-63.
meant acquisition of citizenship in another country. Gradually, another view evolved whereby a person could expatriate himself only with the consent of the government. Thus even after the Declaration of Independence, remnants of the general doctrine of perpetual allegiance existed in the United States. Doubts as to the nature of the individual's power to renounce his citizenship led the Supreme Court as early as 1795 to express the need for a statute clarifying the nature of expatriation; however, seventy-three years passed before Congress enacted the first statute dealing specifically with the subject.

Statutory Development. During the past century, the law of expatriation has been shaped primarily by four major congressional acts dealing specifically with loss of citizenship. It should be noted, however, that in 1865 Congress provided that rights of citizenship were forfeited by any person who deserted the military or naval service or who avoided military draft by leaving the country. Apparently the purpose of this statute was to provide an additional penalty for the crimes of desertion and draft evasion; therefore, it seems that only rights of citizenship, rather than citizenship itself, were lost. It was not until 1868 that Congress first dealt with loss of citizenship per se.

Act of 1868. In 1868 Congress declared that expatriation was "a natural and inherent right of all people." This statute removed the necessity for governmental consent in order for one to renounce his citizenship, but it placed the responsibility on the courts to determine the overt acts which would constitute an intentional renunciation of citizenship by the individual.

Act of 1907. With an aim toward defining the bounds of expatriation, Congress in 1907 specifically set forth certain acts which would result in the automatic expatriation of a citizen even against his will; thus the concept of forcible expatriation officially appeared. The 1907 statute provided that citizenship was forfeited by any American citizen who became naturalized in, or took an oath of allegiance to, a foreign state, by any naturalized citizen who resided for two years in the foreign state from which he came or for five years in any foreign state, and by any American

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18 Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 134 (1791).
20 Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490-91. This provision was later modified in that the penalty of expatriation did not apply to acts committed in peacetime. Act of Aug. 22, 1912, ch. 336, § 1, 37 Stat. 356.
25 Id. This section also provided that no American citizen could expatriate himself in time of war.
woman who married an alien.\textsuperscript{26}

\textit{Act of 1940.} Through the Nationality Act of 1940, Congress greatly expanded the grounds for forcibly expatriating American citizens.\textsuperscript{27} Section 401 of the Act provided that any American citizen expatriated himself upon becoming naturalized in a foreign state, taking an oath of allegiance to a foreign state, serving in a foreign armed force, formally renouncing his American citizenship while in a foreign state, deserting the American military or naval service in time of war, or committing an act of treason against the United States.\textsuperscript{28} Section 404 provided that a naturalized citizen expatriated himself by residing for two years in the foreign state where he was born or was formerly a national if through such residence he again acquired the nationality of that state, by residing continuously for three years in a foreign state where he was born or was formerly a national, or by residing continuously for five years in any foreign state.\textsuperscript{29} Two amendments to section 401 added additional grounds for expatriation: formally renouncing American citizenship while within the United States in time of war,\textsuperscript{30} and remaining outside the jurisdiction of the United States in time of war to avoid military or naval service.\textsuperscript{31}

\textit{Act of 1952.} The Immigration and Nationality Act of 1952 was the second comprehensive revision of the law of expatriation.\textsuperscript{32} Section 349 of the Act\textsuperscript{33} was a re-enactment, with little modification, of the expatriation provisions applicable to any citizen as contained in section 401 of the 1940 Act and the amendments thereto.\textsuperscript{34} Provisions relating to the naturalized citizen remained substantially unchanged,\textsuperscript{35} however, the new Act contained a section applicable specifically to the dual national (principally one who acquires at birth citizenship of the United States and of some foreign state). It was provided that the dual national lost his American citizenship by residing for three continuous years in the foreign country of which he was also a citizen, after attaining the age of twenty-one, unless, before the expiration of the three-year period, he formally renewed his oath of allegiance to the United States.\textsuperscript{36}

These statutes illustrate the attempt by Congress to deal with expatriation first in terms of the individual's power to expatriate himself intentionally, and then to add to this concept ever-expanding grounds for the forcible expatriation of the unwilling citizen.

