Expatriation: Afroyim v. Rusk and Its Progeny

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Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol25/iss2/5
INTRODUCTION

Notwithstanding nearly 200 years of experience under the Constitution and the conceded importance of the citizenship tie, Americans have not yet arrived at a clear understanding of the law of expatriation. Confusion has arisen primarily because of the lack of terminological clarity in this area of inquiry. "The word 'expatriation' tends to be used indiscriminately, in both judicial discussion and popular speech, as comprehending all losses of national status, however brought about." The most widely accepted definition of expatriation is that it is the voluntary renunciation or relinquishment of citizenship. However, every definition will reflect, in some degree, the intention of the person performing the expatriating act. Under the strictest view of expatriation, a citizen can lose his citizenship only by making an explicit, formal renunciation; the individual's intent to relinquish citizenship is, therefore, express and deliberate. The most expansive view of expatriation provides that a citizen can be divested of citizenship voluntarily by performing acts, including, although not exclusively an express, formal renunciation, which have been deemed by Congress as evincing a relinquishment of citizenship; the individual's intent to renounce his citizenship is inferred from such acts. The cases and commentators generally have characterized both methods of relinquishing one's citizenship under the rubric of voluntary expatriation. However, such terminology ignores subtle differences revolving around the element of intent that exist between the two. Therefore, for purposes of clarity, this article will only refer to an explicit, formal renunciation as voluntary expatriation. The voluntary performance of acts,

1. "Citizenship is man's basic right for it is nothing less than the right to have rights." Perez v. Brownell, 356 U.S. 44, 64 (1958) (Warren, C. J., dissenting).
3. Although this Comment concentrates on loss of citizenship, it should be noted that there is a slight conceptual distinction between the terms "citizenship" and "nationality." See 8 U.S.C. §§ 1101(a)(21)-(22) (1970).
6. The intent to relinquish citizenship is inferred, e.g., when a citizen obtains naturalization in a foreign state or takes an oath of allegiance to a foreign state. 8 U.S.C. §§ 1481(a)(1), (2) (1970).
7. In the context of this article, voluntariness will have two different but related
falling short of an express renunciation, deemed by Congress as evincing a relinquishment of citizenship will be characterized as involuntary expatriation.

An individual may also lose his citizenship, irrespective of his expressed or inferred intent, by an act of the state of which he is a citizen. Thus, a person may be involuntarily deprived of his citizenship because he has performed acts whose legal effect is to produce loss of citizenship, even though his intent in so acting is not to renounce his citizenship but to accomplish other, unrelated results.\(^8\) The term "denationalization" has generally been used to characterize such an involuntary loss of citizenship. But denationalization can be viewed more narrowly as the involuntary loss of citizenship pursuant to an implied power of Congress to effect an end which is within Congress' power to achieve.\(^9\) Since Congress determines which acts, short of explicit, formal renunciations, evince involuntary expatriation and which acts result in denationalization pursuant to this implied power, there is really little difference between these two types of loss of citizenship provisions.\(^10\) Therefore, unless stated otherwise this article will refer to any involuntary loss of citizenship, i.e., where the citizen does not specifically and expressly renounce his citizenship, as involuntary expatriation.

During the 18th and 19th centuries, the right of an American citizen to expatriate himself was a matter of some controversy, and it was not until 1868 that Congress declared that expatriation was a natural and inherent right of every person.\(^11\) Although the primary purpose of the Act of 1868 was to protect naturalized Americans from the claims of their countries of origin, the statutory language came to be regarded as establishing the right of American citizens to renounce their citizenship.\(^12\) However, the statute did not provide any specific

\(^8\) Maxey, supra note 2, at 152. The Immigration and Nationality Act of 1952 provides, e.g., that an individual loses his citizenship by departing from or remaining outside of the United States during wartime for the purpose of evading training and service in the armed forces. 8 U.S.C. § 1481(a)(10) (1970).

\(^9\) Comment, Afroyim v. Rusk, 17 BUFFALO L. REV. 925, 927 n.23 (1968).

\(^10\) "Supporting this contention is the failure of Congress, when it enacted the Nationality Act of 1940, to make this distinction when it interwove the two types of loss of citizenship provisions into one statute." Id.


\(^12\) Comment, Formal Renunciation of United States Citizenship to Avoid Criminal Liability Under Selective Service Law Constitutes a Voluntary Renunciation of Nationality Within the Meaning of Afroyim v. Rusk, 71 COLUM. L. REV. 1532, 1533 (1971).
method for exercising that right. Finally, in 1907, Congress guaranteed effective exercise of the right of expatriation by American citizens.\textsuperscript{18} The concept of involuntary expatriation also appeared for the first time in the Act of 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.\textsuperscript{14} Through the Nationality Act of 1940\textsuperscript{15} and the Immigration and Nationality Act of 1952,\textsuperscript{16} Congress greatly expanded the grounds for involuntarily expatriating American citizens. With few exceptions,\textsuperscript{17} the constitutionality of these statutory enactments was not seriously questioned by the Supreme Court until 1958.

\textit{Perez v. Brownell,}\textsuperscript{18} decided in 1958, represented the beginning of the Supreme Court's contemporary encounter with the issue of involuntary expatriation. In a 5 to 4 decision, the Court upheld the constitutionality of section 401(e) of the Nationality Act of 1940, which provided for the expatriation of American citizens who voted in foreign elections. The Court held that the implied power of Congress to regulate foreign affairs was sufficient to validate this section. Thereafter, however, the Court began to assault the concept of involuntary expatriation by declaring unconstitutional various sections of the loss of citizenship provisions of the Immigration and Nationality Act of 1952 and its predecessor statute, the Nationality Act of 1940.\textsuperscript{19}

In \textit{Afroyim v. Rusk,}\textsuperscript{20} decided in 1967, the Supreme Court continued this decade-long trend by stating, in another 5 to 4 decision, that a United States citizen has “a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”\textsuperscript{21} In so deciding, the Court expressly overruled the specific hold-

\begin{footnotesize}
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\item Act of March 2, 1907. ch. 2534, 34 Stat. 1228.
\item Marsh, \textit{The Supreme Court and the Power of Congress to Expatriate—From the Objective to the Subjective Test of Voluntariness: A Shift in Predominance}, 22 Sw. L.J. 466 (1968).
\item Ch. 876, §§ 401-10, 54 Stat. 1168-71 (1940).
\item 356 U.S. 144 (1958).
\item 387 U.S. 253 (1967).
\item Id. at 268.
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ing in Perez as well as the broad principles underlying that decision. In Afroyim, the Court invalidated section 401(e) of the Nationality Act of 1940, rejected foreign policy considerations as grounds for expatriation, and ruled that Congress can never deprive an American citizen of his citizenship involuntarily.

Although Afroyim clarified somewhat the confused position of citizenship and expatriation within the framework of the Constitution,\(^{22}\) the doctrine and principles to be derived from that decision are still unclear. Certainly, Afroyim would seem to mean no less than that the fourteenth amendment forbids Congress from depriving an American of his citizenship when he has not intended voluntarily to relinquish it. However, subsequent lower court cases,\(^{23}\) a Statement of Interpretation issued by the Attorney General\(^{24}\) delineating Afroyim’s effect, and interpretive guidelines issued by the Department of State and the Immigration and Naturalization Service\(^{25}\) for adjudication of cases affected by Afroyim indicate that Afroyim leaves open the question of exactly what actions will be deemed to constitute a voluntary relinquishment of citizenship. Although the citizen’s right to expatriate himself remains unchallenged, it is still debatable whether voluntary relinquishment can only be effectuated by an explicit, formal renunciation of American citizenship or whether it can be brought about by the uncoerced commission of an act, short of an express renunciation, which has been deemed by law as evincing a relinquishment of citizenship. Furthermore, a recently decided Supreme Court case, Rogers v. Bellei,\(^{26}\) has declared that only certain citizens are protected by the fourteenth amendment’s citizenship clause,\(^{27}\) while other citizens are not afforded this protection by reason of the circumstances of their birth, thus subjecting the latter category to involuntary expatriation.\(^{28}\) In essence, Bellei simply limits the scope of the Afroyim rule against involuntary expatriation to native-born and naturalized

\(^{22}\) U.S. Const. art. I, § 8, cl. 4. As originally adopted, the Constitution’s only specific grant of power given to Congress was “[t]o establish an uniform Rule of Naturalization.” Today, with the exception of the fourteenth amendment, there is no reference in the Constitution to the status and rights of citizenship nor is there any express constitutional provision regarding the loss of citizenship.


\(^{25}\) Dep’t of State Circular Airgram CA-2855, May 16, 1969.

\(^{26}\) 421 U.S. 815 (1971).

\(^{27}\) U.S. Const. amend. XIV, § 1.

\(^{28}\) See text accompanying notes 194-224 infra.
citizens. But it also is a decided retreat from the doctrinal approach set forth in *Afroyim* that had held involuntary expatriation to be expressly beyond the powers of Congress. Furthermore, and possibly most important, *Bellei* seems to reflect a policy change on the part of the Court which leaves the entire issue of voluntary relinquishment of citizenship seriously in doubt.

This Comment traces the evolution of the law of expatriation which culminated in *Afroyim v. Rusk*, and explores the meaning and implications of that decision in the light of subsequent administrative and judicial developments. Although an analysis of the history of expatriation is a prerequisite to understanding *Afroyim*, this paper will principally be directed at the *Afroyim* decision, and to post-*Afroyim* developments. These developments in the law of expatriation indicate that *Afroyim* is rather limited in its scope and import. In particular, it is suggested that *Bellei* unnecessarily undermines the proposition that the first sentence of the fourteenth amendment defines the total range of American citizenship, and that a statutory response to that decision would be most appropriate.

