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Comments

EXPATRIATION: CONSTITUTIONAL AND NON-CONSTITUTIONAL CITIZENSHIP

The fourteenth amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."¹ By operation of this clause, any person born in the United States becomes an American citizen.² Citizenship by naturalization, however, can only be acquired by complying with statutory requirements.³ In addition to these two means of attaining citizenship, Congress has provided a third category of citizenship which includes persons born to one alien parent outside the United States.⁴ The other parent must be a United States citizen who, prior to the birth of such person, was physically present in the United States or its outlying possessions for periods totaling ten years or more, at least five of which were after reaching the age of fourteen.⁵ Any person who attains citizenship in this third way must be continuously present in the United States for at least five years between the ages of fourteen and

1. U.S. CONST. amend. XIV, § 1. Because birth and naturalization in the United States are mentioned in the fourteenth amendment, that amendment was taken by the Court in *Rogers v. Bellei* to be an express constitutional definition of citizenship. 401 U.S. 815 at 830 (1971). For the purpose of this Comment, these two types of citizenship will be called constitutional citizenship.

2. *In re Gogal*, 75 F. Supp. 268 (W.D. Pa. 1947).

3. *United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898). For naturalization requirements, see 8 U.S.C. §§ 1421-34 (1970).

4. 8 U.S.C. § 1401 (1970). In *Rogers v. Bellei*, the Court concluded that this type of citizenship was not within the fourteenth amendment's terms and, thus, the amendment did not affect the government's power to revoke citizenship that had been granted in this manner. 401 U.S. at 827. For the purpose of this Comment, this type of citizenship will be called non-constitutional citizenship.

5. 8 U.S.C. § 1401(a)(7) (1970). The ten year residence requirement may be partially or wholly satisfied by honorable service abroad in the United States armed forces, United States government, or specified international organizations. If a child is born abroad of two United States citizens, the statute grants him citizenship at birth provided one parent had a residence in the United States prior to such birth. *Id.* § 1401(a)(3) (1970). If the child is born abroad of a United States citizen and a United States national who is not a citizen, then citizenship is granted to the child provided the citizen parent had been physically present in the United States or its outlying possessions for a continuous period of one year prior to the child's birth. *Id.* § 1401(a)(4) (1970).

twenty-eight.⁶ If this condition subsequent is not met, the citizenship granted at birth is forfeited.

This Comment examines the law of expatriation for each of these three types of citizenship: citizenship by birth in the United States, citizenship by naturalization in the United States, and citizenship by birth abroad when one parent is a United States citizen. Part I briefly traces the developments in expatriation theory as applied to the first two types of citizenship, focusing on the 1967 case of *Afroyim v. Rusk*,⁷ which established the current guidelines for expatriating constitutional citizens. Part II examines the recent United States Supreme Court decision of *Rogers v. Bellei*⁸ and the significance of its holding that there is non-constitutional as well as constitutional citizenship, and shows that the decision in *Bellei* is not supported by history, policy, or reason. Finally, part III considers the effect of *Afroyim* and *Bellei* on United States foreign relations and suggests an alternative method of achieving the objective of expatriation statutes.

I

DEVELOPMENT OF EXPATRIATION THEORY

The power of Congress to expatriate has been disputed since the ratification of the Constitution, which contained neither a definition of citizenship nor a delineation of circumstances in which it could be lost.⁹ During the nineteenth century, the dispute focused on whether a citizen could voluntarily shed his United States or foreign citizenship and thereby relieve himself of obligations arising from allegiance.¹⁰ When

6. 8 U.S.C. § 1401(b) (1970). Section 1401(c) provides that subsection (b) shall only apply to persons born abroad after May 24, 1934.

7. 387 U.S. 253 (1967).

8. 401 U.S. 815 (1971).

9. A full historical development of expatriation theory will not be given here as the subject has been extensively discussed elsewhere. The most thorough examination of expatriation up to 1963 is found in a series of articles by Professor John P. Roche: Roche, *Loss of American Nationality: The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950); Roche, *Statutory Denaturalization*, 13 U. PITT. L. REV. 276 (1952); Roche, *The Expatriation Cases*, 1963 SUP. CT. REV. 325 (1963). For other historical treatment, see Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510 (1960); Klubock, *Expatriation—Its Origin and Meaning*, 38 NOTRE DAME LAW. 1 (1962).

10. Before the Expatriation Act of 1868, ch. 249, 15 Stat. 223, United States courts followed the English view of indefeasible allegiance. See *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 246 (1830). For a thorough treatment of the English doctrine and its application in the United States, see G. HAY, A TREATISE ON EXPATRIATION (1814). The Expatriation Act was interpreted to permit persons to cast off United States citizenship as well as that of foreign nations although the primary purpose of the Act was maintenance of the public peace by allowing emigrants to renounce their prior allegiances. *Savorgnan v. United States*, 338 U.S. 491, 498 n.11 (1950); 9 OP. ATT'Y GEN. 356 (1859).

Congress enacted the first general loss of nationality statute¹¹ in 1907 the focus shifted to the issue of Congressional power to deprive a person of his citizenship. The Act provided for expatriation of those who were naturalized in a foreign state or took an oath of allegiance to one. It also raised a presumption of expatriation for certain persons who resided abroad and declared that all American women who married foreigners would be expatriated.

The number of voluntary acts that would result in loss of nationality was substantially increased by the Nationality Act of 1940.¹² There were subsequent modifications in 1952¹³ and 1954.¹⁴ In a 1958 decision, *Perez v. Brownell*,¹⁵ the Supreme Court held one of two expatriation sections under consideration to be a constitutionally proper exercise of Congress' power to regulate foreign affairs. Section 401(e) provided that a national by birth or naturalization would lose citizenship by voting in an election in a foreign state.¹⁶ Perez, a United States citizen by birth, had voted in the 1946 Mexican presi-

11. Act of March 2, 1907, ch. 2534, 34 Stat. 1228 (1907). See *Mackenzie v. Hare*, 239 U.S. 299 (1915), which held that an American woman who married a foreigner took her husband's nationality under section 3 of the 1907 Act. The Court felt this was not an involuntary expatriation because the woman voluntarily married when she knew what the consequences would be. *Id.* at 311-12.

12. Ch. 876, 54 Stat. 1137, 1168 (1940), as amended, Act of September 27, 1944, ch. 418, 58 Stat. 746 (1944) [now 8 U.S.C. § 1481 (a)(1) (1970)]. Besides the ways listed in the 1907 Act, the 1940 Act provided for loss of nationality for those who serve in the armed forces of a foreign state without authorization; are employed by the government of a foreign state or any of its subdivisions in a position for which only nationals of the state are eligible; vote in a foreign political election; renounce their citizenship before a United States diplomatic or consular officer abroad; renounce in the United States during wartime and receive the approval of the Attorney General; desert the armed forces during wartime and are court martialled and discharged; commit treason and are convicted; or leave the United States during wartime to avoid service in the armed forces. A table giving the numbers of persons expatriated for committing each of these acts during the years 1949-61 is found in Klubock, *supra* note 9, at 49.

13. Immigration and Nationality Act of 1952, ch. 477, § 349, 66 Stat. 163 (1952). Under this statute, service in a foreign country's army became an expatriating act. Expatriation could also result if one took an oath of allegiance in order to gain employment with a foreign government.

14. Expatriation Act of 1954, ch. 1256, 68 Stat. 1146. This Act provided for loss of nationality for those who commit the crimes of rebellion, seditious conspiracy, insurrection, and advocacy of overthrow of the government by force.