\textsuperscript{26}Id. § 1. Marriage to an alien husband as a ground for expatriation was repealed in 1922. Act of Sept. 22, 1922, ch. 411, §§ 3, 7, 42 Stat. 1022.
\textsuperscript{27}Nationality Act, §§ 401-10, 54 Stat. 1168-71 (1940).
\textsuperscript{28}Nationality Act, §§ 401(a)-(h), 54 Stat. 1168-69 (1940).
\textsuperscript{29}Nationality Act, §§ 404(a)-(c), 54 Stat. 1170 (1940).
\textsuperscript{30}Act of July 1, 1944, ch. 368, § 1, 58 Stat. 677.
\textsuperscript{31}Act of Sept. 27, 1944, ch. 418, § 1, 58 Stat. 764.
\textsuperscript{34}See notes 28, 30, 31 supra and accompanying text.
II. THE SUPREME COURT AND THE EXPATRIATION STATUTES

In dealing with the question of Congress' power to expatriate an American citizen against his will, the Supreme Court employed a test of voluntariness. However, when applied to the concept of forcible expatriation, the test caused problems because voluntary has two possible meanings. The term can mean either the voluntary performance of a statutorily defined act which causes loss of citizenship regardless of the actor's intention (an objective test) or the voluntary desire of a person to renounce or abandon his citizenship intentionally by performing the act (a subjective test).

Pre-1958 Cases: An Assumption of Congressional Power To Expatriate—Development of the Objective Test. In the cases prior to 1958, the Supreme Court applied the objective test to determine if the person had voluntarily performed the proscribed act. In Mackenzie v. Hare the Court dealt for the first time with the issue of the forcible expatriation of an unwilling citizen. Mrs. Mackenzie, a native-born citizen, married a British subject who was permanently residing in California. Later she attempted to register to vote but was refused on the ground that she was no longer a citizen as a result of her marriage to an alien. Although Mrs. Mackenzie apparently never intended to give up her citizenship, the Court held that she had lost her citizenship under the 1907 Act because she had voluntarily married an alien with notice of the consequence of such conduct.

A quarter of a century later, the Court faced the same question in Perkins v. Elg. Miss Elg was born in the United States of naturalized Swedish parents. While she was a child, her parents returned with her to Sweden, and she remained there until reaching majority. Under Swedish law, resumption of residence in Sweden repatriated the parents and carried with it Swedish citizenship for the child. Shortly after reaching majority, Miss Elg returned to the United States, but she was soon threatened with deportation as an alien illegally in this country. The Supreme Court concluded that Miss Elg had not lost her American citizenship on the ground that her removal from this country was not a voluntary act on her part, since it had occurred during her minority.

The question of forcible expatriation was not considered again by the Court until 1950 in Savorgnan v. United States. In this case Mrs. Savorgnan, a native-born citizen, sought Italian citizenship in order that an Italian Consul serving in the United States might obtain royal consent to marry her. She was granted Italian citizenship, and in the process, she

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239 U.S. 299 (1915).
24 Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228. The statute provided that any American woman who married a foreigner took the nationality of her husband.
25 Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915). Marriage to an alien husband as a ground for expatriation was repealed in 1922. See note 26 supra.
27 Id. at 334, 343. Accord, Mandoli v. Acheson, 344 U.S. 133, 137 (1952), where the Court under very similar circumstances pointed out that there was no congressional policy designed to subject a native-born citizen to the burden and hazard of electing between his dual citizenships at majority.
signed an instrument expressly renouncing her American citizenship and
swearing allegiance to the King of Italy. The Court held that Mrs. Sav-
vorgnan had lost her citizenship under the Acts of 1907 and 1940 by her
voluntary naturalization as an Italian citizen followed by her residence
abroad, even though at no time did she intend by such action to give up
her American citizenship. The Court pointed out that statutory expatria-
tion through the voluntary performance of a specified act did not depend
upon the undisclosed intent of the person doing the act.