I. THE HISTORICAL DEVELOPMENT OF EXPATRIATION

In Roman law, the right of a citizen to renounce his allegiance to the state was firmly established. However, in the early English common law, the citizen had no right to expatriate himself. Under the principle of perpetual allegiance, the English citizen, through his own conduct, could not change his allegiance even with the sovereign's consent.

Soon after the American colonies broke their ties with England, the question was raised whether American citizens had a right to expatriate. Although some doubt was expressed as to whether the English common law doctrine of perpetual allegiance was part of the American common law heritage, the federal judiciary nevertheless

32. In Juando v. Taylor, 13 F. Cas. 1179 (No. 7558) (S.D.N.Y. 1818), the court held that:

[i]n this country, expatriation is conceived to be a fundamental right. As
applied the doctrine because of the absence of any congressional expression on the subject. The Supreme Court dodged the issue of whether citizens had the right to expatriate themselves by simply refusing to express an opinion directly on the subject. However, as early as 1795, the Supreme Court did seem to indicate that the individual possessed the right to relinquish his citizenship voluntarily; the only doubt expressed by the Court was in determining the manner in which the right was to be exercised. The Court thus indicated the need for a statute to resolve doubts as to the manner in which expatriation might be effectuated. Efforts in Congress in 1808 and 1817 to enact legislation providing for expatriation proved unsuccessful, and the matter was not seriously considered again until 1868. In that year, as a result of Great Britain's continued refusal to recognize the shedding of allegiance by naturalized Americans who were formerly of British nationality, Congress enacted legislation which put this nation on record as rejecting the doctrine of perpetual allegiance and asserting the international validity of the naturalization process and the right of all persons to expatriate themselves.

Although admirable in its purpose, this unilateral action by the Congress did not provide any specific method for domestically exercising the right voluntarily to expatriate, and could not, of course, bind other nations to this congressional pronouncement. Accordingly, the United States began negotiating bilateral treaties with various nations to protect the status of its naturalized citizens on a reciprocal basis in an effort to reduce or eliminate the conflicting claims of different sovereignties arising out of dual nationality. Although provisions of these treaties differed, they generally provided that residence by the

far as the principles maintained, and the practice adopted by the government of the United States is evidence of its existence, it is fully recognized. Id. at 1181. However, according to Maxey, supra note 2, at 161 n.57, this was the only unequivocal judicial declaration in support of this right.

33. See, e.g., William's Case, 29 F. Cas. 1330, 1331 (No. 17,708) (C.C.D. Conn. 1799).


36. Id. at 162-63.


38. Dual nationality is generally agreed to be an undesirable status since an individual subject to the conflicting allegiances of two states will cause himself to be burdened with the responsibilities and obligations of two citizenships. Not surprisingly, this will often serve as a source of friction between the two nations.
naturalized citizen in his original nation without the intent to return to the United States shall be deemed a renunciation of his acquired citizenship, and, further, that the intent not to return may be deemed to exist when the naturalized person resides continually in his mother country for more than two years.  

During the remainder of the 19th century, the executive and judicial branches of government recognized that although the Act of 1868 did affirm the right of American citizens to expatriate, there existed no systematized procedure by which such persons could relinquish their American citizenship. Several presidents, recognizing their own lack of authority to expatriate and the paucity of authoritative judicial decisions on the subject, urged Congress to define specifically the acts by which citizens should be held to have expatriated themselves. For many years, however, Congress resisted these presidential urgings for a more precise definition of expatriating acts because it believed that it had already met the problem in a meaningful fashion when it enacted the Act of 1868. Finally, in 1907, Congress took official notice of the shortcomings of its prior legislation and enacted the first general statute to specify acts of expatriation.

The Expatriation Act of 1907 provided for loss of citizenship only, (1) by naturalization in a foreign state, (2) by taking an oath of allegiance to a foreign state, (3) by an American woman’s marriage to a foreigner, and, (4) by residence abroad by a naturalized citizen for a specified number of years (such residence abroad only giving rise to a presumptive loss of citizenship which could be rebutted by evidence of acts indicating attachment to the United States). As these provisions indicate, the primary emphasis in the law of expatriation had shifted since 1868 from the original function of providing a means whereby a citizen might intentionally divest himself of dual nationality, to its “use as a sanction by government to discourage or even punish

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40. For a time, some doubt was expressed as to whether the legislative enactment of 1868 merely affirmed the right of foreign nationals to expatriate and become naturalized American citizens. Roche, The Expatriation Cases: “Breathes There the Man, With Soul So Dead . . . ?,” 1963 Sup. Ct. Rev. 325, 330. Eventually, the statutory language came to be regarded as establishing the right of American citizens to expatriate and become naturalized in a foreign country. Id.

41. Maxey, supra note 2, at 162.

42. Act of March 2, 1907, ch. 2534, 34 Stat. 1228.

43. Id.
various forms of proscribed conduct." By specifically setting forth certain acts which would result in the expatriation of a citizen even against his expressed will, Congress had given, for the first time, its official approval to the concept of involuntary expatriation.

Following the congressional decision to use expatriation for punitive and regulatory purposes, the expatriation statutes began to be subjected to judicial scrutiny. The constitutionality of the 1907 Act was first tested in the landmark case of Mackenzie v. Hare, in which the Supreme Court upheld the power of Congress to expatriate, during the period of coverture, an American woman who had married a British national and taken on British citizenship. The Court based its decision on Congress' implied power of sovereignty in foreign affairs. Although indicating that a "change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen," the Court inferred assent from the fact that the expatriating act had been "voluntarily entered into, with notice of the consequences." By enlarging the meaning of voluntariness and by disregarding the citizen's actual intent, the Court was able to turn what had previously been assumed to be an involuntary expatriation into a voluntary one. However, the Court did not expressly declare involuntary expatriation as being among Congress' powers; rather, it has been suggested that the Court merely held that expatriation must be voluntary and that Congress has the power to declare that the commission of specified acts shall be conclusively deemed to be voluntary expatriation.

The concept of expatriation was further defined in Perkins v. Elg. The Court there held that a native-born citizen retained her American citizenship despite the acquisition of a second nationality. This dual nationality resulted from operation of Swedish law when she was taken to Sweden, before she reached the age of majority, by her Swedish-born parents. The Court stated that "[e]x-patriation is the voluntary renunciation or abandonment of nationality and allegiance." The Court reasoned that since section 2 of the Expatriation...
tion Act of 1907 was aimed at voluntary expatriation and since Elg had neither made any statement renouncing her citizenship nor voluntarily performed any act indicating an abandonment of nationality or a transfer of allegiance, she could not be held to have expatriated herself. However, the Court noted that an American citizen could be involuntarily expatriated through the operation of a treaty or statute. “As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.”

In retrospect, this comment seemed to give the judicial imprimatur to the expatriation of the unwilling citizen.

Judicial and administrative experience with the Act of 1907 soon demonstrated that it was unsatisfactory in dealing with the issue of expatriation. The legislation was thought to be deficient for several reasons: it was not explicit enough; it permitted too much administrative discretion; and it failed to deal effectively with recurrent problems of dual nationality. Congress’ recognition that the statute had major shortcomings and its belief that there was a need to substantially increase the number of actions which, when performed voluntarily, would result in the automatic loss of American citizenship led ultimately to the Nationality Act of 1940. Although the statute did not introduce any significant changes concerning the right of voluntary expatriation, it did establish new criteria in the area of involuntary expatriation.

The Act stipulated that native-born and naturalized citizens would lose their citizenship by,

1. obtaining naturalization in a foreign state; (2) taking an oath

53. Section 2 of the Expatriation Act of 1907 provides: “[t]hat any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws . . . .”

54. 307 U.S. at 329.

55. The legislation did not categorically state that there were no other ways of losing American citizenship except those prescribed therein. Maxey, supra note 2, at 168.

56. Id.

57. Id. at 169.

58. Ch. 876, 54 Stat. 1138-74 (1940). The increased number of statutory provisions can probably best be explained by the stress and increased security-consciousness caused by the onset of World War II, as well as by the reversal of America’s traditional “open door” immigration policy, which led to stricter requirements for the acquisition and retention of American citizenship. Duvall, Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship, 56 VA. L. Rev. 408, 415-16 (1970).

59. Comment, supra note 9, at 928.
of allegiance to a foreign state; (3) entering or serving in the armed forces of a foreign state while a national thereof without legal authorization; (4) holding any office, post, or employment in the government of a foreign state or any subdivision thereof; (5) voting in a political election in a foreign state; (6) formal renunciation before a United States diplomatic or consular officer in a foreign state; (7) formal renunciation in the United States approved by the Attorney General during wartime; (8) court martial conviction and discharge from the armed forces for desertion during wartime; (9) court martial or civil court conviction for treason, attempting by force to overthrow, or bearing arms against the United States; and, (10) departing from or remaining outside of the United States during wartime for the purpose of evading training and service in the armed forces.60

Additional provisions provided that a national born abroad would lose his citizenship by, (11) failing to take up permanent residence in the United States before attaining 16 years of age, subject to certain exceptions;61 and a naturalized citizen would lose his citizenship by, (12) fraudulent naturalization;62 and by, (13) residing continuously for three years in the foreign state of birth or for five years in any other foreign state, with certain exceptions.63

The post-World War II climate and the hyper-security-consciousness that stemmed from the cold war led to the passage of the Immigration and Nationality Act of 1952.64 This Act continued, with certain modifications, the provisions of the 1940 Act relative to loss of nationality; however, it added a provision for the expatriation of citizens who acquired dual nationality at birth and voluntarily sought or claimed the benefits of their foreign nationality and resided in the foreign state for three consecutive years after the age of 22.65

The Expatriation Act of 195466 amended the Immigration and Nationality Act of 1952 by adding certain crimes, including rebellion and insurrection, seditious conspiracy and advocacy of the overthrow of the government in any manner proscribed by law, to the list of expatriative acts. It is therefore not surprising that by 1954 one com-

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mentator was moved to note: “From the day 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.”

