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Constitutional Law—Involuntary Loss of Citizenship for Voting in a Foreign Election Declared Unconstitutional

Alan R. Feldstein

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although probable cause in the traditional sense may be absent, citizens might nevertheless be subjected to criminal processes as a result of evidence acquired by a search pursuant to a warrant issued for inspection purposes.

A return to a modified *Frank* doctrine seems desirable. There, warrantless inspections, justified by a public need and carried out pursuant to city health and housing ordinances, were deemed constitutional as a valid exercise of the state's police power. Since the justification for these inspections was not premised upon considerations requiring immediate entry, a system whereby notice would be given to an individual advising him that if an excuse was tendered inspection might be made at a later, more convenient, but definite date, seems workable. Under this system the right of privacy would be afforded some extra measure of protection against obnoxious government intrusion, while at the same time, the tampering with probable cause as seen in the instant case would be avoided.

MICHAEL P. COUTURE

CONSTITUTIONAL LAW—INVOLUNTARY LOSS OF CITIZENSHIP FOR VOTING IN A FOREIGN ELECTION DECLARED UNCONSTITUTIONAL

Petitioner, born in Poland, emigrated to this country in 1912 and became a naturalized American citizen in 1926. He emigrated to Israel in 1950, and in 1951 voted in an election for the Israeli Knesset, the legislative body of Israel. In 1960, in preparation for return to this country, petitioner applied to the United States Consulate in Haifa for a passport. His application was rejected, and the American Vice Consul issued a Certificate of Loss of Nationality to the petitioner¹ on the ground that he had expatriated himself by casting a ballot in a foreign political election in contravention of section 401(e) of the Nationality Act of 1940.² The Vice Consul's decision was affirmed by appropriate administrative appeals.³ Petitioner then sought declaratory relief in a federal

1. 8 U.S.C. § 1501 (1964) provides that:

Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality . . . , he shall certify the facts upon which such belief is based to the Department of State If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, . . . , and the diplomatic or consular office in which the report was made shall . . . forward a copy of the certificate to the person to whom it relates.

2. Nationality Act, § 401, 54 Stat. 1137 (1940), *as amended*, 58 Stat. 746 (1944), 8 U.S.C. § 801 (1946):

[A] person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.

This provision was re-enacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267, 8 U.S.C. § 1481(a)(5) (1964).

3. The Vice Consul's action was approved by the Passport Office of the Department of State on January 4, 1961. Petitioner then appealed to the State Department's Board of

district court,⁴ alleging that section 401(e) of the Nationality Act violated both the due process clause of the fifth amendment and the citizenship clause of the fourteenth amendment of the Constitution of the United States.⁵ In the district court, petitioner stipulated that he voluntarily voted in the election,⁶ but contended that at no time did he intend to abandon his American citizenship. The district court granted a summary judgment for the Secretary of State⁷ relying on *Perez v. Brownell*,⁸ which held that Congress has constitutional power, based on its implied power to regulate foreign affairs, to divest a person of his citizenship for voting in a foreign country. The United States Court of Appeals affirmed,⁹ and petitioner was granted certiorari.¹⁰ The Supreme Court, in a five-four decision, reversed, *holding*, in overruling *Perez*, that Congress has no power under the fourteenth amendment to divest a person of his United States citizenship without such person's express consent. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

That a citizen could not change his allegiance was the doctrine that prevailed in the Middle Ages—the doctrine of perpetual allegiance.¹¹ This doctrine was absorbed into the common law and survived in England until the latter half of the nineteenth century, when Parliament enacted legislation providing that a British subject could lose his citizenship upon naturalization in a foreign state.¹² The United States has never adhered to the doctrine of perpetual allegiance, for two reasons: to legitimize in popular thinking a mass transfer of allegiance after the American Revolution, and to further the national policy of encouraging immigration, which could be successful only if immigrants could break their bonds to former countries.¹³ The Supreme Court gave judicial support to these purposes in 1830 when it stated that a person could divest

Review on the Loss of Nationality which affirmed the Vice Consul's decision on May 3, 1965. *Afroyim v. Rusk*, 250 F. Supp. 686, 687 (S.D.N.Y. 1966).

4. 8 U.S.C. § 1503(a) (1964) provides:

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action . . . against the head of such department or independent agency for a judgment declaring him to be a national of the United States

5. U.S. Const. amend. XIV, § 1, cl. 1 provides in part that "All persons born or naturalized in the United States . . . are citizens of the United States"

6. Throughout the administrative proceedings petitioner had denied having voted in an election. However, in the district court he made this stipulation in order to bring the case within the ambit of *Perez v. Brownell*, 356 U.S. 44 (1958), and to remove the often-litigated issue of duress from the case. *Afroyim v. Rusk*, 250 F. Supp. 686, 687 (S.D.N.Y. 1966).