In the preceding cases, the ability of Congress to take away a person’s
citizenship against his will was not considered specifically in terms of the
power of Congress to expatriate. The Court apparently assumed that Con-
gress had such power and proceeded to consider only the question of
whether the person voluntarily performed the act which resulted in loss of
citizenship regardless of his intention. In the two cases in which expatria-
tion was upheld, it should be noted that the expatriate apparently acquired
the citizenship of another country in performing the act which caused her
loss of American citizenship; therefore, the expatriate was not without a
country.

1958 Cases: The Questioning of Congressional Power To Expatriate—A
Lessening Predominance of the Objective Test. It was not until 1958 in
Perez v. Brownell, the first of three expatriation cases decided on the same
day, that members of the Court first questioned the constitutional power
of Congress to take away a person’s citizenship against his will. In contrast
to its prior decisions upholding the expatriation of an unwilling citizen,
the Court in Perez upheld the expatriation of a person even though he had
not acquired another nationality. This resulted in a stateless person and ap-
parently caused the dissenters deep concern over the existence of such con-
gressional power.

The case involved a native American. Mr. Perez was born in Texas in
1909 but went with his parents in 1920 to Mexico, where he remained
until 1943. The Government alleged that he had expatriated himself under
the amended 1940 Act, section 401(e) by voting in a foreign political
election and section 401(j) by remaining outside the United States in

43 The instrument was written in Italian and was not translated to her, but she understood that
it related to her citizenship and to the acquisition of the royal consent for Mr. Savorgnan to marry
her.


45 Id. at 499-500. In a 1915 case, the Court did not reach the question of forcible expatriation
but dealt only with the burden of proof to be applied in such cases. The Court held that the
Government, in alleging that expatriation of the citizen had occurred regardless of his intention,
had the heavy burden of proving that fact by clear, unequivocal, and convincing evidence. Gon-
zales v. Landon, 330 U.S. 920 (1945). This standard of proof was adopted from the denaturaliza-
tion cases. See Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States,
320 U.S. 118 (1943). See also Costello v. United States, 365 U.S. 267 (1961); Chaunt v. United
States, 364 U.S. 350 (1960); Nowak v. United States, 316 U.S. 660 (1942). Recently the same
"clear, unequivocal, and convincing" standard of proof has been extended by the Court to de-


47 Nationality Act, § 401(e), 54 Stat. 1169 (1940), superseded by, Immigration & Nationality
time of war to avoid military service. In a five-to-four decision, the Court held that Perez had expatriated himself under section 401(e) by voting in a Mexican election, but it did not reach the constitutionality of section 401(j).

Speaking for the majority, Justice Frankfurter employed a rational nexus theory as the basis for supporting the Court's conclusion that Congress had the power to expatriate a citizen against his will. Under this theory, the Court specified that a reasonable relation must exist between a specific power in Congress (regulation of foreign affairs) and the means employed by Congress to carry the power into execution (withdrawal of citizenship). Thus in upholding the constitutionality of section 401(e) as a reasonable exercise of Congress' power to regulate foreign affairs, the Court said:

The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct [voting in a foreign election] 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.

In Perez a majority of the Court again applied the objective test of voluntariness, holding that since Perez voluntarily voted in a foreign election, he automatically lost his American citizenship. However, the Court no longer simply assumed that Congress had the power to expatriate one against his will.

In a strong dissenting opinion, Chief Justice Warren, joined by Justices Black and Douglas, concluded that the Government had no constitutional power to take away the citizenship of a native-born or naturalized American citizen against his will. The Chief Justice emphasized that citizenship could be voluntarily renounced or voluntarily abandoned through certain

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50 356 U.S. at 62.
51 The test was whether Congress had concluded not unreasonably that there was a relevant connection between the fundamental source of power and the ultimate legislative action. Id. at 58.
52 Id. at 60.
53 "Of course, Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily... But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so." Id. at 61.
54 Id. at 77 (dissenting opinion of Chief Justice Warren). 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. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the state within whose borders he happens to be. In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation and thereby deprived of the right to assert any rights. This government was not established with power to decree this fate.
55 Id. at 64-65 (dissenting opinion of Chief Justice Warren) (emphasis in original).
actions in derogation of an undivided allegiance to this country, and, in recognizing the consequences of such action, the Government was not taking away citizenship, but was "simply giving formal recognition to the inevitable consequence of the citizen's voluntary surrender of his citizenship." However, it seems that the Chief Justice was using "voluntary" in its subjective sense because he indicated that citizenship could be lost only if the person intentionally renounced or abandoned it.