15. 356 U.S. 44 (1958). Because the Court found Congress had power under section 401(e), [now 8 U.S.C. § 1481(a)(5) (1970)] to expatriate Perez, it did not reach a decision on the constitutionality of 401(j), which provided for expatriation of all those who remain outside the jurisdiction of the United States to avoid service in the armed forces. This latter section was invalidated five years later in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Nine years later, in *Afroyim v. Rusk*, 387 U.S. 253 (1967), section 401(e) was also invalidated.

16. 8 U.S.C. § 1481(a)(5) (1970) (originally enacted as Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137).

dential election. Speaking for a majority of five, Justice Frankfurter reasoned that the question presented was whether Congress could reasonably conclude that there is a rational nexus between the expatriation provision and fundamental Congressional power to regulate foreign affairs.¹⁷ The Court held it was not irrational for Congress to find that citizens voting abroad could cause embarrassments that might jeopardize Congressional regulation of foreign relations.¹⁸ The single limitation placed upon Congressional power was that only voluntary acts could be grounds for expatriation.¹⁹

On the day it decided *Perez*, the Court, in *Trop v. Dulles*,²⁰ invalidated a different section of the 1940 Nationality Act. Section 401(g)²¹ provided for expatriation of those who are convicted by court martial of deserting the armed forces and are dismissed from the service. Although Chief Justice Warren, speaking for four of the five member majority,²² found there was no rational nexus between this provision and any Congressional powers, the decision rested on the ground that expatriation was being used as a punishment barred by the eighth amendment prohibition against cruel and unusual punishments.²³

Four years later, in *Kennedy v. Mendoza-Martinez*,²⁴ the Court considered the constitutionality of section 401(j) of the 1940 Act,²⁵ which purported to divest citizenship for departing from or remaining outside the United States for the purpose of avoiding service in the armed forces in time of national emergency or war. The Court held section 401(j) and its successor invalid because Congress had employed

17. 356 U.S. at 58. Congress' power to regulate foreign affairs derives from U.S. CONST. art. I, § 8.

18. 356 U.S. at 59.

19. *Id.* at 61. Frankfurter cautioned: "But it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so." *Id.*

20. 356 U.S. 86 (1958).

21. 8 U.S.C. § 1481(a)(8) (1970).

22. Justice Black and Justice Douglas joined in the Chief Justice's opinion, but Justice Black also wrote a short concurring opinion, in which Justice Douglas joined, adding the argument that nothing in the Constitution gives military courts any control over the right to be an American citizen. 356 U.S. at 104.

23. *Id.* at 101. The Court in *Perez* had concluded that expatriation was a rational means of solving international problems. 356 U.S. 44 at 60-62. In *Trop*, the majority found that the purpose of the expatriating section was penal and not rationally related to either Congress' war power or its power over foreign affairs. 356 U.S. 86 at 97-98. Justice Frankfurter, speaking for the dissenters, believed Congress' action was sustainable under the war power. *Id.* at 122.

24. 372 U.S. 144 (1963).

25. The successor to section 401(j), section 349(a)(10) of the Immigration and Nationality Act of 1952, [ch. 477, § 349(a)(10), 66 Stat. 163, now 8 U.S.C. § 1481(a)(10) (1970)], was challenged in the companion case of *Rusk v. Cort*, 372 U.S. 144 (1963).

expatriation as a punishment without affording the procedural safeguards of the fifth and sixth amendments.²⁶ Although Mendoza-Martinez had been tried for draft evasion, and consequently had been afforded these constitutional protections, conviction was not a prerequisite to expatriation; one could lose citizenship without having received the benefit of these procedural safeguards. Furthermore, the expatriating act of section 401(j) included an element not necessary for the conviction of draft evasion—intent to avoid military training or service—so even where one had been tried for draft evasion, he would not have been afforded the procedural protections required to sustain expatriation.²⁷

A third expatriation section was struck down in the 1963 case of *Schneider v. Rusk*.²⁸ Section 352 of the 1952 Immigration and Nationality Act²⁹ provided that a person who had become a United States citizen by naturalization would lose his citizenship by continually residing abroad for three years in the foreign state of which he was formerly a national or in which he was born. In the brief majority opinion, Justice Douglas attacked the section as violative of due process.³⁰ The section was based, he reasoned, on the impermissible assumption that naturalized citizens bear less allegiance to this country and are less reliable than those who gain citizenship by birth in the United States.

When *Afroyim v. Rusk*³¹ came before the Court in 1967, the Nationality Act was no longer as impregnable as it had appeared when *Perez* was decided nearly ten years earlier. As Justice Black stated, speaking for the majority of five in *Afroyim*, the Court had repeatedly invalidated provisions for involuntary expatriation and many commentators had cast considerable doubt upon the soundness of the holding in *Perez*.³²

Afroyim immigrated to the United States and became a naturalized citizen in 1926. In 1950 he went to Israel and, one year later, volun-

26. 372 U.S. at 165-66. The Court did not decide whether the expatriating section was within the powers of Congress. Had the Court concluded that section 401(j) was not a sustainable exercise of Congress' regulatory power, the rule of *Trop* would have applied. See 372 U.S. at 186 n.43. Justice Brennan, concurring, found section 401(j) had no greater connection with the war power than the section involved in *Trop*. Thus, he concluded expatriation under section 401(j) was a cruel and unusual punishment prohibited by the eighth amendment as well as a violation of the fifth and sixth amendments. *Id.* at 193.

27. *Id.* at 167 n.21. See Comment, *Power of Congress to Effect Involuntary Expatriation*, 56 MICH. L. REV. 1142, 1166 n.102 (1958).

28. 377 U.S. 163 (1964).

29. 8 U.S.C. § 1184 (1970) (originally enacted as Immigration and Nationality Act of 1952, ch. 477, § 352(a)(1), 66 Stat. 163).

30. 377 U.S. at 168.

31. 387 U.S. 253 (1967).

32. *Id.* at 255-56.

tarily voted in an election for Israel's legislative body. Nine years after voting, Afroyim applied for a renewal of his United States passport. His application was denied on the ground that he had lost his citizenship by virtue of section 401(e) of the Nationality Act of 1940,³³ which provided a citizen forfeited his citizenship by voting in a foreign political election. Afroyim sought declaratory relief in a federal district court, alleging that since neither the citizenship clause of the fourteenth amendment nor any other provision of the Constitution expressly granted Congress the power to expatriate, citizenship could only be lost by voluntary renunciation.³⁴ The district court³⁵ and the court of appeals,³⁶ relying on *Perez*, held that Congress, because of its power to regulate foreign affairs, has constitutional authority to expatriate those who vote in a foreign country.

The Supreme Court, in reversing the lower courts, explicitly rejected the contention accepted in *Perez* that Congress has express or implied powers to strip an American of his citizenship without his consent.³⁷ Instead, the Court held that Afroyim had a constitutional right to remain a United States citizen unless he voluntarily relinquished that citizenship.³⁸ Justice Black examined at length the historical background of the fourteenth amendment and expatriation proposals. Since he found conflicting inferences could be drawn from the legislative history, he did not rest the decision on this analysis,³⁹ but instead grounded the decision on the language of the fourteenth amendment and the principles of liberty and equal justice the amendment was intended to guarantee.⁴⁰ Justice Black found no indication in the fourteenth amendment that citizenship was valid when acquired, but subject to destruction by the government at any time.⁴¹ Moreover, he said that citizenship is not a trifling matter that could be jeopardized by Congress. Indeed Black thought it would be completely incongruous for one group of citizens temporarily in political control to be able to deprive another group of citizens of their citizenship. As a matter of policy, Justice Black observed loss of citizenship could mean a person would be left without the protection of citizenship in any country—a clearly undesirable result.⁴²

33. 8 U.S.C. § 1481(a)(5) (1970) (originally enacted as Nationality Act of 1940, ch. 876, § 401(e), 54 Stat. 1137). See note 16 *supra* and accompanying text.