7. *Afroyim v. Rusk*, 250 F. Supp. 686 (S.D.N.Y. 1966).

8. 356 U.S. 44 (1958).

9. *Afroyim v. Rusk*, 361 F.2d 102 (2d Cir. 1966).

10. *Afroyim v. Rusk*, 385 U.S. 917 (1967).

11. Maxey, *Loss of Nationality: Individual Choice or Government Fiat?*, 26 Albany L. Rev. 151, 153 (1962).

12. *Id.* at 154-55.

13. *Id.* at 159.

himself of citizenship, but only with the permission of the sovereign.¹⁴ Congress first attempted to deal with the issue of expatriation when it enacted the Expatriation Act of 1868¹⁵; however, the Act merely affirmed the right of foreign nationals to relinquish their foreign nationality and become naturalized American citizens.¹⁶ It was not specified when and how an American citizen could expatriate himself. Congress finally gave statutory validity to the administrative law of expatriation¹⁷ with the Expatriation Act of 1907.¹⁸ The main purpose of the statute was to set standards by which the United States would take notice that an American national had voluntarily abandoned his citizenship,¹⁹ *i.e.*, by becoming a national of a foreign state, or by taking a formal oath of allegiance to a foreign state.²⁰ The statute established criteria for determining when an American had assumed a new nationality or reverted to his original status:²¹ *e.g.*, "any American woman who marries a foreigner shall take the nationality of her husband."²² This provision is an example of denationalization, *i.e.*, involuntary loss of citizenship, properly acquired, caused by affirmative state action.²³ The question of the power of Congress to denationalize an American citizen was raised in the Supreme Court in *Mackenzie v. Hare*.²⁴ In interpreting the Expatriation Act of 1907, the Court stated:

14. *Inglis v. Trustees of Sailor's Snug Harbor*, 28 U.S. (3 Pet.) 99, 124-25 (1830); *Shanks v. DuPont*, 28 U.S. (3 Pet.) 242, 246 (1830).

15. 25 Rev. Stat. § 1999 (1875).

16. Roche, *The Expatriation Cases: "Breathes There the Man, with Souls so Dead . . . ?"*, 1963 Sup. Ct. Rev. 325, 330-31. The purpose of the Act was to aid the executive department in protecting naturalized citizens when they went abroad. Maxey, *supra* note 11, at 161.

17. Roche, *supra* note 16, at 331.

18. 34 Stat. 1228 (1907).

19. Roche, *supra* note 16, at 332.

20. Maxey, *supra* note 11, at 162.

21. Roche, *supra* note 16, at 332.

22. 34 Stat. 1228-29 (1907). However, her American nationality would be restored if, after the termination of the marriage, she evidenced a desire to regain it.

23. There is some controversy over proper terminology. The cases and commentators have almost invariably used the terms involuntary expatriation and denationalization interchangeably, although there may be some subtle difference in meaning. Expatriation is the voluntary renunciation of citizenship properly acquired. Thus a citizen can expatriate himself by voluntarily renouncing his citizenship or by voluntarily committing acts which can be deemed as a renunciation of citizenship. See *Mackenzie v. Hare*, 239 U.S. 299 (1915). Denationalization, in its broad sense, is any involuntary loss of properly acquired 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 the power of Congress to achieve. See *Perez v. Brownell*, 356 U.S. 44 (1958). Since Congress determines which acts evince voluntary expatriation and which acts result in denationalization pursuant to this implied power, there is in reality little difference in these two types of loss of citizenship provisions. 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. See Roche, *supra* note 16, at 355. The commentators and cases appear to have characterized these two types of involuntary loss of citizenship as involuntary expatriation. Therefore, for the purposes of this Note, any involuntary loss of citizenship, *i.e.*, where the citizen does not specifically state that he renounces his citizenship, will be referred to as involuntary expatriation, unless stated otherwise.

Another term which should not be confused is denaturalization. This is the involuntary loss of citizenship *improperly* acquired, and is beyond the scope of this paper.

24. 239 U.S. 299 (1915).