Justice Douglas, joined by Justice Black, also dissented in a separate opinion in which he emphasized two points. First, he pointed out that not a word in the Constitution covered expatriation; thus no branch of the Government had any power to divest a person of his citizenship against his will. He thereby indicated an adherence to the subjective test of voluntariness. Second, he indicated that in his opinion expatriation required a voluntary attachment to or citizenship in another country.

Although in Perez the Court upheld the constitutionality of the statute involved, that same day the Court for the first time in Trop v. Dulles declared a provision of the expatriation statutes unconstitutional. Trop involved a citizen who was court martialed and convicted of desertion while serving in the United States army during World War II. He was later denied a passport to return to the United States on the ground that he had lost his citizenship under section 401 (g) of the 1940 Act by deserting the armed forces in time of war, but the Court in a five-to-four decision struck down that provision.

Chief Justice Warren, speaking for only four members of the Court, found section 401 (g) unconstitutional for two reasons. First, he indicated, as he had in his Perez dissent, that Congress has no power to take away a person's citizenship unless he voluntarily renounced or abandoned it. In his view, desertion in time of war did not necessarily signify allegiance to a foreign state; thus the act in itself did not represent a voluntary renunciation or abandonment of citizenship. Consequently, Trop could not be expatriated because he had not renounced or abandoned his citizenship.

The Chief Justice again seemed to apply a subjective test of voluntariness, but realizing that this "no-power" view of congressional expatriation had not yet been accepted by a majority of the Court, he offered a second basis for the Court's decision. Even assuming as sound law the rational nexus basis for supporting the constitutional power of Congress to expatriate, the Chief Justice held that section 401 (g) was still unconstitutional as a cruel and unusual punishment in violation of the eighth amendment to the United States Constitution. Thus in essence the Chief Justice...
never reached the application of the rational nexus theory because he held that the expatriation of Trop under the circumstances violated a substantive right guaranteed by the Constitution.

Justice Brennan, who had voted with the majority in Perez, upholding the constitutionality of section 401(e) (voting in a foreign election), concurred separately in Trop and cast the deciding vote declaring section 401(g) unconstitutional. Applying the rational nexus theory of Perez, Justice Brennan concluded that section 401(g) was unconstitutional because expatriation for deserting the armed forces in time of war was not reasonably related to Congress' power to wage war. Thus it was Justice Brennan's switch that changed the whole complexion of the Court's view of forcible expatriation.

Nishikawa v. Dulles, the third case decided that day, involved section 401(c), which provided for loss of citizenship for serving in a foreign armed force. The Court did not reach the constitutionality of that provision, but instead held that the Government had failed to sustain the burden of proving by clear, unequivocal, and convincing evidence that the act of serving in the foreign armed force was voluntarily performed.

It appears from these cases that a majority of the Court at this time still adhered to the view that Congress possessed the power to expatriate an unwilling citizen. Following the objective approach of determining whether or not the expatriating act had been voluntarily performed, the Court in Perez concluded that such congressional power existed by finding a rational nexus between the power of Congress to regulate foreign affairs and forcible expatriation as a means for executing that power. However, the view that Congress had the power to effect forcible expatriation was greatly undermined by the strong dissents. Furthermore, the Court in Trop effectively emasculated the "power" view when it concluded that Congress had no constitutional power to expatriate Trop against his will for deserting the armed forces in time of war. This may explain why the Court seemed very reluctant to face squarely the "power" issue again in the expatriation cases which followed.