34. 387 U.S. at 254-55.

35. 250 F. Supp. 686 (S.D.N.Y. 1966).

36. 361 F.2d 102 (2d Cir. 1966).

37. 387 U.S. at 257.

38. *Id.* at 268.

39. *Id.* at 267.

40. *Id.*

41. *Id.* at 262.

42. *Id.* at 267-68. For a discussion of the problems of statelessness, see text accompanying note 112 *infra*.

Speaking for the four dissenters,⁴³ Justice Harlan attacked the majority's position on two grounds. First, Harlan argued, the majority failed to rebut the reasoning in *Perez* that Congress has the authority to expatriate any citizen who voluntarily commits an act that may be prejudicial to United States foreign relations and that reasonably indicates a dilution of allegiance. Instead, according to Justice Harlan, the majority merely stated the conclusion that Congress did not have power to expatriate a citizen without his consent. Moreover, it was not clear what the majority meant by "consent." Although the majority approvingly cited Chief Justice Warren's dissent in *Perez*,⁴⁴ it adopted a specific intent to expatriate standard, seemingly a substantially greater restriction upon Congress' authority than that urged by Chief Justice Warren in *Perez*.⁴⁵ Secondly, the dissent reasoned that nothing in the history or language of the fourteenth amendment citizenship clause suggested Congress was forbidden in all circumstances to expatriate an unwilling citizen.⁴⁶ On the contrary, immediately before it passed the fourteenth amendment, Congress twice unequivocally expressed its belief that an unwilling citizen could be expatriated.⁴⁷ Although Harlan conceded that the issue before the Court was untouched during the debates on the fourteenth amendment, he found nothing in those debates to support the majority's belief that the citizenship clause prohibited Congress from expatriating unwilling citizens. Rather, its consequences were exhausted by its declaration of those individuals to

43. Justices Harlan, Clark, Stewart, and White.

44. In his *Perez* dissent, Chief Justice Warren recognized that a citizen's conduct showing a voluntary transfer of allegiance is an abandonment of citizenship. 356 U.S. at 68. But he believed the expatriation statute in question was invalid because

its application is not limited to those situations that may rationally be said to constitute an abandonment of citizenship. In specifying that any act of voting in a foreign political election results in loss of citizenship, Congress has employed a classification so broad that it encompasses conduct that fails to show a voluntary abandonment of American citizenship.

Id. at 76.

45. See 387 U.S. at 269 & n.1.

46. *Id.* at 292.

47. Section 14 of the Wade-Davis Bill of 1864 provided that all those who thereafter held any office in the rebel service would lose their United States citizenship. Lincoln did not sign the bill into law. See Roche, *supra* note 9, 1963 SUP. CT. REV. at 354, suggesting that the Congressmen who passed the Bill, rather than tossing in their beds wondering what constitutional power bulwarked section 14, left any needed constitutional justification to the Attorney General or professors of constitutional law. In addition, section 21 of the Enrollment Act of 1865 provided that deserters from the United States military service would be deemed to have forfeited and voluntarily relinquished their rights of citizenship. In greatly modified form, this was the provision held invalid in *Trop v. Dulles*, 356 U.S. 86 (1958), although the holding in that case did not rest on the ground that Congress lacked all power to expatriate an unwilling citizen. See text accompanying note 23 *supra*.

whom citizenship initially attaches.⁴⁸

On the historical question, neither the majority nor the dissent has a persuasive argument. The primary purpose of the citizenship clause was to overrule the *Dred Scott* decision,⁴⁹ its effect on expatriation was virtually ignored by both Congress and the state legislatures.⁵⁰ Since no conclusive argument can be derived from the history of expatriation, the decision in *Afroyim* not to rest on legislative analysis cannot be faulted. It can be challenged, however, for promulgating an ambiguous standard for expatriation.⁵¹ This ambiguity arose because the majority, while stating that the fourteenth amendment gives constitutional protection against Congressional destruction of citizenship and that citizenship can only be relinquished voluntarily, favorably acknowledged Chief Justice Warren's dissenting opinion in *Perez*.⁵² Chief Justice Warren had not suggested Congress was prohibited from destroying citizenship, but only contended that Congress had employed a classification in the statute encompassing conduct that did not evidence a voluntary transfer of citizenship.⁵³ This ambiguity has been criticized by commentators⁵⁴ and presented substantial problems for Attorney General Clark when he issued post-*Afroyim* guidelines for the Department of State and the Immigration and Naturalization Service.⁵⁵

48. 387 U.S. at 292.

49. *Scott v. Sandford*, 60 U.S. (19 How.) (1856). See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72-73 (1873).

50. 387 U.S. at 286 n.48, 289. One commentator, in discussing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962) has stated:

[I]t is hard to discover an area of American public law in which the premises and logic of action have been more absurdly attenuated or the historical record so flagrantly distorted.

The crucial difficulty derives from the fact that a set of improvisations, formulated over a century and a half, were promoted into an ideology in 1940. Since all good ideologies must have historical foundations, there was a hasty movement to the archives and, with appropriate selectivity, a "history" was concocted. Opponents of the expatriation formula, of course, needed a history of their own, or, let us call it, an "anti-history." These two versions of the development of expatriation in the United States have appeared inseparably in all subsequent litigation.

Roche, *supra* note 9, 1963 SUP. CR. REV. at 325-26. Another commentator has concluded, "There is . . . not even a settled body of law from which to proceed by way of reason and analogy. The commentator must state the cases, speculate as to their meaning, and take his stand on policy." Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1165 (1955).

51. See note 45 *supra*.

52. 387 U.S. at 268.

53. 356 U.S. at 76.

54. See 48 B.U.L. REV. 295, 302 (1968); 34 BROOKLYN L. REV. 83, 90-91 (1967); 17 BUFF. L. REV. 925, 935 (1968).

55. The Attorney General stated in the guidelines:

Afroyim did not expressly address itself to the question of defining what declarations or other conduct could properly be regarded as a volun-

There is, however, a common sense solution to this practical problem of interpretation. If voluntary relinquishment were understood in its most narrow sense, the only act that would meet the standard would be an express renunciation of citizenship combined with an intent to expatriate.⁵⁶ For example, a person taking an oath for a lower echelon job in a foreign government would not be automatically expatriated even though the oath contained a pledge of loyalty to the foreign government and a renunciation of all previous allegiances. The United States government would have to further show the individual had a specific intent to expatriate himself. The practical difficulties of proving such specific intent are obvious. A person living abroad rarely would express an intent to renounce his United States citizenship even if he did not plan on returning to the United States in the foreseeable future. By retaining United States citizenship, an individual is subjected to few obligations,⁵⁷ but retains the right to diplomatic protection and, most important, the option of returning to the United States as a citizen at any time. If *Afroyim* were strictly interpreted, the United States could seldom expatriate its citizens.

Such a narrow interpretation of *Afroyim* is not warranted, however. Had the majority intended such a result, they could easily have said this in less equivocal terms. By approving Chief Justice Warren's reasoning in *Perez*, the Court merely indicated the limits of the *Afroyim* holding. Moreover, Justice Black, in opinions both before and after *Afroyim*, has indicated that Congress may declare some acts presumptive of an intent to expatriate.⁵⁸ Combining these indications

tary relinquishment of citizenship. As a consequence, it did not provide guidelines of sufficient detail to permit me to pass definitely upon the validity of other expatriating provisions of the act.