It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences.²⁵

This interpretation established the basic propositions that expatriation must be voluntary; but Congress can establish which voluntary acts will result in expatriation, regardless of a person's actual intent to expatriate.²⁶ The Court further stated that Congress may have the power to impose loss of citizenship due to the necessity of avoiding embarrassment to the United States in its conduct of foreign affairs.²⁷

Congress again revised the nationality laws by enacting the Nationality Act of 1940.²⁸ The statute did not introduce any significant changes concerning the right of voluntary expatriation, but it did, however, establish new criteria in the area of constructive or involuntary expatriation.²⁹ Four of the present statutory provisions reaffirm the original concept of expatriation, *i.e.*, they are designed to provide means by which a citizen can voluntarily expatriate himself.³⁰ The other provisions, however, prescribe conduct that will result in involuntary expatriation, *viz.*, serving in the armed forces of a foreign state,³¹ performing the duties of any office under the government of a foreign state,³² voting in a political election in a foreign state,³³ deserting the military forces of the United States in time of war,³⁴ committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States,³⁵ or departing from or remaining outside of the United States in time of war or national emergency for the purpose of evading or avoiding training and service in the military forces of the United States.³⁶ The constitutional requirement stemming from due process requires that these proscribed acts be voluntary to result in expatriation.³⁷ In the context of expatriation, voluntariness has

25. *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915).

26. *Roche*, *supra* note 16, at 330-31.

27. *Mackenzie v. Hare*, 239 U.S. at 312.

28. Nationality Act of 1940, 54 Stat. 1137, *as amended*, 58 Stat. 746 (1944), 8 U.S.C. § 801 (1946), *now* 66 Stat. 163, 267, 8 U.S.C. § 1481 (1964).

29. *Maxeey*, *supra* note 11, at 169-170.

30. 8 U.S.C. § 1481(a) (1964), may be partially summarized as providing that a national of the United States shall lose his nationality by:

(1) obtaining naturalization in a foreign state upon his own application; . . . or (2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; . . . or . . . (6) making a formal renunciation of nationality . . . in a foreign state; . . . or (7) making in the United States a formal written renunciation of nationality . . . whenever the United States shall be in a state of war and the Attorney General shall approve

31. *Id.* § 1481(a) (3).

32. *Id.* § 1481(a) (4).

33. *Id.* § 1481(a) (5).

34. *Id.* § 1481(a) (8).

35. *Id.* § 1481(a) (9).

36. The Nationality Act of 1940 was amended to include this provision in 1944. It is presently 8 U.S.C. § 1481(a) (10) (1964).

37. Gordon, *The Citizen and the State; Power of Congress to Expatriate American Citizens*, 53 Geo. L.J. 315, 339 (1965).

two possible meanings: it may denote a voluntary desire to surrender or abandon citizenship or it may involve simply the voluntary performance of some action which causes loss of citizenship, irrespective of intention.³⁸ In either case, voluntariness connotes the capacity to make a free choice in performing the act of expatriation with the absence of duress and oppressive factors.³⁹

The constitutionality of the denationalization provisions of the Nationality Act of 1940 tended to be assumed prior to 1958.⁴⁰ Early cases dealt mainly with the special problems of Japanese-Americans with dual nationality who were in Japan at the beginning of World War II, and who remained there throughout the war. These cases are of little relevance to the constitutional issue of involuntary expatriation, except as they reinforced the maxim that expatriation must be voluntary.⁴¹ In 1950 the Supreme Court sustained the provision which provided that a person will lose his citizenship by "obtaining naturalization in a foreign state,"⁴² even though he does not intend to relinquish his American citizenship.⁴³ However, this provision is distinguished from the type of provision at issue in *Afroyim* in that there is no element of the possible stateless person since a new nationality has been assumed.⁴⁴

However, the Supreme Court in 1958 was faced with the question of whether Congress could prescribe involuntary expatriation as a consequence of a citizen's volitional acts. In *Perez v. Brownell*,⁴⁵ the Court sustained the validity of the provision of the Nationality Act of 1940 which directed that a citizen of the United States would "lose his nationality by . . . voting in a political election in a foreign state . . ."⁴⁶ Justice Frankfurter, speaking for the majority, stated that Congress could enact a law divesting an American of his citizenship, even though never voluntarily renounced, as long as the withdrawal of citizenship is "reasonably calculated to effect the end that is within the power of Congress to achieve."⁴⁷ This conclusion was reached by the following chain of reasoning:

[Congress has an implied power to] enact legislation for the effective regulation of foreign affairs The Government must be able not only to deal affirmatively with foreign nations . . . it must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching their dignity and

38. *Id.*

39. *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958).

40. *Maxey*, *supra* note 11, at 171.