In an attempt to soften the harsh consequences which result from
expatriation, certain procedural changes have been made by both
judicial and administrative authorities. For example, the courts have
determined that due process requires that the performance of an act
deemed expatriating be voluntary. Duress and oppressive factors which
inhibit a free and intelligent decision to renounce citizenship protect
against loss of citizenship. More specifically, threats of loss of civil
rights, jail, concentration camp, or fear of physical reprisals to
oneself or one’s family have all been declared complete defenses
to expatriation. The Attorney General has also ruled that in the
absence of clear and compelling statutory language he would be “un-
willing to attribute to Congress an intention that the United States
citizenship of an individual should be forfeited by reason of actions
taken at a time when he was unaware of his citizenship.”

Furthermore, the Supreme Court has determined that the rule of
construction to be followed in loss of nationality cases is that the law
and facts are to be construed as far as reasonably possible in favor of
retaining citizenship. In this regard, the Supreme Court imposed
upon the Government the burden of proving both the act and its
voluntariness by clear, unequivocal, and convincing evidence. How-
ever, because this burden of proof was so burdensome, Congress, in
1961, relaxed it by providing that when loss of citizenship is put in
issue, such loss may be established by a preponderance of the evidence,

67. United Nations, Laws Concerning Nationality 518, 519 (United Nations
Legislative Series 1954), noted in, Note, Problems of the Foreign-Born Citizen: Rogers
68. An individual who has lost his citizenship without having acquired another
will be rendered stateless. Since a stateless person is not considered a national by any
state and is therefore unable to secure the protection of his rights in either the do-

71. Dos Reis ex rel. Gamara v. Nicolls, 161 F.2d 860 (1st Cir. 1947).
72. Schioler v. Secretary of State, 175 F.2d 402 (7th Cir. 1949).
74. See Nishikawa v. Dulles, 356 U.S. 129, 134 (1958); Schneiderman v. United
States, 320 U.S. 118, 122 (1943).
with the burden of proving the commission of the act of expatriation placed upon the Government.\textsuperscript{77} Of course, even when it is established that an act of expatriation has been performed, the individual may prevent expatriation by proving that the act was committed involuntarily. However, in 1961, Congress also provided that when voluntariness of action is put in issue, there is a presumption of voluntariness. Although this presumption may be rebutted by a preponderance of the evidence, the burden of proving involuntariness is placed upon the person who performed the expatriative act.\textsuperscript{78}

It was not until 1958 that the Supreme Court squarely faced the question of whether Congress could enact a law stripping an American of his citizenship which he had never expressly and voluntarily relinquished. In \textit{Perez v. Brownell},\textsuperscript{79} the petitioner was a native-born American citizen\textsuperscript{80} who had resided in Mexico for a number of years and had voted in several Mexican political elections. Upon his return to the United States, he was ordered excluded on the ground that he had expatriated himself, pursuant to section 401 (e) of the Nationality Act of 1940.\textsuperscript{81}

The Supreme Court, by a 5 to 4 margin, upheld the Congress in withdrawing citizenship from a native-born national for having voted in a foreign political election. Justice Frankfurter, speaking for the majority,\textsuperscript{82} concluded that "in making voting in foreign elections (among other behavior) an act of expatriation, Congress was seeking to effectuate its power to regulate foreign affairs."\textsuperscript{83} The Court agreed that the Government has an implied power to legislate for the effective regulation of foreign affairs under the necessary and proper clause of the Constitution.\textsuperscript{84} The only limitation on congressional powers

\textsuperscript{78} Id. There is conclusive presumption of voluntariness when an expatriative act has been performed by a naturalized American citizen who has been physically present in his mother country for at least ten years immediately prior to the commission of the act. 8 U.S.C. § 1481(b) (1970).
\textsuperscript{79} 356 U.S. 44 (1958).
\textsuperscript{80} The Court seemed to presume, without any comment, that Perez possessed dual nationality: American, because of his birth in America, and Mexican, because of his birth to Mexican parents. Id. at 46.
\textsuperscript{82} Justice Frankfurter was joined by Justices Burton, Clark, Harlan and Brennan.
\textsuperscript{83} 356 U.S. at 57.
\textsuperscript{84} U.S. Const. art. I, § 8, cl. 18. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
that the Court acknowledged was the necessity of finding a "rational nexus" between these powers and the legislation to effectuate them.\textsuperscript{85} In other words, due process required that "the means—in this case, withdrawal of citizenship—must be reasonably related to the end—here, regulation of foreign affairs."\textsuperscript{86} Given such an expansive test, the Court found little difficulty in upholding the validity of the provision.

Justice Frankfurter denied that the power of Congress to terminate citizenship depended on the citizen's consent or that the conduct to which loss of citizenship attached had to be such that it amounted to an abandonment of citizenship or a transfer of allegiance.\textsuperscript{87} Furthermore, the Court noted, in a footnote, that the fourteenth amendment neither proscribes nor restricts the power of Congress to unilaterally withdraw citizenship.\textsuperscript{88} Although "undivided allegiance" was not the standard proposed by Justice Frankfurter, he did note, however, in an almost parenthetical manner, that "the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States, but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."\textsuperscript{89} Little did Justice Frankfurter realize at the time that these words would subsequently be used to narrow the test which he had himself proposed.

In a vigorous dissent, Chief Justice Warren, joined by Justices Black and Douglas, categorically denied that citizenship could be terminated subject to the general powers of Congress. The Chief Justice maintained that the first sentence of the fourteenth amendment affords absolute protection of the citizenship which it defines.\textsuperscript{90} Although he denied that Congress has the power to divest an American of his citizenship, he did, however, concede that under certain circumstances a citizen might "be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country."\textsuperscript{91} Nevertheless, he felt that section 401 (e) was over-

\textsuperscript{85} 356 U.S. at 58.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 61-62.
\textsuperscript{88} Id. at 58 n.3.
\textsuperscript{89} Id. at 60-61.
\textsuperscript{90} "The basic constitutional provision crystallizing the right of citizenship is the first sentence of the Fourteenth Amendment." Id. at 65. "The Fourteenth Amendment recognizes that this priceless right is immune from the exercise of governmental powers." Id. at 77-78 (dissenting opinion).
\textsuperscript{91} Id. at 78.
broad in so far as it covered situations not limited "to those that may rationally be said to constitute an abandonment of citizenship." 92

Justice Douglas, joined by Justice Black, wrote a separate dissenting opinion, 93 in which he also strongly maintained that the right to citizenship guaranteed by the fourteenth amendment prohibited Congress from divesting an American of citizenship. 94 And like Chief Justice Warren, he acknowledged that a person may voluntarily relinquish his citizenship by performing certain acts which fall short of an express, explicit renunciation. 95 However, Justice Douglas' opinion differs somewhat from the Chief Justice's in the extent to which he felt that Congress could classify certain kinds of conduct as being the basis for voluntary relinquishment. 96 Not only must the citizen perform an act which evinces an abandonment of allegiance to this country, but the performance of such an act must also indicate a transfer of that loyalty to another. 97 In sum, although he agreed that Congress can prescribe conditions for voluntary relinquishment of citizenship, it was his belief that "Congress cannot turn white to black and make any act an act of expatriation." 98

In *Trop v. Dulles,* 99 decided the same day as *Perez,* the Supreme Court began a decade-long trend, culminating in *Afroyim v. Rusk,* 100 of limiting Congress' expatriation powers. In *Trop,* a native-born American citizen had been convicted of desertion during World War II. Upon his return to the United States, his application for a passport was denied because under the provisions of section 401 (h) of the Nationality Act of 1940, 101 he had lost his citizenship by reason of his

92. Id. at 76.
93. Justice Whittaker wrote a separate dissenting opinion in which he substantially agreed with the approach taken by Chief Justice Warren.
94. "The grant of citizenship by the Fourteenth Amendment is clear and explicit and should withstand any invasion of the legislative power." 356 U.S. at 82.
95. "The waiver [of the right of citizenship] must be first a voluntary act and second an act consistent with a surrender of the right granted." Id. at 83.
97. [Section] 401(e) does not require that his act have a sufficient relationship to the relinquishment of citizenship—nor a sufficient quality of adhering to a foreign power. Nor did his voting abroad have that quality.

98. Id. at 84.
100. 387 U.S. 253 (1967).
conviction for desertion and consequent dishonorable discharge. The Court, again by a 5 to 4 margin, declared the statute unconstitutional.

Chief Justice Warren, in a plurality opinion, stated two grounds of unconstitutionality. First, he repeated what he had noted in his dissent in *Perez*:

"Citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship."

Under these principles, the Court held that Trop had not lost his citizenship. Desertion in wartime does not indicate a dilution of allegiance to this country. However, in language reminiscent of that used by Justice Douglas in his dissenting opinion in *Perez*, Chief Justice Warren also noted that desertion in wartime "does not necessarily signify allegiance to a foreign state." The necessary corollary to this proposition was that the Court determined that section 401(h) was overbroad since it was not expressly limited to cases of desertion to the enemy. Second, based on *Perez*, the Chief Justice went on to state that even if the government had the power to take away citizenship irrespective of the person's intent, expatriation as a penalty for desertion was a "cruel and unusual" punishment proscribed by the eighth amendment since it forced Trop into a situation of statelessness.