42 OP. ATT'Y GEN. 34, at 2 (1969).

56. The current code provides for express written renunciation. 8 U.S.C. §§ 1481(a)(6), (7) (1970).

57. 22 U.S.C. § 1731 (1970). Aside from Federal income tax liability, the primary obligation of United States citizens living abroad concerns males only. They must register under the Selective Service Act and serve when called. See 50 U.S.C. § 453 (1970).

58. In a concurring opinion in *Nishikawa v. Dulles*, 356 U.S. 129 (1958), Justice Black said:

But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights. Although Congress may provide rules of evidence for such trial, it 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.

Id. at 139. In his dissent in *Rogers v. Bellei*, there is nothing to indicate Justice Black understands voluntary relinquishment to mean only express renunciation. In speaking of *Bellei*, he asserts:

with the *Perez* dissent, a more reasonable interpretation of voluntary relinquishment is possible. Since citizenship by birth in the United States is a constitutional right, any Congressional declaration of the acts constituting voluntary relinquishment of citizenship must be free of both vagueness and overbreadth, two defects that invalidate Congressional acts concerning other constitutionally protected rights.⁵⁹ For example, statutes declaring a presumption of intent to expatriate for all those who voted in politically volatile foreign elections or served as employees of foreign governments would fail, respectively, for vagueness and overbreadth. Furthermore, any act declared an indicium of intent to expatriate must raise only a rebuttable, not a conclusive, presumption. This enables the individual to raise the issue of intent and, should he do so, the burden of proof lies by statute upon the government.⁶⁰

This approach to expatriation strikes a rational balance between the individual's right to citizenship and the government's need to sever its obligations to those whose lives have become so intertwined with the affairs of a foreign nation that retention of United States citizenship would seem unwarranted.⁶¹ After *Afroyim*, the Attorney General has urged,⁶² and the State Department and Immigration and Naturalization Service have applied,⁶³ this interpretation of voluntary relinquishment.

II

NON-CONSTITUTIONAL CITIZENSHIP

In *Rogers v. Bellei*, the Court considered whether the *Afroyim* rule should apply to those who gained their United States citizenship by birth abroad to parents one of whom was a United States citizen

He has never given any *indication* of wanting to expatriate himself but, rather has consistently maintained that he wants to keep his American citizenship. In my view, the decision in *Afroyim*, therefore, requires the Court to hold that Bellei has been unconstitutionally deprived . . . of his right to be an American citizen.

401 U.S. at 838 (emphasis added). Justice Black further states that Bellei could give up his citizenship by either voluntarily renouncing or relinquishing it. *Id.* at 814. If Justice Black understood relinquish to mean nothing more than an express renunciation, he would be guilty here of an obvious redundancy.

59. For an application of the doctrines of vagueness and overbreadth in the freedom of speech context, see *Keyishian v. Board of Regents*, 385 U.S. 589, 597-610 (1967). Chief Justice Warren's dissent in *Perez* was based principally on the overbreadth of the expatriation provision. 356 U.S. at 76.

60. 8 U.S.C. § 1481(c) (1970). The government need only establish its claim by a preponderance of the evidence.

61. See text accompanying note 127 *infra* for a discussion of the government's interest in expatriation.

62. 42 OP. ATT'Y GEN. 34 (1969).

63. Dep't of State Circular Airgram CA-2855, May 16, 1969. See also *King v. Rogers*, No. 26,725 (9th Cir., filed June 26, 1972).

and the other an alien.⁶⁴ Bellei was born in Italy in 1939. His mother was a native-born United States citizen and his father was a citizen of Italy. At birth, he acquired both United States and Italian citizenship.⁶⁵ Bellei had come to the United States five different times. On his fourth visit, he was warned about the five year residency requirement for retention of citizenship. Subsequently, he was informed twice by United States authorities of the possibility of expatriation. In 1964, the American Embassy in Rome orally advised him that this possibility had become a reality. This was confirmed in writing two years later by the American consul when Bellei requested another American passport. After Bellei was expatriated for failing to meet the 5 year residency requirement, he brought an action for injunctive and declaratory relief on the ground that the expatriation section violated the fifth amendment's due process clause, the eighth amendment's cruel and unusual punishment clause, and the ninth amendment. Citing *Afroyim* and *Schneider*, a three-judge district court granted Bellei's motion for summary judgment.⁶⁶

On appeal, Justice Blackmun, speaking for a five member majority, concluded Bellei was not a fourteenth amendment citizen, as he was neither born in the United States nor naturalized, and his claim to citizenship was wholly statutory.⁶⁷ The case was distinguished from *Afroyim* and *Schneider* where citizenship had been achieved respectively by birth in the United States and naturalization. Since Bellei's citizenship was not protected by the fourteenth amendment,⁶⁸ the

64. In the Attorney General Opinion, this question is left open. 42 OP. ATT'Y GEN. 34 (1969). Apparently because there were doubts as to the effect of *Afroyim* on section 301(b) expatriations, the Department of State continued to enforce the section. Six hundred and sixty one persons lost their United States citizenship under section 1401(b) during fiscal years 1964-1968 and 25 cases were under consideration at the time *Bellei* was argued before the Supreme Court. The Department further estimated that several hundred section 1401(b) cases were pending in United States consular offices throughout the world. Brief for Appellant at 8 n.4, *Rogers v. Bellei*, 401 U.S. 815 (1971).

65. Bellei's mother had fulfilled the physical presence in the United States requirement found in 8 U.S.C. § 1401(b) (1970). 401 U.S. at 817-18. The factual details of the case are set forth in the opinion beginning at 817.

66. *Bellei v. Rusk*, 296 F. Supp. 1247 (D.D.C. 1969). The decision rested specifically on a violation of the fifth amendment's due process clause. *Id.* at 1248.

67. 401 U.S. at 827, 833. One author has suggested as an alternative basis for the Court's result that, although Bellei was naturalized, he was not naturalized in the United States. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 66 (1971). Justice Black, in his dissent, also found language in the opinion that indicated the majority might support such a view, but he believed such a narrow and extraordinarily technical reading of the fourteenth amendment was impermissible. He felt the requirement of being naturalized in the United States was undoubtedly intended to mean only that the person be naturalized by United States laws. 401 U.S. at 842-43.

68. For the limitations imposed upon Congress' power to expatriate constitutional citizens, see text accompanying notes 59 and 60 *supra*.

only limitation upon Congressional power to expatriate him was the due process clause of the fifth amendment.⁶⁹ The Court found that Congress had a legitimate concern with problems arising from dual nationality and the imposition of a required period of residence as a condition subsequent to the attainment of citizenship could not be held unreasonable, arbitrary, or capricious.⁷⁰ It reasoned that because Bellei's citizenship derived from a Congressional grant, Congress could have conditioned its grant upon the fulfillment of a condition precedent;⁷¹ it thus would not make sense to say that Congress is powerless to impose a condition subsequent when there would be no constitutional complications had it chosen to impose a condition precedent. In other words, it was merely an exercise of Congressional grace that bestowed Bellei with citizenship at birth instead of withholding it until he had satisfied the five year residency requirement. Since Bellei's citizenship derived from the grace of Congress, and not from the fourteenth amendment's citizenship clause, Justice Blackmun claimed a lack of constitutional protection did not make it in any way "second class."⁷²

69. See 401 U.S. at 828. The application of the due process clause by the Supreme Court should be distinguished from the district court's application. The district court held due process required the same treatment of citizens who had been born abroad that had been afforded citizens who had been born in the United States or who had been naturalized. See note 66 *supra* and accompanying text. The Supreme Court, believing the fourteenth amendment does not cover Bellei type citizens, concluded that due process required only that there be a rational nexus between expatriation and a legitimate Congressional interest.