41. *Roche*, *supra* note 16, at 340. *See, e.g., Acheson v. Murata*, 342 U.S. 900 (1952); *Kawakita v. United States*, 343 U.S. 717 (1952).

42. Nationality Act § 401(a), 54 Stat. 1168 (1940), *now* 66 Stat. 267 (1952), 8 U.S.C. § 1481(a)(1) (1964).

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

44. This provision provided for loss of American citizenship upon the deliberate assumption of a foreign attachment. *See supra* note 30 and accompanying text.

45. 356 U.S. 44 (1958).

46. Nationality Act § 401(e), 54 Stat. 1168, *now* 66 Stat. 267 (1952), 8 U.S.C. § 1481(a)(5) (1958). This is the same provision in question in *Afroyim*.

47. *Perez v. Brownell*, 356 U.S. 44, 60 (1958).

interests . . . Since Congress may not act arbitrarily, a rational nexus must exist between the content of a specific power in Congress and the action of Congress in carrying that power into execution . . . The critical connection between [voting in a foreign election] and loss of citizenship is that fact that it is the possession of American citizenship that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem.⁴⁸

It was then concluded that "there is nothing . . . in the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship."⁴⁹ The "notion that the power of Congress to terminate citizenship depends upon the citizen's assent,"⁵⁰ was specifically rejected. Chief Justice Warren, in his dissent, denied that Congress has power to divest an American of his citizenship, but conceded that under some circumstances a citizen may "be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country."⁵¹ Justice Douglas, joined in his dissent by Justice Black, also maintained that under the fourteenth amendment Congress has no power to divest an American of citizenship. His interpretation differed from the Chief Justice's as to the extent to which Congress can classify certain types of conduct as evidence of an individual's compromising his undivided allegiance to this country.⁵² On that same day, in *Trop v. Dulles*,⁵³ the Court invalidated the provision of the Nationality Act of 1940 which divested a person of his citizenship for "deserting the military forces of the United States in time of war, if convicted thereof by court martial and dismissed from the service . . ."⁵⁴ Chief Justice Warren, in a plurality opinion, gave two independent reasons for the Court's decision: "[C]itizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers;"⁵⁵ and even under the view maintained in *Perez*,

48. *Id.* at 57-60.

49. *Id.* at 58 n.3.

50. *Id.* at 61. Here the Court relied upon *Savorgnan v. United States*, 338 U.S. 491 (1950), and *Mackenzie v. Hare*, 239 U.S. 299 (1915).

51. *Perez v. Brownell*, 356 U.S. at 77-78. (Warren, C.J., dissenting). The Chief Justice refuted the Court's reliance upon *Mackenzie* and *Savorgnan* on the ground that those cases sustained a statute which relied upon the outdated common law rule of unity of interest in the marital community. These cases could hardly be understood to sanction the power of divesting citizenship.

52. *Id.* at 79 (1958) (Douglas, J., dissenting). *Agata, Involuntary Expatriation and Schneider v. Rusk*, 27 U. Pitt. L. Rev. 1, 9 (1965).

53. 356 U.S. 86 (1958). On the same day as *Perez* and *Trop* the Court also decided *Nishikawa v. Dulles*, 356 U.S. 129 (1958). Petitioner had been divested of his citizenship pursuant to 8 U.S.C. § 1481(a)(3) (1964), for entering and serving in the armed forces of a foreign state. The Court held that the government had not sustained its burden of establishing that the act was voluntary.

54. Nationality Act § 401(g), 54 Stat. 1169 (1940), now 66 Stat. 267 (1952), 8 U.S.C. § 1481(a)(3) (1964).

55. *Trop v. Dulles*, 356 U.S. 86, 91-93 (1958).

that citizenship may be divested in the exercise of some governmental powers, denationalization as utilized in this situation was simply a punishment to deter deserting, and as such was violative of the eighth amendment protection against cruel and unusual punishments.⁵⁶ Justice Brennan, casting the pivotal vote, affirmed in his concurring opinion the provision in question in *Perez*, but stated that the particular provision at issue in *Trop* was unconstitutional. He stated that he could not "see that this [provision] is anything other than forcing retribution from the offender—naked vengeance."⁵⁷