Chief Justice Warren's opinion, although emphasizing the concept of allegiance, clearly was based on the eighth amendment. This was apparently done to form a consensus which would otherwise have been impossible to obtain had the Court decided the case exclusively on the basis of "dilution of allegiance."

Justice Frankfurter, for the minority, declared that there was no warrant for the Court's labeling the disability imposed by section 401(h) as a "punishment." Moreover, even assuming that section

102. Chief Justice Warren was joined by Justices Black, Douglas, and Whittaker. Justices Brennan and Black each wrote concurring opinions, with Justice Douglas joining in Justice Black's.

103. 356 U.S. at 92.

104. *Id.*

105. *Id.*

106. *Id.* at 101. The Chief Justice characterized the practice of expatriation in such circumstances as being "a form of punishment more primitive than torture . . . ."

*Id.*

107. Justice Frankfurter was joined by Justices Burton, Clark, and Harlan.

108. *Id.* at 125 n.1 (dissenting opinion). Justice Frankfurter gave two reasons
401 (h) does amount to "punishment," he maintained that "to insist that denationalization is cruel and unusual punishment is to stretch that concept beyond the breaking point." Furthermore, he argued that there was a "rational nexus" between the withdrawal of citizenship and Congress' war power: failure to denationalize a citizen who had refused to perform one of the duties of citizenship would lessen morale in the armed forces.

Justice Brennan, casting the pivotal vote, distinguished Perez, in which he had been a member of the majority. Trop, unlike Perez, presented a statute without a relevant connection to the congressional power exercised. Justice Brennan noted that expatriation is not a means reasonably calculated to achieve the legitimate congressional end of dealing with the problem of desertion from the armed forces. As a result, he could not "see that this [provision] is anything other than forcing retribution from the offender—naked vengeance." Justice Brennan's concurring opinion is particularly noteworthy because of his comment that the type of conduct involved in Perez, unlike that in Trop, "imports 'elements of an allegiance to another country in some measure inconsistent with American citizenship.'" Although the quotation is from Justice Frankfurter's majority opinion in Perez, it does not appear to be much different from the standard proposed by Chief Justice Warren in his Perez (dissenting) and Trop (plurality) opinions, and seems to signify, therefore, the forming of a majority built around the factor of allegiance.

The next major Supreme Court case involving Congress' power to involuntarily expatriate was Kennedy v. Mendoza-Martinez. This decision involved two native-born American citizens, one of whom possessed dual nationality, who were held to have lost their American citizenship pursuant to section 401 (j) of the Nationality Act of 1940, by remaining outside the jurisdiction of the United States in time of for this conclusion: first, there are legislative ends within the scope of Congress' war power that are wholly consistent with a "non-penal" purpose to regulate the military forces; second, neither the statutory language nor the legislative history of the enactment indicate that Congress had a contrary purpose.

109. Id. at 125 n.2.
110. Id. at 120-21. Justice Frankfurter, incidentally, did not speak in Trop in terms of any dilution of allegiance, as he had, albeit parenthetically, in Perez.
111. Id. at 114 (concurring opinion).
112. Id. at 112.
war for the purpose of avoiding military service. Although a constitutional challenge was leveled against this statutory provision, Justice Goldberg, writing for the majority, never reached the issue of whether Congress could exercise the power of expatriation without the consent of the citizen—the issue raised in Perez—because he determined that expatriation, as applied in these two situations, was an unconstitutionally imposed punishment due to the absence of the procedural safeguards provided by the fifth and sixth amendments.117

Justices Douglas and Black reiterated the position they took in Perez. Justice Brennan, concurring, seemed to retreat even further from the approach to which he acceded in Perez by noting that he now had some doubts about the correctness of that decision; he did not, however, state exactly what those reservations were. Justice Stewart, dissenting, applied the “rational nexus” test first proposed in Perez. However, he narrowed the test by noting that all of the previous cases upholding expatriation had involved “conduct inconsistent with undiluted allegiance to this country.” This qualified “rational nexus” test would seem to permit the imposition of loss of citizenship incident to the general powers of Congress only where the proscribed conduct imports some dilution of allegiance. This view is similar to that expressed by Chief Justice Warren in his dissenting opinion in Perez, in which he said that citizenship may be renounced voluntarily not only by an expressed renunciation but also by other actions in derogation of undivided allegiance to this country.121

In Schneider v. Rusk, decided in 1964, the Supreme Court shifted still further away from Perez. Mrs. Schneider, who emigrated from Germany as a child, acquired American citizenship at the time her parents were naturalized. She subsequently married a German national and resided in Germany for more than three years. Her citizenship was revoked under section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that a naturalized citizen loses his citizenship by continual residence for three years in the country of origin.122

117. 372 U.S. at 167.
118. Id. at 187 (concurring opinion).
119. Justice Stewart was joined by Justices Clark, Harlan and White.
120. Id. at 214 (dissenting opinion).
Justice Douglas, writing for the majority, stated that the question before the Court was whether, "the means, withdrawal of citizenship, are reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrasment in the conduct of our foreign relations." Although the issue was framed in terms of Justice Frankfurter's "rational nexus" test, the answer which he propounded was apparently grounded in terms of Chief Justice Warren's "dilution of allegiance" test. Justice Douglas found that the purpose of the statute was to reduce the country's burdens in protecting Americans living abroad who bore little or no allegiance to this country. However, he precluded an inquiry into whether Congress had the power to effectively meet this problem by stating that the provision was based 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." Consequently, the Court held that section 352(a)(1) worked an unwarranted discrimination against naturalized citizens, in violation of the equal protection guarantee embodied in the due process clause of the fifth amendment.

Justice Douglas seemed to align himself with the position taken by Chief Justice Warren by stating that "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." However, although he readily accepted Justice Stewart's conclusion in Mendoza-Martinez that involuntary expatriation must be based on a finding of lack of allegiance to this country, Justice Douglas strongly reaffirmed his view that Congress has no power to withdraw citizenship, unless citizenship is voluntarily relinquished or renounced. It appears, then, that although Perez had not yet been formally repudiated, several Justices were masking over their own differences and grouping together into a coalition which would soon deny, or at least severely restrict, Congress' power to expatriate American citizens against their will.

124. Justice Douglas was joined by Chief Justice Warren, and Justices Black, Stewart, and Goldberg.
126. 377 U.S. at 168.
127. Justice Douglas stated that his opinion was based solely on the fifth amendment because the view that Congress lacked the power to destroy citizenship had not yet commanded a majority of the entire Court.
128. 377 U.S. at 169.
129. Id. at 168.
130. Id. at 166.
Justice Clark, joined by Justices White and Harlan, dissented. He contended that, (1) Congress authorized expatriation as "the only adequate remedy" to meet a problem of "the highest national importance"; (2) whatever "badge of allegiance" may be embodied in section 352(a) (1), it was imposed on Mrs. Schneider "through her own acts" in renouncing her derivative citizenship by choosing to live permanently abroad in her native land of Germany; and, (3) if she is a "second class citizen," it is by virtue not of congressional action, but of her own conduct, "with her eyes open to the result." Justice Clark said that the Court in Perez described the central issue in expatriation cases "as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." In applying this "dilution of allegiance" test to these immediate facts, he was able to conclude that a finding of lack of allegiance to this country had been established.

In view of Justice Clark's definition of the central issue in expatriation cases as involving some inquiry into allegiance, it appears that even the dissenters are narrowing Justice Frankfurter's original "rational nexus" test.

As these cases—Trop, Mendoza-Martinez, and Schneider—all indicate, the power of Congress to expatriate citizens without their assent had been sharply limited, although generally on the basis of procedural considerations. Although the Court had struck down several statutory provisions declaring specific conduct to result in the loss of American citizenship, none of these decisions expressly repudiated Perez, nor attempted to redefine Congress' authority to withdraw citizenship.

II. Afroyim v. Rusk

It was not until Afroyim v. Rusk, decided in 1967, that the Supreme Court reconsidered the primary issues originally raised in Perez: Congress' power to expatriate and the nature of the renunciation re-

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131. Id. at 169-70 (dissenting opinion).
132. Id. at 175-76 (dissenting opinion); cf. Perez v. Brownell, 356 U.S. 44, 60-61 (1958). In actuality, Justice Frankfurter, writing for the majority in Perez, maintained that the principal issue in expatriation cases was determining whether a rational nexus existed between Congress' power to regulate foreign affairs and the legislation enacted to effectuate that power. See notes 83-86 supra & accompanying text. His reference to dilution of allegiance was clearly dictum.
133. 377 U.S. at 176 (dissenting opinion).
quired for loss of citizenship. Afroyim involved a naturalized American citizen who had voted in an Israeli political election. As a result, his application for a United States passport was denied on the ground that he had expatriated himself, pursuant to section 401(e) of the Nationality Act of 1940. The district court following Perez v. Brownell, upheld the Government. The Supreme Court expressly overruled Perez and affirmatively rejected the broad principle underlying the Perez decision by ruling that Congress can never deprive an American citizen of his citizenship involuntarily. Relying principally on legislative history, Justice Black, writing for the majority in a 5 to 4 decision, rejected the view espoused in Perez, that "Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent." The American people are sovereign, and the Government cannot unilaterally sever its relationship to the people by withdrawing the status of citizenship. Even if such power once existed, a view that Justice Black did not specifically adopt, it was abolished by the fourteenth amendment, the same constitutional provision dismissed out-of-hand by the Perez Court.