70. The Court was primarily concerned with the nation's interest in having its citizens bear primary allegiance to it. *Id.* at 832-33. Dual nationality is also a problem for the individual since he is subject to the legal claims of two states.

A person with dual nationality may be subjected to taxes by both states of which he is a national. . . . Either state not at war with the other may insist on military service when the person is present within its territory. In time of war if he supports neither belligerent, both may be aggrieved. One state may be suspicious of his loyalty to it and subject him to the disabilities of an enemy alien, including sequestration of his property, while the other holds his conduct treasonable.

Orfield, *The Legal Effects of Dual Nationality*, 17 GEO. WASH. L. REV. 427, 429 (1949). See also *Kawakita v. United States*, 343 U.S. 717, 723-36 (1952); Nielsen, *Some Vexatious Questions Relating to Nationality*, 20 COLUM. L. REV. 840 (1920). Dual nationality presented various problems for Japanese-Americans during World War II. Many were forced into detention compounds and coerced into renunciation of their United States citizenship. See *McGrath v. Tadayasu-Abo*, 186 F.2d 766 (9th Cir. 1951) and *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949).

71. 401 U.S. at 834. See note 123 *infra*.

72. 401 U.S. at 835-36. The dissenting Justices severely criticized the conclusion that Bellei's citizenship, although conditional, was not second-class. *Id.* at 837, 845. Justice Black was particularly vehement:

[T]he Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court.

Id. at 837.

This Comment will attack the Court's holding, that *Bellei* was not a fourteenth amendment citizen, on three grounds. First, it has little foundation in history. Second, there is no rational justification for distinguishing citizens by birth abroad from other citizens and attempts to maintain the distinction may only lead to confusion in determining which citizens by birth abroad meet the *Bellei* standards for expatriation. Finally, in concluding the government has an interest that can be protected by expatriating *Bellei*-type citizens, the Court failed to consider whether there are other possible methods for protecting the same interest which can be applied to all types of citizens.

A. Historical Bases For Non-Constitutional Citizenship

Bellei's citizenship was gained at birth under section 301(b) of the Immigration and Nationality Act of 1952.⁷³ In the report on the House Bill, it was asserted that since the Constitution had been adopted, United States citizenship could be obtained in two ways: by birth within the United States and by naturalization.⁷⁴ This suggests that the House Committee on the Judiciary considered the method of attaining citizenship set forth in section 301(b) a form of naturalization and not a third method of achieving citizenship.⁷⁵ Furthermore, there is the explicit statement in the Report that the power of Congress to enact those provisions of the bill involving nationality and naturalization derives from article I of the Constitution:⁷⁶ "the Congress shall have power . . . to establish a uniform rule of naturalization."⁷⁷ According to the Report, this grant of authority gave Congress discretion "to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended."⁷⁸ Thus, by enacting section 301(b) of the Act, Congress merely intended to provide a simplified form of naturalization allowing persons born abroad to one American parent to attain citizenship without having to satisfy existing naturalization requirements.⁷⁹

73. Ch. 477, 66 Stat. 236 [now 8 U.S.C. § 1401(b) (1970)].

74. H.R. REP. NO. 1365, 82d Cong., 2d Sess. 24 (1952).

75. This view is supported by the fact section 301(b) was part of Title III—Nationality and Naturalization, and Chapter 1—Nationality at Birth and by Collective Naturalization. Act of June 27, 1952, ch. 477, § 301(b), 66 Stat. 236. The same language is carried over to the official code. See 8 U.S.C. § 1401 (1970).

76. H.R. REP. NO. 1365, 82d Cong., 2d Sess. at 26 (1952). In contrast, those provisions of the Act concerned with immigration were based on Congress' power to regulate commerce with foreign nations and on the power and authority of the United States, as an attribute of sovereignty. *Id.* at 5.

77. U.S. CONST. art. I, § 8, cl. 4.

78. H.R. REP. NO. 1365, 82d Cong., 2d Sess. at 26 (1952).

79. There are numerous instances of naturalization by special statute, including the Act of April 14, 1802, ch. 28, 2 Stat. 153, which granted citizenship for those who

Earlier developments in the law of citizenship support this interpretation of section 301(b). Two important doctrines of citizenship are the principles of *jus soli* and *jus sanguinis*.⁸⁰ The principle of *jus soli*, citizenship by place of birth, is declaratory of the common law inherited from England. The principle of *jus sanguinis*, citizenship derived through the nationality of parents, also had its roots in England, although the doctrine may have been a creature of English statutes rather than part of the common law.⁸¹ The *jus sanguinis* statutes,⁸² and leading British authorities,⁸³ make it clear that both those born in the dominion of England and those born abroad to a father who had been born within the dominion of England were natural born subjects.

In the first few years after the adoption of the Constitution, Congress did not deal with the citizenship status of those born in the United States. Since *jus soli* was a common law doctrine, it is possible Congress felt no need to merely reaffirm the principle; or, as some authors have suggested, the silence may have been attributable to Congressional reluctance to consider such controversial issues as the status of Negro slaves and the relation between national and state citizenship.⁸⁴ Congress did, however, in 1790, grant citizenship at birth to persons born abroad to United States citizens.⁸⁵ The same Act provided for the naturalization of qualified aliens and the derivative naturalization of their minor children. The statute was titled "an Act to establish an uniform rule of Naturalization," indicating Congress believed it was legislating under the Constitution's authorization to establish such uniform rules. At the earliest period of United States constitutional history, then, citizenship obtained by birth abroad was believed to be citizenship by naturalization.

Upon adoption of the fourteenth amendment, it became clear United States citizenship would automatically be granted to those born in the United States, and subject to its jurisdiction, but not to the

had resided in the United States for two years prior to January 29, 1795, and the Act of March 22, 1816, ch. 32, 3 Stat. 258, which granted citizenship to those aliens who had resided in the United States between June 18, 1798, and June 18, 1812. See F. VAN DYNE, A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES 317 (1907).

80. F. VAN DYNE, CITIZENSHIP OF THE UNITED STATES 3-4 (1904).

81. *Id.* at 32. This issue was disputed. See A. COCKBURN, NATIONALITY 9 (1869). But the majority in *Bellei* assumed that citizenship by descent depended upon a statutory enactment. 401 U.S. at 828.

82. 29 Car. II, ch. 6, § 1 (1677); 4 Geo. 2, ch. 21 (1731); 13 Geo. 3, ch. 21 (1773).

83. A. DICEY, THE CONFLICT OF LAWS 177 (1st ed. 1896).

84. See Gordon, *The Citizen and the State*, 53 GEO. L.J. 315, 318, 334 (1965); Roche, *The Expatriation Cases*, 1963 SUP. CT. REV. 325, 328 (1963).

85. Act of March 26, 1790, ch. 3, 1 Stat. 103.

foreign born. The amendment reads "All persons born or naturalized in the United States . . . are citizens of the United States. . . ."⁸⁶ No reference is made to citizens born outside the United States; if such citizens are fourteenth amendment citizens at all, it is because they are citizens by naturalization. Whether they are citizens by naturalization must turn upon the purpose of the fourteenth amendment.