Another provision of the Nationality Act of 1940, which deprived an American of his citizenship for "departing from or remaining outside of the United States in time of war or national emergency for the purpose of evading or avoiding military training and service,"⁵⁸ was invalidated in the companion cases of *Kennedy v. Mendoza-Martinez* and *Rusk v. Cort*.⁵⁹ Justice Goldberg, writing for the majority, did not reach the question of whether Congress could validly exercise its power of divesting an American of his citizenship without his consent,⁶⁰ but rather reasoned 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.⁶¹ Justice Brennan, in his concurring opinion, expressed reservations about the correctness of *Perez*.⁶² Justice Stewart, applying the rational nexus test of *Perez*,⁶³ dissented; however, the test was narrowed by recognizing that there may be a constitutional limitation "upon the kind of activity which may be the basis of denationalization," *i.e.*, the activity must be "conduct inconsistent with undiluted allegiance to this country."⁶⁴ This view is very similar to that expressed by Chief Justice Douglas in his dissent in *Perez*.⁶⁵ The Court, in

56. *Id.* at 93-97.

57. *Id.* at 112. Both Justice Brennan and Justice Frankfurter used a rational nexus test, but Justice Frankfurter concluded that the means were reasonably calculated to effect an end within the power of Congress to achieve.

58. Nationality Act § 401(j), *as amended*, 58 Stat. 746 (1944), *now* 66 Stat. 268 (1952), 8 U.S.C. § 1481(a)(10) (1964).

59. 372 U.S. 144 (1963).

60. Agata, *supra* note 52, at 12.

61. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). One commentator has stated that the Court in this case was led by the preferred-freedom status of citizenship to apply a standard of review more rigorous than mere minimum rationality. See Newhouse, *The Constitution and International Agreements or Unilateral Action Curbing "Peace-Imperiling" Propaganda*, 31 Law & Contemp. Prob. 506, 519-20 (1966). See also text at *infra* note 101.

62. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 187. Unfortunately Justice Brennan did not state what those reservations were. He merely stated that:

The instant cases do not require me to resolve some felt doubts of the correctness of *Perez*, which I joined. For the Court has never held that expatriation was to be found in Congress' arsenal of common sanctions, available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it.

Id. at 187-88.

63. See text at *supra* notes 47-48.

64. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 214.

65. Agata, *supra* note 52, at 13. See text at *supra* note 51.

Schneider v. Rusk,⁶⁶ invalidated another provision of the Nationality Act of 1940. Under this provision, a naturalized citizen would "lose his nationality by having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated."⁶⁷ Justice Douglas, writing for the majority, stated that the provision was an invalid discrimination against naturalized citizens. The "right of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive."⁶⁸ In addition, Justice Douglas reaffirmed his view that the "power of Congress to take away citizenship is nonexistent absent expatriation by the voluntary renunciation of nationality."⁶⁹

Thus, preceding the decision in *Afroyim v. Rusk*,⁷⁰ three views had been expressed concerning the power of Congress to divest an American of his citizenship:⁷¹ (1) the rational nexus test of Justice Frankfurter in *Perez*, which would permit Congress to impose loss of nationality incident to the exercise of its general powers;⁷² (2) the qualified rational nexus test as espoused by Justice Stewart in his dissent in *Mendoza-Martinez*, which would permit the imposition of loss of nationality incident to the general powers of Congress only where the proscribed conduct imports some dilution of allegiance;⁷³ and (3) the absolute view of Justices Douglas and Black, which would deny Congress any power of involuntary expatriation incident to the exercise of its general powers.⁷⁴ After this series of cases, concluding with *Schneider*, the power of Congress to involuntarily expatriate was sharply limited.⁷⁵

The Court, in the instant case, stated that the fundamental issue was whether Congress within the fourteenth amendment could divest an American of his citizenship never voluntarily renounced.⁷⁶ Justice Black, writing for the majority, maintained that the Constitution does not specifically confer upon Congress the power to prescribe grounds for expatriation.⁷⁷ This silence led him to deny that "Congress has any general power, express or implied, to take away an American citizen's citizenship without this assent."⁷⁸ To substantiate this assertion, Justice Black first embarked on an historical survey of the

66. 377 U.S. 163 (1964).

67. Immigration and Nationality Act, 66 Stat. 269 (1952), 8 U.S.C. § 1484 (1964).

68. *Schneider v. Rusk*, 377 U.S. at 165. That only a natural born citizen is eligible to be President is the only distinction the Constitution draws between natural born and naturalized citizens. U.S. Const. art. II, § 1.

69. *Id.* at 166. Justice Douglas conceded at this point that his view "has not yet commanded a majority of the entire court." (Emphasis supplied).

70. 387 U.S. 253 (1967).

71. *Agata*, *supra* note 52, at 47.

72. *See* text at *supra* notes 47-48.