1963 and 1964 Cases: An Avoidance of the Congressional Power Question —Additional Theories of Unconstitutionality. In the cases which were decided in 1963 and 1964 the Court amplified the approach begun in Trop and effectively avoided the congressional power question by declaring other provisions of the Acts of 1940 and 1952 unconstitutional because they violated specific constitutional guarantees. Rusk v. Cort involved a native-born citizen who had remained outside the United States during the Korean conflict to avoid military service. Similarly, in Kennedy v. Mendoza-Martinez a dual national had avoided military service during World
War II by remaining outside the United States. In these companion cases the Government contended that the men had expatriated themselves under section 349(a) (10) of the 1952 Act and its predecessor, section 401 (j) of the amended 1940 Act. Speaking through Justice Goldberg, the Court in a five-to-four decision asserted that forcible expatriation as a consequence of remaining outside the United States to avoid military service was essentially penal in character and held that the provision was unconstitutional because it deprived the petitioners of citizenship without procedural due process of law. Again, Justice Brennan's concurring vote swung the pendulum toward unconstitutionality, and he expressly declared that he now had some doubts about the correctness of the Perez decision.

The following year the Court in Schneider v. Rusk declared another provision of the expatriation statutes unconstitutional. Schneider, a German national by birth, had come to the United States with her parents while still a child. In this country she acquired derivative American citizenship through her mother and thus became a dual national. Later she returned to Germany and resided there for several years, and she was subsequently denied a passport to return to the United States on the ground that she had expatriated herself under section 352 (a) (1) of the 1952 Act by residing continuously in her native country for more than three years. Speaking through Justice Douglas, the Court in a five-to-three decision held the provision unconstitutional as a violation of substantive due process. The Court concluded that living abroad was "no badge of lack of allegiance and in no way [evidenced] a voluntary renunciation of nationality and allegiance." Since there was no comparable limitation on the freedom of a native-born citizen to live abroad, the Court found that the provision discriminated unreasonably against the naturalized citizen and indeed created a second-class citizenship. The language of Justice Douglas revealed sympathy for the view that Congress has no power to take away one's citizenship against his will; however, it was not necessary for the Court to consider the "power" question because it had found that the statutory provision itself violated a substantive right guaranteed by the Constitution.


Constitutional: Justices Clark, Harlan, Stewart, and White. After the 1958 decisions, Justices Stewart, White, and Goldberg had replaced respectively Justices Burton, Whittaker, and Frankfurter.


Constitutional: Justices Clark, Harlan, and White.

"There is one view that the power of Congress to take away citizenship for activities of the citizen is non-existent absent expatriation by the voluntary renunciation of nationality and allegiance. . . . That view has not yet commanded a majority of the entire Court." Id. at 166.
Strangely enough, on the same day that *Schneider* was decided, an equally divided Court in *Marks v. Esperdy* upheld the constitutionality of section 349(a)(3) of the 1952 Act providing for the expatriation of a person who served in the armed forces of a foreign state without the prior consent of the United States Secretaries of State and Defense. The court of appeals had upheld the constitutionality of the provision on the authority of the *Perez* decision. The obvious inconsistency among these cases created additional confusion concerning the existence of congressional power to expatriate a person against his will; yet three years passed before the Court again had a chance to deal with the power question.

### III. AFROYIM V. RUSK: ADOPTION OF THE "NO-POWER" VIEW—A SHIFT TO THE SUBJECTIVE TEST OF VOLUNTARINESS

In *Afroyim v. Rusk* the Supreme Court squarely faced the issue of Congress' power to expatriate one against his will, and the seemingly unequivocal resolution of that issue by the Court revealed a profound change in its position. The case involved a naturalized American citizen who had gone to Israel in 1950 and had voted in an Israeli legislative election the following year. As a result, the State Department refused to renew his passport, asserting that he had lost his citizenship under section 401(e) of the 1940 Act by voting in a foreign political election.