Although it has been said the citizenship clause is a comprehensive definition of United States citizenship so all methods of achieving citizenship, whether existing at the time of the amendment or not, would be subsumable under the phrase "born or naturalized in the United States,"⁸⁷ the *Bellei* majority adopted the view that the purpose of the clause was to protect only those citizenship rights that had previously been recognized⁸⁸ and that *jus sanguinis* citizenship would not fall within the protected sphere. But it is surely anomalous to suggest that Congress intended to exclude those who gained citizenship at their birth abroad from the amendment's protection. Because Congress had treated this group of individuals as naturalized citizens since 1790, it is more probable Congress intended they be treated as naturalized citizens under the fourteen amendment. This view of the citizenship clause has been summarized in a well known dictum:

Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.⁸⁹

Thus, soon after the adoption of the fourteenth amendment, the Court believed *jus sanguinis* citizens were naturalized citizens.

It was not until the Nationality Act of 1940,⁹⁰ the forerunner of current nationality statutes, that naturalization was given a more restrictive meaning. In a special Cabinet Committee report,⁹¹ which

86. U.S. CONST. amend. XIV, § 1, cl. 1.

87. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 73 (1873).

88. See *Rogers v. Bellei*, 401 U.S. at 829-30; *Perez v. Brownell*, 356 U.S. at 58 n.3; cf. Gordon, *Who Can Be President of the United States: The Unsolved Enigma*, 28 MD. L. REV. 1, 13 (1968).

89. *United States v. Wong Kim Ark*, 169 U.S. at 702-703.

90. Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940).

91. Nationality Laws of the United States (1939) (Message from the President of the United States transmitting a report proposing a revision and codification of the nationality laws of the United States).

eventually became the substance of the Act, naturalization was defined as "the conferring of nationality of a state upon a person *after* birth."⁹² The Committee noted that this restrictive definition of naturalization was for the purpose of the Act only, and was adopted because such a meaning was almost universally attributed to the word.⁹³ It further observed that it would be possible to interpret naturalization to cover citizenship gained by foreign birth, but it did not feel this possibility of a broad interpretation precluded using the narrow one.⁹⁴

But the Committee's decision not to treat *jus sanguinis* citizens as naturalized citizens does not dispose of the issue. First, natural born citizen is a more favored classification than naturalized citizen. The natural born tag denotes that at least one parent is a United States citizen and, by virtue of the ten year residence requirement for that parent, also indicates that the family is "American." On the other hand, the label naturalized citizen connotes all the stigma and prejudice that has generally been associated with immigrants. Furthermore, the Committee believed that certain tangible benefits might accrue to only natural born citizens.⁹⁵ Under these circumstances, a gross disservice could have resulted to *jus sanguinis* citizens had they been denominated naturalized citizens.

Secondly, at the time the Committee chose to use a narrow definition of naturalized citizens, excluding *jus sanguinis* citizens, it could not know that naturalized citizens would be held constitutionally immune to involuntary expatriation.⁹⁶ In view of its desire to favor *jus sanguinis* citizens, had the Committee possessed the foresight to see the importance of the citizenship clause's protection, it would certainly not have adopted a narrow definition of naturalized citizen.

The need to interpret the concept of naturalization within its historical context is equally applicable to all pre-*Afroyim*, and perhaps even all pre-*Bellei*, cases involving the citizenship clause. For example, in *United States v. Wong Kim Ark*,⁹⁷ which was decided in 1897, Justice Gray said the fourteenth amendment did not touch citizenship achieved by foreign birth. After *Bellei*, this assertion has great doc-

92. *Id.* at 3 (emphasis added).

93. *Id.* at 3-4.

94. *Id.* at 3.

95. See, e.g., the Committee's observation that a *jus sanguinis* citizen may be eligible for the office of the President of the United States, a position only open to natural born citizens. *Id.* For greater consideration of this question, see Gordon, *supra* note 88.

96. Perhaps the first sign of the importance of the citizenship clause in expatriation cases appeared in Chief Justice Warren's dissent in *Perez*, eighteen years after the Nationality Act was adopted. The first loss of nationality statute was enacted in 1907. See note 11 *supra*. No part of it had been held unconstitutional as of 1939.

97. 169 U.S. at 688.

trinal significance. But Justice Gray continued, in the same sentence, to say citizenship by foreign birth was left to regulation by Congress in the exercise of its Constitutional power "to establish a uniform rule of naturalization." Under the *Bellei* holding, this statement, too, is doctrinally significant and it directly contradicts the prior assertion.⁹⁸ Yet at the time *Wong Kim Ark* was decided the two assertions were doctrinally compatible.⁹⁹ The inconsistencies arise only when the decision is analyzed in terms of a doctrine that has only existed for the last four years.¹⁰⁰

Aside from the historical argument, treating *jus sanguinis* citizens as non-fourteenth amendment citizens is simply unsupported by reason. There is no rational basis for the distinction between citizens born or naturalized in the United States (using naturalized in the more conventional sense) and those who were born abroad and acquired citizenship because of a parent's citizenship.¹⁰¹ A person born in the United States of parents not themselves eligible for naturalization becomes a constitutional citizen.¹⁰² Yet a person born in a foreign country only gains a revocable citizenship even though one of the parents was a United States citizen and might have been abroad for only a very short time. If such a person returns to the United States and resides here until he is eighteen years old and then goes abroad until he is twenty-four, he will lose his citizenship when he becomes twenty-eight. On the other hand, after *Afroyim*, a citizen by naturalization or birth in the United States may reside abroad indefinitely and retain his citizenship if he avoids those acts which may evidence an intent to expatriate.

Even when the person is born abroad and remains abroad, there is no rational justification for carte blanche Congressional power to expatriate. The two arguments that have been advanced in support of this power are first, such citizens do not retain the social ties and allegiance consistent with United States citizenship,¹⁰³ and second, they

98. Under current doctrine it is possible to interpret the two assertions as being consistent with each other by assuming that Gray would allow Congress to deal with *jus sanguinis* citizenship under the naturalization clause even though this was not a form of naturalization. Such an assumption cannot be made, however, as elsewhere in the opinion Gray recognized *jus sanguinis* citizenship as a form of naturalization. See 169 U.S. at 702-703.

99. In view of the context, a likely interpretation of the sentence is that, under the fourteenth amendment, *jus sanguinis* is no longer arguably a matter of right whereas *jus soli* retains this favored position. Instead, *jus sanguinis* may be recognized or not under Congressional naturalization laws.

100. Cf. note 50 *supra*.

101. See Justice Brennan's concurring opinion in *Bellei*, 401 U.S. at 845.

102. This is the conclusion in *United States v. Wong Kim Ark*, 169 U.S. 649, 702-03.

103. Justice Blackmun said Congress was properly and reasonably concerned that United States citizens would grow up with a primary allegiance to the foreign coun-

might frustrate United States foreign policy.¹⁰⁴ The first argument is no longer supportable. In an era of intra-global transportation and growing economic, political, and cultural interdependence, and when a large number of United States citizens work for American corporations and the United States government abroad,¹⁰⁵ extended residence in a foreign country does not preclude allegiance to the United States.¹⁰⁶ It is no longer true, if it ever was, that an American citizen residing abroad will necessarily be dominated by the foreign culture; he may build ties with the United States if he chooses, and whether or not he does cannot rationally be said to turn on how the individual attained his citizenship.¹⁰⁷ In no situation, either where the citizen spends most of his life in the United States or most of it residing abroad, is there a rational basis for concluding he should not be afforded the protection the fourteenth amendment concededly gives those who either were born in the United States or have gone through the more conventional naturalization process.