73. *See* text at *supra* note 64.

74. *See* text at *supra* notes 52, 69.

75. *Agata*, *supra* note 52, at 46. *See also Afroyim v. Rusk*, 361 F.2d 102, 105 (2d Cir. 1966) (Kaufman, J., concurring).

76. *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967).

77. *Id.* at 257.

78. *Id.* The dissent stated that the Court came to this conclusion without refuting the reasoning of *Perez*. *Id.* at 269.

views expressed in Congress before the passage of the fourteenth amendment, concerning Congress' power to expatriate, and concluded that Congress denied having any such power.⁷⁹ The only judicial determination relied on, prior to the passage of the fourteenth amendment, was the "well-considered dictum" of Chief Justice Marshall in *Osborn v. United States Bank*, where it was stated:

[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress so to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.⁸⁰

Justice Black further asserted that if there is "any doubt as to whether prior to the passage of the fourteenth amendment," Congress had the power to expatriate, this doubt should be "removed by the unequivocal terms of the amendment itself."⁸¹ There is nothing in the language of the fourteenth amendment indicating a "fleeting citizenship subject to destruction by the Government at any time."⁸² The undeniable purpose of the amendment was to make the citizenship of the Negro secure.⁸³ This purpose would be frustrated by allowing the Government to divest a person "of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted."⁸⁴ Thus, it cannot be denied that the framers of the fourteenth amendment "wanted to put citizenship beyond the power of any governmental unit to destroy."⁸⁵ Relied upon for this interpreta-

79. *Id.* at 257. Justice Black relied upon three occasions, in 1795, 1797, and 1818, when Congress considered and rejected proposals which prescribed certain acts as resulting in expatriation. However, he admitted that the legislative statements "may be regarded as inconclusive and must be considered in the historical context in which they were made." *Id.* at 261. Mr. Justice Harlan, dissenting, attempted to demonstrate the inconclusiveness of these events. Justice Harlan noted that Justice Black relied on the views of three individual Congressmen with no proof that they were shared by any substantial number. *Id.* at 274. He further noted that on two occasions prior to the passage of the fourteenth amendment Congress had affirmed its belief that it had authority to involuntarily expatriate. In 1864, Congress passed, but Lincoln pocket-vetoed, the Wade-Davis bill, section 14 of which provided for expatriation for anyone who had held office in the rebel service. A year later, Congress passed the Enrollment Act of 1865, section 21 of which provided for forfeiture of rights of citizenship for deserters and draft evaders. *Id.* at 279-82. These two enactments, of course, must be considered in the context of the Civil War.

80. *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 827 (1834), *quoted in* *Afroyim v. Rusk*, 387 U.S. at 261.

81. *Afroyim v. Rusk*, 387 U.S. at 261-62. U.S. Const. amend. XIV, § 1, cl. 1 provides in part: "All persons born or naturalized in the United States . . . are citizens of the United States . . ."

82. *Id.* at 262.

83. *Id.* at 263.

84. *Id.*

85. *Id.*; *see also*, Roche, *supra* note 16, at 343, who argues that the finding that citizenship is "irreversible" except by individual option involves "standing the fourteenth amendment on its head."

tion was the dictum⁸⁶ of Justice Grey in *United States v. Wong Kim Ark*, where he stated:

Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act . . . of Congress . . . can affect citizenship acquired as a birthright by virtue of the constitution itself The fourteenth amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization has conferred no authority upon Congress to restrict the effect of birth, declared by the constitution to constitute a *sufficient and complete right to citizenship*.⁸⁷

Justice Black admitted that the legislative history of the fourteenth amendment was inconclusive as to his interpretation, but added that the holding in the instant case does not rest "entirely or principally upon that legislative history,"⁸⁸ for the decision "comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee."⁸⁹ Justice Black then concluded:

Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power Citizenship in this Nation is part of a cooperative affair. Its citizenry is the country and the country is its citizenry We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, *a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship*.⁹⁰

Some argue that the Court's decision in *Afroyim v. Rusk*⁹¹ has left the issue of involuntary expatriation in a state of confusion.⁹² The possible weakness is twofold. First, "the Court's decision is disconcerting. Its reliance upon history is hardly justified in view of the highly dubious support it gives

86. One commentator considers this to be the holding. See Hurst, *Can Congress Take Away Citizenship?*, 29 Rocky Mt. L. Rev. 62, 78-79 (1956). Another commentator considers this to be only *obiter dictum*. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25, 26-27 (1950).