The broad issue before the Court was "whether Congress [could] consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he [had] never voluntarily renounced or given up." Speaking through Justice Black, the Court in a five-to-four decision held section 401(e) unconstitutional and specifically overruled *Perez v. Brownell*. In view of the language of the fourteenth amendment, the Court concluded that Congress had no power, express or implied, to take away a person's citizenship "without his assent."

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81 It is probable that Justices Harlan, Clark, White, and Stewart voted in favor of the constitutionality of the provision; whereas, Chief Justice Warren, and Justices Black, Douglas, and Goldberg probably voted for the unconstitutionality of the provision.
84 Marks v. Esperdy, 315 F.2d 673, 675 (2d Cir. 1963).
86 387 U.S. 253 (1967).
88 387 U.S. at 256.
90 387 U.S. at 257, 268 (emphasis added).
91 It is interesting to note that four years before the *Perez* decision, a lack of congressional power to expatriate a person against his will had been strongly urged by a federal district court which held unconstitutional the same voting provision involved in the *Perez* and *Afroyim* cases. *Terada v. Dulles*, 121 F. Supp. 6 (D. Hawaii 1954): "Without this essential element of consent by the citizen, the statutory attempt to expatriate the citizen unilaterally is beyond the power of Congress and therefore invalid." *Id.* at 12.
92 However, thirteen years passed before that view commanded a majority of the Supreme Court. *Afroyim v. Rusk*, 387 U.S. 253 (1967).
Any doubt as to whether prior to the passage of the Fourteenth Amendment Congress had the power to deprive a person against his will of citizenship once obtained should have been removed by the unequivocal terms of the Amendment itself. It provides its own constitutional rule in language calculated completely to control the status of citizenship: "All persons born or naturalized in the United States . . . are citizens of the United States . . . ." There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.9

The Court emphasized that its holding did nothing more than give to the citizen that to which he was already entitled: "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." The dissenters, who emphasized that the term voluntary has two meanings, strongly objected to the Court's decision because the majority had in essence defined voluntary only in terms of the individual's subjective intent to give up his citizenship. They pointed out that there was nothing in the history, purpose, or language of the fourteenth amendment to forbid Congress in all circumstances from taking away a person's citizenship against his will.

Questions Raised by the Afroyim Decision. In overruling Perez v. Brownell,98 the Court's decision in Afroyim99 effectively destroyed the rational nexus theory as a means for establishing congressional power over forcible expatriation. Yet the Court's failure to define clearly the term assent raises several questions regarding the full impact of the decision.

The term assent has been defined to mean consent or agreement;99 thus carried to its logical extreme, the term, when applied to expatriation, may mean that a person cannot be divested of his citizenship without his actual, verbal consent. This seemed to be the meaning that Justice Black attached to the term throughout the Court's opinion. However, the Court did not discuss the possibility of abandonment of citizenship, even though Justice Black in a prior decision had said that a person could abandon, as well as renounce, his citizenship.98 Thus Afroyim leaves some doubt as to whether the present concept of expatriation also includes a voluntary abandonment.

93 387 U.S. at 261-62 (emphasis added). This broad rule clearly applies only to citizenship lawfully acquired and has no application to cases involving the cancellation of citizenship illegally or fraudulently procured. Id. at 267 n.23. See Costello v. United States, 355 U.S. 265 (1961); Knauer v. United States, 328 U.S. 614 (1946); Johannessen v. United States, 225 U.S. 227 (1912).
94 387 U.S. at 268.
95 Id. at 269 (dissenting opinion of Justices Harlan, Clark, Stewart, and White).
96 Id. at 292 (dissenting opinion of Justices Harlan, Clark, Stewart, and White).
99 "Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration." Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (concurring opinion of Justices Black and Douglas).
of citizenship in the absence of the person’s actual, affirmative consent to relinquish his citizenship.

This question is perhaps only one of semantics. A person’s voluntary performance of an act in complete derogation of an undivided allegiance to the United States (abandonment) may be one form of overt “assent” which Justice Black would accept as meeting the subjective test of voluntariness. Furthermore, perhaps the test of voluntariness employed in Afroyim was meant to be neither purely subjective nor purely objective, but a mixed test having a predominantly subjective element.