Thus the second class citizenship¹⁰⁸ given the foreign born has little justification. There is also little support for this position in the legislative history. When examined from a historical perspective, remembering that the significance of the citizenship clause for the law of expatriation could not have been foreseen, the history is more con-

tries in which they were born. This concern probably arose because citizenship has traditionally been looked upon as an association of persons into a nation for the promotion of the general welfare, and allegiance to the government has been treated as the quid pro quo for government protection. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165 (1874). The crucial question at issue in the *jus sanguinis* expatriation cases is whether, assuming for the present that failure to satisfy the condition subsequent is an adequate indicium of lack of allegiance, the mere absence of strong United States allegiance should result in a loss of citizenship or only in a reduction of the United States' concurrent obligation to provide protection. For an argument that the latter result is the proper one, see part III of this Comment.

104. The second justification is considered in part III of this Comment.

105. See Brief of Association of American Wives of Europeans and American Bar Association as *Amici Curiae* at 20 (hereinafter cited as *Amici Brief*); *Rogers v. Bellei*, 401 U.S. 815 (1971), (stating that information received from the Under Secretary of State for Administration shows 940,000 non-military United States civilian government employees). When added to the number of military forces abroad, the total United States population resident overseas is close to 2 million.

106. *Amici Brief* at 19.

107. The ties may be maintained through American schools, churches, or social clubs abroad, or merely through American TV programs and movies which are standard fare abroad. *Amici Brief*, *supra* note 105 at 20. Of course, if the foreign born citizen chooses not to develop these ties, and his acts sufficiently evidence an intent to cast off his citizenship, he should be subject to expatriation just as other citizens would be under similar circumstances.

108. The *Bellei* majority rejected this term because *jus sanguinis* citizenship is granted by the grace of Congress. Yet, those who go through the conventional naturalization process are also granted citizenship by the grace of Congress, and their citizenship may not be lost involuntarily. See note 72 *supra*.

sistent with the position that *jus sanguinis* citizens are naturalized citizens protected by the fourteenth amendment.

B. Practical Difficulties of a Non-Constitutional Citizenship

Although the Court in *Bellei* upheld the imposition of a condition subsequent on citizenship obtained by birth abroad, it recognized that arbitrary or capricious conditions violate the due process clause of the fifth amendment.¹⁰⁹ The condition upheld in *Bellei* cannot fairly be said to have a rational basis, however, and if the *Bellei* standard becomes the measure of rationality, few conditions will fail to pass the Court's scrutiny.

Although many conditions might be upheld, the Court did suggest a number of possible defenses.¹¹⁰ One is statelessness. Expatriation provisions are harshest when the citizen is not a dual national.¹¹¹ A person without a country cannot derive benefits under international law because the law is not concerned with the way a state treats the stateless.¹¹² Consequently, the stateless individual is at the mercy of each country he enters until he obtains a new nationality. In an effort to alleviate this problem, the United Nations has declared that everyone has the right to a nationality.¹¹³ Since the United States is a party signatory to this declaration, it should refrain from enforcing conditions subsequent to citizenship by foreign birth when the individual is not a dual national.

109. 401 U.S. at 831. The majority said the condition was not arbitrary because Congress has an appropriate concern with problems created by dual nationality. This conclusion is examined in part III of this Comment.

110. See 401 U.S. at 836. Because of the peculiar facts of the case, none of these defenses was available to *Bellei*.

111. Also, those problems sought to be alleviated by the condition are minimal where the erstwhile citizen has lost any foreign citizenship which he may have previously had.

112. L. OPPENHEIM, INTERNATIONAL LAW 641, 668 (8th ed. 1955). Two authors have argued that expatriation which results in statelessness may constitute cruel and unusual punishment. Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1187-94 (1955).

113. A Universal Declaration of Human Rights, art. 15, G.A. Res. 217, U.N. Doc. A/810 (1948). Two years later, the United Nations Economic and Social Council adopted a Resolution on Provisions Relating to the Problem of Statelessness (Resolution 319 B III (XI), U.N. Doc. E/1814 (1950)):

The Economic and Social Council,

.

Taking note of article 15 of the Universal Declaration of Human Rights concerning the right of every individual to a nationality,

Considering that statelessness entails serious problems both for individuals and for States, and that it is necessary both to reduce the number of stateless persons and to eliminate the causes of statelessness,

.

Invites States . . . to re-examine their nationality laws with a view to reducing as far as possible the number of cases of statelessness created by the operation of such laws. . . .

A second possible defense is hardship. For many people living abroad, moving to the United States for five years of continuous residence can be disruptive, especially since this requirement must be fulfilled between the ages of fourteen and twenty-eight. Most children do not graduate from high school until they are eighteen years old, leaving only ten years to satisfy the residence requirement. If the individual goes to college, at least four of those ten years will be used up unless he attends an American school, and the costs of higher education in the United States may make this impossible.¹¹⁴ Thus the individual may be twenty-two years old before he has any real opportunity to move to the United States, and the statute requires that he do so before reaching the age of twenty-three.¹¹⁵ There are a number of other obvious mitigating circumstances. For example, the individual may be caring for an invalid relative or he may be in ill health himself. The number of such problems could be multiplied, however, and this suggests a limitation on the defense. Since there will be some hardship in every case, the degree of hardship necessary for a successful defense will probably be large unless another defense is simultaneously urged.

A third defense, present intent to reside in the United States, would be most persuasive if it were combined with hardship; the loss of citizenship would then have a very harsh effect. The greater the hardship and the closer the time the individual intended to come to the United States, the greater are the equities in his favor. Exactly how great they would have to be is not clear. The condition subsequent is capricious, however, when the threat of dual nationality problems is minimized by the individual's intent to come to the United States at a specified time in the near future, although a lesser showing may be sufficient.¹¹⁶

114. Besides the funds needed for tuition, room and board, and spending money, the foreign student may have large travelling costs. These items may be beyond the reach of parents living on a foreign pay scale, and opportunities to limit costs may be few. United States government travel grants are not available to United States citizens, and since the students would not initially be state residents, they would be ineligible for lower resident tuition at public universities. These problems become more acute when there are a large number of children in the family, and some or all of them wish to retain their United States citizenship. *Amici Brief*, *supra* note 105 at 16-17.

115. 8 U.S.C. § 1401(b) (1970).

116. The individual who intends to come to the United States as soon as possible (for example, one who could not come because he was caring for an aged relative) might successfully resist expatriation even though the danger of dual nationality problems would be present indefinitely. If the intent is not feigned, the statute works as harshly here as where the individual intends to come to the United States on a specified date. The burden of proof on intent should lie with the potential expatriate. No more than a preponderance of the evidence should be required, and the degree of

Ignorance and mistake are the remaining two possible defenses mentioned in *Bellei*. The most compelling case of ignorance is where the individual does not know he gained citizenship at birth and says he would have come to the United States had he known. To strip him of his citizenship would be capricious since dual nationality problems, such as conflicting demands made by two countries, cannot arise when he does not know of his United States citizenship. Consequently, if he comes to the United States soon after discovering he is a United States citizen, he should not be subject to loss of citizenship. The same result should be reached where the individual knows he acquired United States citizenship at birth and comes to this country for awhile, but is unaware of the residency requirement and fails to satisfy it. The possibility of dual nationality problems decreases the longer he lives in the United States, and his interest in retaining United States citizenship should increase.

An individual might also have a strong defense when he realizes there is a residency requirement, but is mistaken as to its content or meaning. A typical situation would be where the individual resides in the United States for five or more years while between the ages of fourteen and twenty-eight, but is not continuously present for five years as the statute requires,¹¹⁷ or where he resides in the United States continuously for five or more years, but not after reaching the age of fourteen and before becoming twenty-eight. In many of these situations, since the individual resides in the United States for a substantial length of time, the danger of dual nationality problems would be so slight, and the disability imposed upon the individual so great, that the purpose of the loss of citizenship provision¹¹⁸ would not be served by carrying out its terms.