Although the congressional debates preceding the adoption of the fourteenth amendment and the expatriation proposals which followed it conclusively proved to the Court's satisfaction that the fourteenth amendment's citizenship clause was intended to preclude involuntary expatriation, the majority conceded that conflicting inferences could be drawn from the legislative history. Consequently, the Court was forced to assert that, in any event, such expatriations are prohibited by the explicit language used in the amendment, coupled with the "principles of liberty and equal justice to all that the entire fourteenth amendment was adopted to guarantee." The Court cited three additional considerations to buttress its holding: (1) the importance of the citizenship tie; (2) the perilous

135. Although the record did not expressly establish that Afroyim was a dual national, the district court assumed that he had acquired Israeli citizenship since he made no claim that the loss of American citizenship would render him stateless. 250 F. Supp. 686, 687 (S.D.N.Y. 1966). The court of appeals and the Supreme Court also seemed to assume, without comment, that Afroyim was a dual national.
138. 361 F.2d 102 (2d Cir. 1966).
140. 387 U.S. at 257.
141. Id. at 267.
142. Id.
143. "Citizenship is no light trifle to be jeopardized any moment Congress de-
consequences of being rendered stateless; and, (3) the inconsistencies which adhere when a free government involuntarily expatriates its citizens. Under the majority's analysis, an American citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." However, the Court's use of the phrase "voluntarily relinquishes" and its contention that expatriation is conditioned upon the citizen's "assent" was neither defined nor amplified.

The dissent quite properly pointed out that voluntariness is not a term with a fixed meaning. "[I]t has been employed to describe both a specific intent to renounce citizenship and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship." Consequently, because of the majority's lack of verbal precision, the meaning of *Afroyim* is uncertain and subject to varying interpretations.

From the ostensible holding that Congress has absolutely no power under the fourteenth amendment to divest an American of his citizenship without his assent, many commentators have assumed that the Court has immunized from expatriation even those citizens whose allegiance has clearly shifted. If this is a correct interpretation, Justice Black would presumably require a specific intent to abandon citizenship before he would find a voluntary expatriation, an intent which could only be expressed through some explicit and voluntary statement of renunciation. Congress' powers would therefore be limited to enacting "measures to regulate such abjuration."

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144. "In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world—as a man without a country." *Id.* at 268.

145. "The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." *Id.* at 268.

146. *Id.*

147. As a practical matter, such ambiguous language was perhaps deliberate, obfuscating the differences among this newly-formed coalition of Justices. Furthermore, since the issue before the Court was framed to decide only whether there was a congressional power to strip an American of his citizenship without his assent, any pronouncement on the meaning of voluntary relinquishment would have been dictum.

148. 387 U.S. at 269 n.1 (dissenting opinion).


Paradoxically, Justice Black intimated, although he did not expressly declare such to be the case, that he was adopting Chief Justice Warren's dissenting opinion in *Perez*. In *Perez*, however, the Chief Justice, while recognizing the role that intention plays in expatriation, conceded that he would allow Congress to classify acts as in derogation of undivided allegiance to this country, the indisputable effect of which would be the voluntary abandonment of citizenship. Hence, Justice Black's favorable citation of Chief Justice Warren's dissent in *Perez* may mean that those acts, including, but not limited to, an explicit renunciation, which clearly demonstrate diluted allegiance to this country, may be deemed as evincing a voluntary relinquishment of citizenship.

Although Justice Black's lack of verbal precision in dealing with this issue in *Afroyim*, even coupled with his approval of Chief Justice Warren's dissent in *Perez*, does not necessarily indicate support for the "dilution of allegiance" test, language to this effect is found in his concurring opinion in *Nishikawa v. Dulles*, a case decided the same day as *Perez*. In *Nishikawa*, Justice Black noted that

> Congress . . . cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces establish a conclusive presumption of intention to throw off American nationality. . . . Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship.

This language, by specifically referring to "equivocal" acts, might mean that actions considered to be unequivocal indicators of voluntary abandonment may be deemed by Congress as establishing a conclusive presumption of intention to renounce one's citizenship. Conceivably, Justice Black's language might even acknowledge a congressional power to declare certain equivocal acts as establishing a rebuttable presumption of intention to renounce one's citizenship.

The *Afroyim* dissent, delivered by Justice Harlan, rejected each of the majority's premises. Justice Harlan contended that the citizenship clause of the fourteenth amendment serves only the "nar-

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151. This was the contention of Justice Harlan in his dissenting opinion. 387 U.S. at 269 n.1.
152. 356 U.S. 129 (1958) (concurring opinion).
153. Id. at 159.
155. Justice Harlan was joined by Justices Clark, Stewart, and White.
row, essentially definitional purpose" of declaring "to whom citizenship, as a consequence either of birth or naturalization, initially attaches." The assertion by the majority that the effect of the fourteenth amendment is to preclude Congress' power to expatriate citizens against their will was deemed "conclusory and quite unsubstantiated." Justice Harlan also claimed that the majority had failed to overcome the reasoning employed in Perez, that Congress' power to regulate foreign affairs gives it authority to expatriate any citizen who voluntarily commits acts prejudicial to United States foreign relations and which indicate a dilution of allegiance to this country. Justice Harlan concluded by noting that the majority opinion is an "ipse dixit, evincing little more . . . than the present majority's own distaste for the expatriation power." Although Afroyim v. Rusk is subject to varying, and often contradictory, interpretations, it is a landmark decision. The evolutionary course traveled by the Court which began with Perez and culminated in Afroyim, has resulted in the elevation of American citizenship to a preferred status, any impairment of which is to be strenuously resisted. Although Afroyim presumably stands for the proposition that a mere rational basis for expatriative legislation will no longer be a sufficient ground for divesting an American citizen of his citizenship, to categorize that decision as granting an absolute right of citizenship which may in no manner be abridged by the Government, would be an overstatement. Although Justice Black seemed intent on establishing citizenship as a precious right to be lost only under extreme circumstances, to view his position as setting forth the constitutional doctrine that citizenship, once granted, is completely beyond the power of Congress to revoke is not warranted considering the imprecise language of Afroyim, the limited reliance on

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156. 387 U.S. at 285 (dissenting opinion).
157. Id. at 292.
158. Id. at 268-69.
159. Id. at 293.
160. Some commentators maintain that Afroyim stands for the proposition that there must be a formal and explicit statement of renunciation before an American is held to have voluntarily relinquished his citizenship. See, e.g., Comment, supra note 50, at 175; Comment, supra note 149, at 137. Others contend that the correct interpretation of Afroyim is that the performance of certain acts deemed by Congress as demonstrating diluted allegiance to this country will establish a voluntary relinquishment of citizenship. See, e.g., Comment, supra note 9, at 935-36; Comment, supra note 154, at 302-03. Probably because the operative effect of Afroyim is so uncertain, Congress has not yet made any attempt to revise the loss of citizenship provisions of the present statute.
161. Roche, supra note 40, at 364.
Chief Justice Warren's dissenting opinion in *Perez*, and the language which Justice Black himself used in *Nishikawa*. The assumption that *Afroyim* grants an absolute right of citizenship would be, moreover, even less reasonable to assume today in the light of various post-*Afroyim* developments.

III. Post-Afroyim Developments

A. Administrative Developments

The confusion created by *Afroyim* was apparently shared by then-Attorney General Ramsey Clark. Pursuant to his authority, the Attorney General, two days before leaving office, issued a Statement of Interpretation delineating the effect of *Afroyim*. The statement was designed to aid both the Passport Office of the Department of State and the Immigration and Naturalization Service of the Department of Justice in administering the passport and immigration laws, insofar as they involve loss of citizenship. By its own terms, the Statement of Interpretation applied to all of the loss-of-nationality provisions in the Immigration and Nationality Act of 1952 and its predecessor statute, the Nationality Act of 1940.

Clark noted that the crucial question left open by *Afroyim* was the definition of "voluntary relinquishment" and that the decision did not provide specific guidelines by which he could definitively determine the validity of the other expatriative sections of the two Acts. It was the opinion of the Attorney General, however, that "[u]nder any reading of *Afroyim* . . . it is clear that an act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States cannot be made a basis for expatriation." Clark noted, however, that "voluntary relinquishment" is not limited to formal, written renunciation; it can also be manifested by

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162. Ch. 477, § 103(a), 66 Stat. 173 (1952), as amended, 8 U.S.C. § 1103(a) (1970), provides that while the Secretary of State has jurisdiction to determine the nationality of persons not in the United States, a determination and ruling by the Attorney General with respect to all questions of law shall be controlling.


164. The Statement of Interpretation has no application, however, to a revocation of naturalization unlawfully procured, and it does not necessarily apply to loss of United States citizenship as a result of birth abroad to a citizen parent or parents, a matter then under litigation. *Id.* at 1080.