If expatriation does include an abandonment concept, the Afroyim decision raises the additional question of what acts, when willingly performed by the citizen, may be defined by Congress as constituting an abandonment of citizenship. Must such an act always be in complete derogation of an undivided allegiance to this country? If so, such broad phrases as “in derogation of an undivided allegiance,”100 “without his assent,”101 “against his will,”102 and “unless he voluntarily relinquishes that citizenship”103 necessarily require further consideration by the Court.

The Afroyim opinion suggests that the Government may not take away a person’s citizenship because he has voluntarily performed a specified act indicating an intent to relinquish citizenship unless certain procedural niceties have been followed. This possibility raises the question of whether the Afroyim test places a burden upon the citizen affirmatively to object to his proposed expatriation and, if so, what type of objection must be made in order to preserve his citizenship. If the broad language of the opinion is interpreted literally, this burden, if it exists at all, is slight.

Such an interpretation raises the further question of whether the person’s silence upon the matter of his proposed expatriation may be construed by the Government as constituting an assent thereto. In this connection one may ask what type of notice must the Government give to the proposed expatriate? How long may a person wait and still be able to object effectively to his proposed expatriation? Again, if the Afroyim language “without his assent” is construed literally, perhaps the person may never be precluded from objecting to his proposed loss of citizenship.

It is certain from Afroyim that a majority of the Court has now concluded that Congress has no power to take away a person’s citizenship against his will, and in reaching that conclusion, the Court has adopted some form of the subjective test of voluntariness. Yet these questions indicate that a more precise explanation of what is meant by the term assent must be forthcoming if the Afroyim test is to serve as a guide for delineating the power of Congress in the area of expatriation.

IV. THE PRESENT STATUS OF THE EXPATRIATION STATUTES

Prior to Afroyim only three of the thirteen statutory provisions104 pro-
viding for expatriation upon the performance of a specified act had been specifically declared unconstitutional: deserting the armed forces in time of war, a remaining outside the United States to avoid military service, and residence of a naturalized citizen for three continuous years in a state in which he was born or was formerly a national. However, the practical effect of the Court's decisions rendered prior to Afroyim probably made other statutory provisions likewise defective. For example, since the residence of a naturalized citizen for three years in the state of his birth or former nationality as a ground for expatriation was held unconstitutional because it unreasonably discriminated against the naturalized citizen in violation of due process, it appears that the similar section providing for the expatriation of a naturalized citizen upon his residing for five continuous years in any foreign state was equally defective. In addition, the provision calling for the expatriation of a dual national because of his residence in the foreign state of his birth for three continuous years after attaining majority was likewise constitutionally questionable. Such was the probable status of the expatriation statutes prior to Afroyim.

In view of Justice Black's broad assertion in the Afroyim opinion that Congress has no power to divest a person of his American citizenship "without his assent," the potential effect of that decision may be much more profound than the mere holding that voting in a foreign political election as a ground for expatriation is unconstitutional. Thus, following the apparent Afroyim rationale, the remaining statutory provisions may be briefly considered.

Naturalization in a Foreign State. The voluntary naturalization of a person in a foreign state upon his own free initiative represents a positive attachment to another country and may constitute strong evidence that he has renounced his American citizenship. Under Chief Justice Warren's view, this would perhaps amount to an intentional abandonment of citizenship because the act is in derogation of an undivided allegiance to the United States. Yet the question still remains: May a person acquire another nationality and at the same time have no subjective intention of giving up his American citizenship? If under a strict application of the Afroyim test expatriation does not include an abandonment concept, then perhaps this provision is also beyond the power of Congress to enforce against the will of the citizen.

(108) Id.
(111) 387 U.S. at 237.
Oath of Allegiance to a Foreign State. Taking an oath of allegiance to a foreign state does not necessarily involve the simultaneous acquisition of another nationality. The oath itself may evidence a dilution of allegiance to the United States. However, in the absence of the person's actual intention to give up his citizenship, the oath may be characterized perhaps as nothing more than abandonment, subject to the same potential constitutional objections as naturalization in a foreign state.