87. *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898) (Emphasis added.), quoted in *Afroyim v. Rusk*, 387 U.S. 253, 266-67 (1967).

88. *Afroyim v. Rusk*, 387 U.S. at 267. The dissent pointed out that the Court relied upon the statements of individual Congressmen. *Id.* at 282-83. However, the dissent is equally inconclusive in stating that the two Congressmen relied upon by the majority did not voice any opposition to the two denaturalization bills passed by Congress. See *supra* note 79.

89. *Id.* at 267.

90. *Id.* at 267-68. The dissent stated that the "citizenship clause thus neither denies nor provides to Congress any power of expatriation [I]t is not proper to create from the citizenship clause an additional, and entirely unwarranted, restriction upon legislative authority." *Id.* at 292-93.

91. 387 U.S. 253 (1967).

92. See *id.* at 269 n.1 (1967) (Harlan, J., dissenting); *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 112, 138 (1967).

The majority's evidence of the purpose of the fourteenth amendment's citizenship clause is equally unpersuasive."⁹³ Additionally, the language of the citizenship clause is "singularly ambiguous," supporting in fact either the majority or the dissenting opinions.⁹⁴ In the words of Justice Harlan, the majority opinion is an "*ipse dixit*, evincing little more, it is quite apparent, than the present majority's own distaste for the expatriation power."⁹⁵ Second, the Court set no guidelines for Congress to delimit the circumstances, if any, where involuntary expatriation may be invoked. Thus, one can only surmise how the Court will view any future legislative attempts to involuntarily expatriate a citizen.

Although *Afroyim* construed only one provision of the Nationality Act of 1940,⁹⁶ its significance lies in its broader implications relating to the extent to which Congress has power to prescribe involuntary expatriation for certain acts, and to the concept of citizenship in general. In the cases subsequent to *Perez v. Brownell*,⁹⁷ construing the 1940 Act, the Supreme Court invalidated specific provisions without explicitly addressing the question of Congress' power to expatriate involuntarily. Ostensibly, in *Afroyim*, the Court has held that Congress has no power whatsoever, under the fourteenth amendment, to divest an American of citizenship without his consent; the probable implication is that under no circumstances can a citizen be involuntarily expatriated. Paradoxically, such is not necessarily the case. The Court held only that Congress shall not enact legislation which prescribes those acts which will result in a citizen's involuntary expatriation. Arguably, this does not entirely preclude involuntary expatriation. Justice Black, in the instant case, "intimates, but does not expressly declare, that [he] adopts the reasoning of the Chief Justice [dissenting] in *Perez*."⁹⁸ In *Perez*, however, Chief Justice Warren conceded that under some circumstances a citizen may "be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country."⁹⁹ Presumably, under this view, a properly defined class of such acts could result in involuntary expatriation. Perhaps the Chief Justice was considering a situation such as an American citizen bearing arms against the United States while serving in a foreign army. For example, what would result if an American citizen were to join the North Vietnamese forces in battle against the American forces in Viet Nam? In the final analysis, the determinative question in deciding whether involuntary expatriation has met its demise is: In order to expatriate, must the citizen explicitly state that he renounces his American citizenship, or can some acts which evince diluted allegiance to this country rise to the level of express expatriation?

93. *The Supreme Court, 1966 Term*, *supra* note 92, at 134-35.

94. *Id.* at 136.

95. *Afroyim v. Rusk*, 387 U.S. at 293 (Harlan, J., dissenting).

96. 54 Stat. 1169 (1940), now 66 Stat. 267 (1952), 8 U.S.C. § 1481 (1964).

97. 356 U.S. 44 (1958).

98. *Id.* at 269 n.1 (Harlan, J., dissenting).

99. *Perez v. Brownell*, 356 U.S. 44, 77-78 (1958) (Warren, C.J., dissenting).

The course of Supreme Court decisions has evolved a new élan which regards American citizenship as a priceless status, any impairment of which is to be vigorously resisted.¹⁰⁰ This evolution has culminated in the *Afroyim* decision, in which the Court has elevated citizenship to a preferred status¹⁰¹ to be afforded the same protection as first amendment rights. No longer can an American citizen be divested of his citizenship where only a mere rational basis for the divesting legislation is shown. However, that the right of citizenship is necessarily absolute cannot be inferred from this, for even speech not consonant with the first amendment can be proscribed.¹⁰² Therefore, although the Court has elevated citizenship to a preferred status, the decision nonetheless can be interpreted to presage that some acts which demonstrate diluted allegiance to this country rise to the level of express expatriation.