165. *Id.* at 1079.
other actions statutorily determined to be expatriative, so long as these actions amount to a derogation of allegiance.\textsuperscript{166} However, the Attorney General asserted that \textit{Afroyim} permits the individual to raise the issue of intent, and once that issue is raised, the "not easily satisfied" burden is on the Government to prove that expatriation has occurred.\textsuperscript{167}

Although the Attorney General did not set forth a section-by-section analysis of the validity of each expatriation provision of the Nationality Act of 1940 and the Immigration and Nationality Act of 1952, he did state that certain types of conduct declared expatriative would not be sufficient to establish a voluntary relinquishment of citizenship. For example, Clark indicated that neither employment as a public school teacher in a foreign country\textsuperscript{168} nor service in the armed forces of an allied country\textsuperscript{169} would support a finding of loss of citizenship. On the other hand, an individual's acceptance of an important political post in a foreign government\textsuperscript{170} would indicate an intention to relinquish citizenship, and enlistment in the armed forces of a foreign government engaged in hostilities against the United States\textsuperscript{171} would be "highly persuasive evidence" of an intent to abandon American citizenship.\textsuperscript{172} After qualifying the foregoing examples as being merely illustrative, the Attorney General directed that administrative authorities should decide on a case-by-case basis whether the individual comes within the terms of an expatriation provision, and whether that individual has in fact voluntarily relinquished his citizenship.\textsuperscript{173} Substantial differences in interpretation between the Department of State and the Immigration and Naturalization Service were directed to be referred to the Attorney General for final resolution.

The Attorney General's Statement of Interpretation also directed the Department of State and the Justice Department to draw up interpretive procedural guidelines for cases involving possible loss of

\textsuperscript{166} Id.
\textsuperscript{167} Id. at 1080.
\textsuperscript{168} Ch. 876, § 401(d), 54 Stat. 1168 (1940), as amended, ch. 477, § 349(a) (A) & (B), 66 Stat. 267; 8 U.S.C. §§ 1481(a)(4) (A), (B) (1952).
\textsuperscript{170} Ch. 876, § 401(d), 54 Stat. 1168 (1940), as amended, ch. 477, § 349(a)(4) (A), (B), 66 Stat. 267; 8 U.S.C. § 1481(a) (4) (A), (B) (1952).
\textsuperscript{173} Id.
These guidelines were subsequently transmitted to all American diplomatic and consular posts abroad. Under the State-Justice guidelines, the voluntary performance of certain acts is considered "highly persuasive evidence" of an intention to relinquish citizenship and will "normally" result in expatriation absent countervailing evidence of an intent not to transfer or abandon allegiance to the United States. These acts are: (1) naturalization in a foreign state, (2) a meaningful oath of allegiance to a foreign state, (3) service in the armed forces of a foreign state engaged in hostilities against the United States, and, (4) service in an important political post in a foreign government. The voluntary performance of the remaining statutory expatriative provisions will not "normally" result in expatriation, unless the record in the particular case contains persuasive evidence of an intent by the citizen to transfer his allegiance to a foreign state or abandon his allegiance to the United States. The guidelines also provide that two categories of cases will be decided by the Department of State and the Immigration and Naturalization Service on a case-by-case basis. These cases involve: (1) the voluntary performance of the four specific acts delineated above, coupled with persuasive evidence of an intent not to transfer or abandon allegiance; and, (2) the voluntary performance of other acts coming under statutory expatriative provisions, coupled with persuasive evidence of an intent to transfer or abandon allegiance.

Procedurally, the guidelines direct that every citizen who has allegedly performed an act described as expatriative by statute should be given an opportunity to state fully all of the facts, circumstances, motives, intentions, and purposes which contributed or led to the performance of the expatriative act. If the diplomatic or consular officer believes that the evidence points to expatriation, he is directed to refer the case to the Department of State for final decision.

Although it is still too early to make a final assessment of the

174. Unlike the Attorney General's Statement of Interpretation, which noted that it was not necessarily applicable to persons who acquired American citizenship by birth abroad to a citizen parent or parents, the guidelines explicitly provide that such citizens will be treated in the same manner as persons who acquired citizenship under the fourteenth amendment. The guidelines obviously refused to draw a distinction between fourteenth amendment and non-fourteenth amendment citizens, perhaps in the belief that the amendment defined the total range of citizenship. The subsequent decision of the Supreme Court in Rogers v. Bellei, 401 U.S. 815 (1971), would appear to have negated this belief since the Court recognized a new type of citizenship, a statutory citizenship, distinguishable from one acquired pursuant to the fourteenth amendment. See text accompanying notes 194-224 infra.

175. Dep't of State Circular Airgram GA-2855, May 16, 1969.
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administrative experience with the Attorney General's Statement of Interpretation and the Department of State-Department of Justice guidelines, the practical effect to date has certainly been to facilitate the retention of citizenship. Since the individual's intent to relinquish his citizenship is the controlling factor in these administrative proceedings, the operation of the expatriation laws will not result in a determination of loss of nationality unless there is persuasive evidence of an intent to abandon or transfer allegiance.

Although the standards underlying the guidelines have transcended the milder standards employed by the Supreme Court in its expatriation rulings prior to Afroyim, these administrative determinations have not considered a formal and explicit renunciation as being the sole means by which a citizen is held to have voluntarily relinquished his citizenship, as Justice Black's opinion in Afroyim has often been interpreted to mean. Rather, the intent in this administrative context has been "[e]valuated in the light of all the relevant facts and circumstances in each case, including the statements and conduct of the individual and third parties with personal knowledge, the credibility of the individual, and the social, economic and political circumstances present in the situational context." 176

At the same time, however, the definition of voluntary relinquishment, as employed by the Department of State and the Immigration Service, is somewhat different from Chief Justice Warren's proposed "dilution of allegiance" test. The Chief Justice apparently would have permitted Congress to classify certain acts as in derogation of undivided allegiance to this country, the "indisputable" effect of which would be abandonment of citizenship. The Chief Justice would not have permitted an individual to raise lack of intent to relinquish citizenship as a defense to expatriation, as do the guidelines. Consequently, it can be said that the guidelines forge a new standard, not as restrictive as Justice Black's formulation, but more expansive than Chief Justice Warren's proposal, in regard to Congress' authority to withdraw citizenship.

B. Lower Court Decisions

To date, there have been only five lower court cases which have applied the rationale and principles of Afroyim. Unfortunately, they have done little to clarify that decision. Apparently, the lower courts have been applying a standard similar to that applied by the Depart-

ment of State and the Immigration and Naturalization Service in their administration of the passport and immigration laws. The commission of certain specified acts, including, but not limited to, an explicit renunciation of citizenship, which have been declared expatriative because they are indicative of a transfer of allegiance to another state when performed with an intent to transfer that allegiance, have been held to constitute a voluntary relinquishment of citizenship.

In Baker v. Rusk, a California district court held that a native-born American citizen, who was raised and educated in Canada, had not voluntarily relinquished his citizenship, pursuant to section 2 of the Immigration Act of 1907, by taking an oath of allegiance to the British sovereign as a condition of admittance to the Canadian bar. Although the court seemed to assume, without explicitly raising the issue, that after Afroyim a person could still relinquish his citizenship through the performance of acts indicating a transfer of allegiance to another state, as well as by explicit statement, the court found that the oath of allegiance and the circumstances surrounding the taking of that oath did not indicate any such intent on the part of the claimant. The court attached particular importance to the fact that Baker had always cherished his American citizenship and had never wished to relinquish it; that he was not aware of the consequences that resulted from his taking of the oath; that, even after taking the oath, he had never considered himself to be a Canadian citizen nor had Canadian authorities; and finally, that he had made, apart from the oath, no expression and performed no act inconsistent with United States citizenship, such as voting in a Canadian election or serving in the Canadian armed forces. Thus, although he had performed an act normally deemed expatriative, the totality of the record indicated no intent to transfer allegiance to another state.

However, in King v. Rogers, the Court of Appeals for the Ninth Circuit held that a native-born American citizen had voluntarily relinquished his citizenship, pursuant to section 349(a)(1) of the Immigration and Nationality Act of 1952, when he became a naturalized British subject. Because King took an oath of allegiance to the

180. Duvall, supra note 58, at 441-42.
181. 463 F.2d 1188 (9th Cir. 1972).
British sovereign in becoming a British subject, expressed his willingness to formally renounce his American citizenship, and disclaimed liability for service in the United States military forces, the court determined that the evidence clearly established a voluntary relinquishment of United States citizenship.

In *In re Balsamo*,\(^\text{183}\) an Illinois district court held that a naturalized American citizen, who automatically reacquired Italian citizenship upon his return to his native land, had not voluntarily relinquished his citizenship, pursuant to section 404 (a) of the Nationality Act of 1940.\(^\text{184}\) The provision in question provides that a naturalized citizen shall lose his citizenship by residing for at least two years in the state of his birth, or in a state of which he was formerly a national, if he thereby acquires the nationality of such state. The court ruled that Balsamo's resumed residence in Italy did not constitute voluntary relinquishment of American citizenship, since his reacquisition of Italian citizenship was automatic in the sense that he did not have to perform any affirmative act in accepting it.

In *Jolley v. Immigration & Naturalization Service*,\(^\text{185}\) a native-born citizen had renounced his citizenship, pursuant to section 1481 (a) (6) of the Immigration and Nationality Act of 1952,\(^\text{186}\) after losing his student deferment and being reclassified as available for military service. Jolley had argued that his renunciation was not truly voluntary, since it was compelled by his moral convictions against participating in military endeavors. Because his oath of renunciation itself had been made without duress, the Court of Appeals for the Fifth Circuit held that Jolley had voluntarily relinquished his citizenship. It is important to remember that the concept of duress is applicable only to the issue of voluntariness; it is irrelevant to the issue of intent to relinquish citizenship, except in the sense that the question of intent will not be reached until after a determination of voluntariness has been made.\(^\text{187}\) In fact, if the evidence fully supports a claim of involuntariness, then the issue of intent will never be reached at all. The court of appeals rejected the argument that Jolley's abhorrence of the Selective Service laws and his refusal to serve in the military constituted legal duress so as to render his formal renunciation in-


\(^{185}\) 441 F.2d 1245 (5th Cir. 1971).