Service in a Foreign Armed Force. Service in a foreign armed force was at issue in Marks v. Esperdy, but Justice Brennan's abstention resulted in an equally divided Court's affirmation of the constitutionality of the provision. However, in view of Justice Brennan's apparent change of position in Afroyim, it is likely that this provision lies beyond the constitutional power of Congress, even though the act may evidence a dilution of allegiance to this country.

Employment by a Foreign Government. Employment by a foreign government may also represent a dilution of allegiance to the United States; however, this is not necessarily true. Consequently, such employment may be characterized, if at all, as nothing more than abandonment of citizenship. In the absence of the person's assent to his loss of citizenship, this provision is subject to the same potential constitutional objections as the naturalization and oath of allegiance provisions.

Formal Renunciation in a Foreign State; Formal Renunciation Within the United States. The formal renunciation of American citizenship by a person capable of understanding the meaning of his act is the best possible example of an overt manifestation by that person of his subjective intention to cast off his American citizenship. Thus the constitutionality of these provisions is basically secure because they are consistent with all viewpoints and meet even the most stringent requirements of Afroyim. It seems well settled that a person can intentionally renounce his citizenship even if it results in statelessness.

Committing Treason and Other Related Acts. Although acts of treason against the United States represent an extreme dilution of allegiance to this country, it is difficult to say that such acts in all cases represent an overt manifestation of a subjective intention to give up American citizenship. It seems certain from Trop v. Dulles that expatriation cannot be imposed as an additional punishment for a crime, and in the absence of the person's assent to loss of citizenship, it seems that under Afroyim the con-

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117 217 U.S. 214 (1914).
120 316 U.S. 86 (1918).
stitutionality of even this provision is questionable. But one accused of treason must remember that if he asserts his American citizenship and subjects himself to the jurisdiction of this country, he may suffer the ultimate penalty of death upon conviction.

V. Conclusion

In view of the Supreme Court's decision in *Afroyim v. Rusk*, it appears that expatriation now includes only the individual's right to renounce his American citizenship. By reversing its position on the subject of expatriation, the Court seemingly has created an indefeasible American citizenship which once lawfully acquired by the individual through birth or naturalization remains constitutionally secure in the absence of his express, intentional, and voluntary renunciation thereof.

Perhaps Congress still has the power, as in the case of the convicted criminal, to take away rights of citizenship, rather than citizenship itself, upon the individual's performance of certain proscribed acts; however, when *Trop v. Dulles* is considered in conjunction with *Afroyim*, even this power becomes questionable. Moreover, to say broadly as the Court did in *Afroyim* that Congress has no express or implied power to expatriate a citizen without his assent denies Congress an effective means of relieving this country of the responsibility of protecting those persons who completely shirk their responsibilities as citizens while at the same time seek to reap the full benefits of American citizenship. Such a broad assertion seems contrary to the concept of sovereignty itself.

It takes no stretch of the imagination to visualize even the expatriation of an unwilling citizen as an appropriate implied power under certain circumstances, necessary and proper for carrying into effect other governmental powers, such as the power to wage war or to regulate foreign affairs. For example, must the Government stand by helplessly as one of its soldiers acquires asylum in a foreign country simply because he disagrees with the philosophy under which this country is waging a particular war? That person may retain his American citizenship even though he has deserted the armed forces in time of war and continues to remain beyond the territorial jurisdiction of the United States. Termination of citizenship would terminate any problem that might arise in this situation, such as subjecting the United States to embarrassment or potential conflict with another country, and it would relieve the United States of any responsibility for protecting that citizen while abroad. Thus one can only hope that in future expatriation decisions, the Supreme Court will clarify the position taken in *Afroyim* and will limit the apparent, all-encompassing effect of that decision negating all congressional power to expatriate the unwilling citizen.

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189 See notes 20 and 21 supra, and accompanying text.
191 See note 52 supra, and accompanying text.