Yet, the Court's opinion is also subject to the interpretation that in some respects citizenship may be afforded even more stringent protection than first amendment rights, for citizenship may be considered to be absolute, and as such, not subject to abrogation. Under this interpretation, a person could not be divested of his citizenship regardless of how diluted his allegiance to this country appears to be. Expatriation could result only where the citizen explicitly states that he voluntarily renounces his citizenship. Arguably, this is the proper interpretation, for the Court stated in unequivocal terms that every citizen has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."¹⁰³ Additionally, citizenship is solely an innocuous, but precious *status*, which does not present any danger to this country. However, a citizen can commit certain *actions*, such as serving and fighting under an enemy flag, which do present a danger. The solution to such a situation is not to involuntarily expatriate him, but rather to impose applicable criminal sanctions condemning and punishing his particular actions. Here the punishment would not be directed against one's citizenship, but rather, as it should be, against his proscribed conduct.¹⁰⁴

The question of whether involuntary loss of citizenship has met its demise has not been finally settled. Possibly the more reasonable probability is that a class of acts evincing a dilution of allegiance will be elevated to the level of express expatriation. The Court would be hard pressed to uphold the involuntary loss of citizenship of an American who commits a heinous crime such as bearing arms against the United States. Additionally, the Court stated that one evil resulting from the involuntary loss of citizenship was the creation of stateless

100. Roche, *The Expatriation Cases: "Breathes There the Man, with Souls so Dead . . . ?"*, 1963 Sup. Ct. Rev. 325, 364.

101. See *supra* note 61.

102. See, e.g., *Roth v. United States*, 354 U.S. 476 (1957) (pornography); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words").

103. *Afroyim v. Rusk*, 387 U.S. at 268.

104. It should be noted that *Trop v. Dulles*, 356 U.S. 86 (1958) prohibited the use of involuntary loss of citizenship as a punishment. However, the Court did not hold that a citizen could not otherwise be punished for these proscribed acts.

persons.¹⁰⁵ Therefore, the Court could possibly uphold a provision which provides for loss of citizenship where an American voluntarily assumes the citizenship of another country,¹⁰⁶ for the person would not become stateless. Yet not inconceivable is the probability that the Court meant precisely what it stated: that every citizen, under all circumstances, has a constitutional right to remain a citizen until he specifically and voluntarily renounces that citizenship.

ALAN R. FELDSTEIN

CRIMINAL LAW—NEW YORK “STOP AND FRISK” STATUTE HELD CONSTITUTIONAL IN THE ABSENCE OF PROBABLE CAUSE FOR ARREST

A police officer received an anonymous telephone call informing him that a youth with a loaded revolver in his left-hand jacket pocket was standing on a certain corner. A detailed description of the youth was given. The policeman proceeded to the stated location and saw a boy, who matched the description given him by the caller, standing among a group of children. There was nothing in the youth's appearance to indicate that he was carrying a gun, and the detective had never seen or arrested him before. The officer approached the boy, placed him against a wall, and withdrew a loaded revolver from the youth's left-hand jacket pocket. Subsequently the defendant was indicted for violation of section 265.05 of the New York Penal Code. A motion to suppress evidence seized at the time of the arrest as constitutionally inadmissible was denied, the trial court ruling that the requirement of probable cause for arrest had been satisfied. The defendant was thereafter convicted upon a plea of guilty. The conviction was affirmed without opinion by the Appellate Term, Second Department, one judge dissenting. The New York Court of Appeals, while conceding that probable cause for arrest was not present, also affirmed, holding that under the “stop and frisk” amendment to the New York Code of Criminal Procedure (section 180-a), the search and subsequent seizure were constitutionally valid. *People v. Taggart*, 20 N.Y.2d 335, 229 N.E.2d 581, 283 N.Y.S.2d 1 (1967).

The fourth amendment to the Constitution of the United States protects the right of the people to be secure against unreasonable searches and seizures.¹ A search or seizure is reasonable, within the meaning of this amendment, if made pursuant to a warrant issued upon probable cause,² or, in the absence of such warrant, if made with consent,³ in “hot pursuit,”⁴ or incident to a lawful

105. *Afroyim v. Rusk*, 387 U.S. at 268.

106. *E.g.*, 8 U.S.C. § 1481(a)(1) (1964). This provision states that a national of the United States shall lose his nationality by “obtaining naturalization in a foreign state upon his own application”

1. U.S. Const. amend. IV.

2. *Fed. R. Crim. P.* 41(a).

3. *Stoner v. California*, 376 U.S. 483 (1964).

4. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).