\(^{187}\) Duvall, *supra* note 58, at 449.
It is not unlikely that the court theorized that if formal renunciation without a finding of duress were not to be treated as an act of expatriation, then the concept of expatriation would be rendered meaningless and the courts would be deprived of any workable standards by which they could decide whether an individual had in fact voluntarily relinquished his citizenship.\textsuperscript{188}

Certainly, an explicit renunciation would constitute a voluntary relinquishment of citizenship under Chief Justice Warren's "dilution of allegiance" test, since his formulation is satisfied by the commission of certain specified conduct—for example, an oath of renunciation—that manifests a voluntary transfer or abandonment of allegiance. By focusing exclusively on the issue of voluntariness, and refusing to inquire into Jolley's subjective intent in making his formal renunciation, the court's interpretation also seems consistent with even the most restrictive view of Congress' power to enact expatriative legislation. Although it is debatable whether Justice Black would have required specific intent as an element of the voluntary relinquishment of citizenship necessary for expatriation, it is doubtful whether even he would have found fault with an interpretation of voluntary relinquishment that gives legal recognition to the voluntary execution of a formal oath of renunciation.\textsuperscript{190}

In \textit{Peter v. Secretary of State}, the most recently decided case interpreting the \textit{Afroyim} decision, the Court of Appeals for the District of Columbia Circuit held that the acts of Peter were not so inconsistent with the retention of American citizenship as to result in loss of that status under section 349(a)(4)(A) of the Immigration and Nationality Act of 1952. Peter was a naturalized American citizen who had married a Hungarian citizen and who, on joining her husband in Hungary, had registered with the Hungarian police as an American citizen, worked for Hungarian radio, toured Japan twice on Hungarian passports, and subsequently traveled to the United States on a Hungarian passport. The court reasoned that her conduct did

\textsuperscript{188}. Dislike for the law does not in and of itself compose coercion . . . .
\textsuperscript{189}. Comment, supra note 12, at 1541.
\textsuperscript{190}. It is, of course, quite possible that Justice Black never even contemplated the argument made by Jolley.
not unequivocally indicate relinquishment of American citizenship in favor of allegiance to some foreign state since it was not her intention to transfer that allegiance.\textsuperscript{193}

C. Rogers v. Bellei

In Rogers v. Bellei,\textsuperscript{194} the Supreme Court, in a 5 to 4 decision,\textsuperscript{196} departed sharply from its earlier trend in loss of nationality cases by upholding the constitutionality of section 301 (b) of the Immigration and Nationality Act of 1952.\textsuperscript{196} Section 301 (b) provides that a person who has acquired his nationality by descent loses that nationality unless he spends at least five years continually in the United States between the ages of 14 and 28. Although the decision does not expressly overrule Afroyim, it significantly limits its scope, and suggests that the Court, in the future, will not be entirely receptive to challenges made to the expatriation laws.

Bellei was born in Italy in 1939 to an Italian father and a native-born American mother. By law, he acquired at birth dual nationality: Italian, because of his birth in Italy,\textsuperscript{197} and American, because of his mother's citizenship.\textsuperscript{198} Although Bellei visited the United States for brief periods on five separate occasions, he never satisfied the five-year continual residency requirement. On each of his visits to the United States, he was expressly notified of the impact of section 301 (b). Finally, when Bellei applied for an American passport in 1966, he was informed by the American consul in Rome that he was no longer an American citizen.

Bellei instituted an action against the Secretary of State, asking that the Secretary be enjoined from carrying out and enforcing section

\textsuperscript{193} 347 F. Supp. at 1038.
\textsuperscript{194} 401 U.S. 815 (1971).
\textsuperscript{195} Justice Blackmun wrote the majority opinion and was joined by Chief Justice Burger, and Justices Harrah, Stewart, and White. Justice Black wrote a dissenting opinion, joined by Justices Douglas and Marshall. Justice Brennan filed a dissenting opinion in which Justice Douglas joined.
\textsuperscript{196} 8 U.S.C. § 1401(b) (1970).
\textsuperscript{197} 401 U.S. at 818.
\textsuperscript{198} Ch. 477, § 301(a), 66 Stat. 235 (1952), as amended, 8 U.S.C. § 1401(a) (1970), provides that the following shall be nationals and citizens of the United States at birth:

\begin{itemize}
\item (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years...
He also requested a declaratory judgment that section 301 (b) was unconstitutional as violative of the fifth amendment’s due process clause, the eighth amendment’s cruel and unusual punishment clause, and the ninth amendment, and that he was and always had been a native-born American citizen.

A three-judge district court in the District of Columbia sustained Bellei’s motion for summary judgment, holding section 301 (b) unconstitutional on the grounds that Congress had created a “second class citizenship” in violation of the due process clause of the fifth amendment and had gone beyond its powers in denying an individual his citizenship against his will. The court based its decision on the “[B]road teaching of Afroyim and Schneider ... that once American citizenship has been recognized or conferred, Congress may not remove the status; it is for the citizen to abandon his citizenship voluntarily.”

Upon appeal by the Government, the Supreme Court reversed the decision of the three-judge district court. In so doing, the Court upheld a loss of citizenship statute for only the second time since Perez v. Brownell. The majority held that Congress has the power to impose the condition subsequent of residence in this country upon foreign-born citizens who do not come within the fourteenth amendment’s definition of citizens as those “born or naturalized in the United States.” The Court further held that the imposition was not unreasonable, arbitrary, or unlawful and thus not violative of the due process clause of the fifth amendment. In essence, the Court declined to extend the holdings in Schneider and Afroyim to the facts in Bellei, embracing instead a very narrow, plain-meaning construction of the citizenship clause of the fourteenth amendment.

In Schneider the Court relied on the due process clause of the fifth amendment in holding unconstitutional a statutory distinction between native-born and naturalized citizens. Although the Court made an oblique reference to the citizenship clause of the fourteenth amendment, the crux of the decision was “[t]hat the rights of citizenship of the native-born and of the naturalized person are of the

200. Id. at 1252.
201. In Marks v. Esperdy, 377 U.S. 214 (1964), aff’d 315 F.2d 673 (2d Cir. 1963), the Supreme Court upheld the constitutionality of section 349(a) (3) of the 1952 Act, which provided 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. 8 U.S.C. § 1481(a) (3) (1970).
202. 401 U.S. at 827.
same dignity and are coextensive." A persuasive argument can be made that the decision of the court focused not so much on Schneider's status as a naturalized citizen but on the fact that she was a citizen and, as such, entitled to the guarantees of due process.

In *Afroyim* the Court relied exclusively on the citizenship clause of the fourteenth amendment, concluding that Congress was precluded from expatriating an American absent voluntary relinquishment of citizenship. Although it is arguable that *Afroyim* does not stand for the principle that citizenship is completely immune from congressional regulation, it certainly stands for the proposition that citizenship once conferred cannot be unilaterally revoked by Congress without at least inquiring into the individual's intent to transfer his allegiance to another country. It is also clear that *Afroyim* interprets the fourteenth amendment as defining the total range of citizenship: a non-fourteenth amendment citizen simply does not exist under the Court's formulation.

In *Bellei* the Court distinguished *Schneider* and *Afroyim* by limiting them to persons acquiring citizenship under the fourteenth amendment. The Court noted that while Schneider and Afroyim had acquired their citizenship by naturalization "in" the United States, Bellei had neither been born nor naturalized "in" the United States. In the Court's view, therefore, the citizenship clause had no application to Bellei. "He simply is not a Fourteenth-Amendment-first-sentence citizen." Since he was not a "Fourteenth-Amendment-first-sentence citizen," the Court held that he was not entitled to the protection which that amendment mandates.

Prior to *Bellei*, it had long been assumed that there were only two types of citizenship: that obtained by birth within the United States, and that obtained through naturalization granted by Congress pursuant to its power to establish a uniform rule of naturalization. It had also been generally assumed that citizenship by descent (*jus sanguinis*) was a form of naturalization, and therefore equal in quality to citizenship acquired by birth within the territorial jurisdiction of the United States. In *Bellei*, however, the Court drew a distinction

204. Id. at 165.


207. 401 U.S. at 827.


between naturalization within the United States and citizenship acquired by descent outside the United States. In effect, the Court recognized a new type of citizenship, a statutory citizenship distinguishable from one acquired pursuant to the fourteenth amendment.

After distinguishing *Afroyim* and *Schneider*—by characterizing the former as grounded on the reading of the first sentence of the fourteenth amendment and by pointing out that although the latter was a fifth amendment due process case, by a “process of after-the-fact osmosis,”* Schneider was also a fourteenth amendment citizen—the Court next attempted to delineate the proper limits upon Congress’ power to condition statutory citizenship. By noting that the “proper emphasis is on what the statute permits [Bellei] to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place,”* the Court reasoned that for constitutional purposes there is no distinction between a condition preceding the granting of citizenship and a condition subsequent limiting a grant of citizenship already conferred. The Court next focused on the fact that since Congress has an interest in solving the problems attendant to dual nationality and resulting divided loyalty, it may condition citizenship in any manner so long as such procedures are not unreasonable, arbitrary, unlawful, or unconstitutional.

In a stinging dissent, Justice Black criticized the majority's technical reading of the fourteenth amendment. He argued that the word “naturalized” is a generic term referring to any means of obtaining citizenship dependent upon an act of Congress. Consequently, Bellei’s status as a citizen is protected from congressional efforts to remove it without his consent by the citizenship clause of the fourteenth amendment. Reiterating his position that citizenship cannot be terminated unless the individual affected so “intends or desires,” Justice Black contended that since Bellei had never voluntarily relinquished his citizenship, the majority, by upholding section 301 (b), had pro tanto overruled the constitutional principles declared in *Afroyim*.

The Court’s position that Bellei was not a “Fourteenth-Amendment-first-sentence citizen” obviously imposes a limitation on the scope

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210. 401 U.S. at 827.
211. *Id.* at 836.
212. *Id.* at 834.
213. *Id.* at 833.
214. *Id.* at 838 (dissenting opinion).
215. *Id.* at 845.
of the citizenship clause, which is inconsistent with the holding in *Afroyim*. The scope of the *Afroyim* rule against involuntary expatriation is affirmatively limited to native-born citizens and citizens naturalized in the United States. In fact, the Court's reasoning would seem to indicate that foreign-born children of two American parents are non-fourteenth amendment citizens, since they acquire their citizenship at birth and abroad, and not by naturalization.\(^{216}\) Since the Court has determined that there is no distinction between conditions precedent and subsequent, the only obstacle to congressional limitations on this class of citizens is the easily satisfied due process requirement of reasonableness.\(^{217}\)

More important, though, than the Court's recognition of a new category of citizenship are the questions left unanswered by *Bellei*. First, since the *Bellei* Court did not take the opportunity either to affirm or to overrule *Afroyim*, the extent of Congress' power to expatriate a citizen against his will has been left unsettled.\(^{218}\) Second, since the Court based its holding on its classification of *Bellei* as a non-fourteenth amendment citizen, it did not decide whether a conceptual distinction exists between expatriation on the one hand and the use of conditions subsequent on the other. The Court's decision therefore does little to clarify the issue of whether Congress has the power to impose a condition subsequent upon fourteenth amendment citizens.\(^{219}\) Third, since the Court has determined that Congress may use its power to conduct foreign affairs as the basis for destroying a conditional grant of citizenship, the ghost of the "rational nexus" test would appear to be raised once again. Finally, the limited reading given by the Court to the citizenship clause of the fourteenth amendment would seem to call into question the scope and import of other constitutional provisions.\(^{220}\)

\(^{216}\) See Comment, *Rogers v. Bellei*, 85 Harv. L. Rev. 64, 67 n.25 (1971). The residing requirement of section 301(b) would not, however, apply to such children.

\(^{217}\) If there is no conceptual distinction between conditions precedent and subsequent, Congress may well restrict a foreign-born citizen's rights in many ways unforeseen by the Court. For example, statutory citizens might be required to take a loyalty oath or be prohibited from travelling to countries engaged in hostilities against the United States as independent conditions for the acquisition or retention of American citizenship. Note, *Problems of the Foreign-Born Citizen: Rogers v. Bellei*, 11 Colum. J. Transnat'L L. 304, 316 (1972).

\(^{218}\) Comment, *supra* note 216, at 72.

\(^{219}\) *Id.*

\(^{220}\) The privileges and immunities clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. If foreign-born children of American citizens are excluded from the scope of the citizenship clause, it should necessarily
What is certain, however, is that Rogers v. Bellei represents a sharp departure from the prior trend in citizenship cases and a decided policy change on the part of the Court. After striving to preserve American citizenship from congressional interference for a period of more than ten years, the citizenship of one American citizen has been revoked on highly technical and suspicious grounds. "The concept of a hierarchy of citizenship, apparently overruled by Schneider, has been revived."221 And the interpretation of Afroyim granting an absolute right of citizenship has been firmly and unequivocably rejected.222 Whether the import of Bellei has so weakened the underpinnings of Afroyim that the latter decision has been "pro tanto" overruled, as Justice Black contended, remains to be seen. With the exception of one decision not even directly on point,223 the federal courts have neither applied nor interpreted the principles underlying Bellei. The decision, however, is not one that the Supreme Court is likely to reverse soon.224

SUMMARY AND CONCLUSION

Recent administrative and judicial developments have both clarified and obfuscated the principles and doctrines which underlie the law of expatriation. The Supreme Court has expressly eliminated certain statutory provisions as grounds for expatriation. No longer may follow that they are also excluded from protection under the privileges and immunities clause since that clause relies upon the citizenship clause definition of citizenship. Comment, Rogers v. Bellei, 24 VAND. L. REV. 1257, 1263-64 (1971).

221. Note, supra note 217, at 316.

222. "We do not accept . . . that [the holdings in Schneider and Afroyim] are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute." 401 U.S. at 835.

223. See Palomo v. Mitchell, 361 F. Supp. 455 (S.D. Tex. 1972). A Texas district court held that the 1952 enactment of § 301(a)(7), as amended, 8 U.S.C. § 1401(a)(7) (1970), which liberalized the derivative citizenship requirement by providing for five years of residence in the United States by a parent after attaining the age of 14 years and prior to the birth of the citizenship-seeking child, did not apply retroactively to persons born before its effective date. See note 198 infra. Prior to the 1952 enactment of § 301(a)(7), a parent was required to have had five years of residence in the United States after attaining the age of sixteen years and prior to the birth of the citizenship-seeking child. Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1138.

224. The composition of the Supreme Court has changed somewhat since Bellei was decided. Justice Harlan, a member of that five-man majority, Justice Black, the author of the dissenting opinion, and Justice Douglas, a member of that four-man dissent, have been replaced by Justices Powell, Rehnquist, and Stevens. Although it is mere speculation, it appears unlikely that the three new Justices, all of whom are considered to be conservative in their judicial attitudes, will join with the remaining dissenters in Bellei, Justices Marshall and Brennan, to form a new majority to overturn that decision.
a native-born or naturalized citizen lose his citizenship by virtue of a court-martial conviction and discharge from the armed forces for desertion during wartime,\(^{225}\) nor by departing from or remaining outside of the United States during wartime for the purpose of evading military training and service.\(^{226}\) A naturalized citizen may no longer be considered to have expatriated himself by residing abroad for a certain period of time in the foreign state of his birth.\(^{227}\)

Although ostensibly only holding unconstitutional a statutory provision which provided for withdrawal of citizenship for voting in a foreign political election, *Afroyim v. Rusk*\(^ {228}\) culminated a decade-long trend towards limiting Congress' power to expatriate by laying down the broad doctrine that an American citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."\(^ {229}\) Confusion and misunderstanding have followed the case. Although the *Afroyim* decision was once thought to have completely nullified each of the loss of nationality provisions of the Nationality Act of 1940\(^ {230}\) and the Immigration and Nationality Act of 1952,\(^ {231}\) with the exception of the two formal renunciation provisions of the two Acts, subsequent administrative interpretations and lower court decisions seem to indicate that *Afroyim* merely modified the remaining expatriation sections.

It has been thought that the commission of certain specified acts which Congress has deemed as evincing a dilution of allegiance will subject a citizen to loss of citizenship, provided that those acts have been performed voluntarily and absent persuasive evidence that they have been performed with no intent to transfer or abandon allegiance to the United States. However, the Supreme Court's decision in *Rogers v. Bellei*\(^ {232}\) has again thrown the entire law of expatriation into a state of flux. By refusing to clear up the confusion surrounding the term "voluntary relinquishment" the status of the law of voluntary expatriation remains clouded.\(^ {233}\) And by declaring that only "first-sentence-Fourteenth-Amendment citizens" are protected from congressional


\(^{228}\) 387 U.S. 253 (1967).

\(^{229}\) Id. at 268.

\(^{230}\) Ch. 876, 54 Stat. 1137-74 (1940).


\(^{232}\) 401 U.S. 815 (1971).

\(^{233}\) It is quite possible that the Court's refusal in *Bellei* to clarify the meaning of "voluntary relinquishment" was deliberate. The Court may simply be awaiting a more appropriate case before attempting to develop a workable definition of that term.
efforts to divest them of citizenship without their consent, the Court has limited the scope of the Afroyim holding against involuntary expatriation to native-born and naturalized citizens. Those citizens who derive their status from a statutory congressional grant may henceforth be expatriated against their will, subject only to considerations of due process.

Although the Bellei majority claimed that statutorily based citizenship is not "second-class citizenship," the effect of the decision, as the minority pointed out, will obviously be to deprive a certain group of citizens of the full protection of the Constitution. The Court's recognition of a new class of citizenship—a citizenship conferred by the statutory power of Congress—necessarily creates a halfway status between alienage and citizenship based upon the first sentence of the fourteenth amendment. The priceless right of citizenship certainly deserves more protection. Since the Supreme Court is not likely to reverse its decision in Bellei soon, it is suggested that an appropriate congressional response would be most welcome. Congress should choose between, (1) conferring unconditional citizenship at birth to all foreign-born children of an American parent by eliminating the condition subsequent of section 301 or, (2) denying such children citizenship outright by forcing them either to satisfy the naturalization requirements and quota restrictions placed on other immigrants or, perhaps, by extending to them a preferred right to immigrate. Regardless of the choice made by Congress, the effect would be to proclaim, as well it should, that the first sentence of the fourteenth amendment defines the total range of American citizenship.

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234. 401 U.S. at 835-36.
235. Id. at 838 (dissenting opinion).
236. Comment, supra note 205, at 161.
237. In fact, the Court has several times declared that citizenship is a fundamental right. See, e.g., Trop v. Dulles, where the Court argued that: "As long as a person does not voluntarily renounce or abandon his citizenship . . . his fundamental right of citizenship is secure." 356 U.S. 86, 93 (1958) (emphasis added). See also Afroyim v. Rusk, 387 U.S. 253, 267-68 (1967); Perez v. Brownell, 356 U.S. 44, 64 (1958) (dissenting opinion).