One possible defense not mentioned by the Court in *Bellei* is coercion or duress. In cases involving constitutional citizenship, coercion negates any implication that the individual's act is evidence of a voluntary relinquishment of citizenship.¹¹⁹ In the third category of citizen-

hardship should be relevant to the issue of intent. Thus, an absence of intent would be inferred if there were only a small amount of hardship. One area where the courts have accepted this intent plus hardship defense is where the individual intended to come to the United States, but the State Department's sluggish processing rendered compliance with the residence requirement impossible. See *Lee Hong v. Acheson*, 110 F. Supp. 60 (N.D. Cal. 1953); *Lee Bang Hong v. Acheson*, 110 F. Supp. 48 (D. Haw. 1951).

117. Under the strict terms of the statute, a person could be born abroad, return to the United States with his family the following day, remain in the United States at all times except while he is eighteen and twenty three years old, and still lose his citizenship.

118. See note 127 *infra*.

119. See, e.g., *Insogna v. Dulles*, 116 F. Supp. 473 (D.D.C. 1953). Duress is not limited to the use of guns, clubs, or physical threats. *Id.* at 473. Renunciations

ship, coercion might be a defense even though it does not constitute hardship. Thus, a person who remains abroad to satisfy some legal duty, such as an employment contract, could be excused from the statute's effect, especially if he intends to come to the United States upon termination of the obligation.¹²⁰

The existence of so many possible defenses may cause the exceptions to become the rule, except for those *jus sanguinis* citizens who, like Bellei, have no valid hardship defense, ignore repeated warnings, and do not even express a desire to retain United States citizenship until after the statutory period has expired.¹²¹ Yet the more often these defenses are successfully invoked, the less effective the statute will be in minimizing embarrassment in foreign relations. This is true even though the likelihood of embarrassment is least in cases where a defense is available,¹²² for some threat will always remain when a United States citizen resides abroad.

If the statute were actually emasculated in this way, Congress might enact even more demanding conditions subsequent, although the same defenses should apply to these conditions as well. Alternatively, Congress could change the present condition subsequent to a condition precedent,¹²³ or even abolish this third route to citizenship. This latter solution is highly improbable, however, since the reasons for recognizing *jus sanguinis* in earlier times exist today.¹²⁴ Similarly, conditions

made by Japanese-Americans in World War II detention centers were held to be non-expatriative because of the duress of government confinement and coercion. McGrath v. Tadayasu-Abo, 186 F.2d 766 (9th Cir. 1951). The Fifth Circuit, however, has recently held that dislike for the selective service laws in and of itself is not legal duress. Jolley v. Immigration and Naturalization Service, 441 F.2d 1245, 1250 (1971).

120. See note 116 *supra* and accompanying text.

121. Bellei came to the United States in 1965 as an alien visitor with an Italian passport. He had been warned twice about the statute, but apparently he did not become concerned until long after his twenty-third birthday, since he did not file suit until 1969. The facts of the case are set forth at 401 U.S. at 817-20. A further possible limitation of the Bellei rule is the amount of proof needed to sustain the government's case. Although it has been argued that the government must prove with clear and convincing evidence that the individual did not satisfy the five year residency requirement, this issue has yet to be decided. See Gonzalez-Gomez v. Immigration and Naturalization Service, 450 F.2d 103 (9th Cir. 1971).

122. Except for the defense of statelessness, a person who has a strong defense to expatriation will generally plan on moving to the United States in the near future. Thus the possibility of causing embarrassments with foreign countries by residing abroad will be diminished. See text accompanying notes 110-20 *supra*.

123. In Bellei, the plaintiff's counsel and counsel for the amici both conceded that Congress may choose not to vest the foreign-born with citizenship at birth, but it may establish conditions precedent to the status. 401 U.S. at 831 & n.6.

124. At the bottom of the *jus sanguinis* doctrine is the belief that blood ties are stronger than those arising from the place of birth. Cf. Weedin v. Chin Bow, 274 U.S. 657, 663-64 (1926). One author has concluded that a major reason for the dominance of the principle is the intense ambition of nearly all states to increase their

precedent, an attractive alternative because they may not have to satisfy the non-capricious standard,¹²⁵ would probably not be imposed. The same arguments for having a special form of naturalization for the foreign born support the position that such a provision should not be too cumbersome or demanding. If it is, those who are born abroad of one United States parent may be deterred from seeking United States citizenship. Similarly, a cumbersome condition subsequent may deter the individual from attempting to retain citizenship. If Congress feels that these individuals should not be deterred from attaining or retaining United States citizenship, and chooses to preserve the rights afforded *jus sanguinis* citizens, it will be left to other means to achieve the condition's objective.

III

AN ALTERNATIVE TO EXPATRIATION FOR PREVENTING EMBARRASMENTS IN FOREIGN AFFAIRS

In appraising an expatriation statute, the opposing interests of the individual and the government must be considered. The individual's interest is retention of his citizenship.¹²⁶ The government's interest is the avoidance of embarrassment in foreign affairs.¹²⁷ Embarrassment is generally caused by United States citizens abroad who promote or encourage conduct contrary to the interests of their government, and this embarrassment can become acute if foreign nations regard the citizens' actions as an expression of official United States policy. Activities Congress has deemed to be indicative of voluntary relinquishment of citizenship are those that not only raise a presumption of intent to expatriate, but also are reasonably likely to result in embarrassment.¹²⁸ For example, under present law service in the armed

manpower in an era of rampant nationalism. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and Loss of Nationality*, 29 AM. J. INT'L L. 248, 278 (1935).

125. The district court in *Bellei* suggested Congress could not create capricious conditions precedent to citizenship, 296 F. Supp. at 1252, but this suggestion should not be valid when Congress, by its own choice, is extending a benefit to non-citizens. See *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 70 n.37 (1971).

126. See text accompanying note 57 *supra*.

127. Congress has not enacted any provisions that use expatriation as a punishment since the Court struck down such a provision in *Trop v. Dulles*. See text accompanying note 20 *supra*. Since the statute in *Trop* failed under the eighth amendment and not the fifth, Congress may not pass a similar statute to be applied to *jus sanguinis* citizens. For a traditional statement by the Court that the purpose of expatriation is avoidance of embarrassment abroad, see *Perez v. Brownell*, 356 U.S. at 57-60.

128. These acts which give rise to a presumption of expatriation, however, are not necessarily the greatest threats to embarrassment abroad. Bribery of a foreign official can cause serious embarrassment, but this is not an expatriative act because it does not indicate an intent to cast off one's citizenship.

forces of a foreign country is presumptive of voluntary relinquishment of citizenship.¹²⁹ Service in foreign armed forces has a high potential for embarrassment. If Country X has strained relations with Country Y, the United States government's efforts to maintain good relations with both countries could be jeopardized if United States citizens are serving in Country X's army. In other situations, embarrassment can result when only one foreign nation is involved. Thus, merely voting in a foreign country raises the presumption of voluntary relinquishment of citizenship.¹³⁰

Since *Afroyim*, some commentators have concluded expatriation statutes can no longer prevent embarrassment abroad¹³¹ and one has even urged the Court to reconsider its decision because the decision interferes with the conduct of our foreign relations, undermines the development of international law, and could foster situations dangerous to United States interests.¹³² These assertions, however, were premised on a narrow interpretation of *Afroyim* that has been rejected in practice and was probably erroneous in its inception.¹³³ Yet it is undoubtedly true that *Afroyim* has greatly limited the government's power to use expatriation to diminish foreign embarrassment. By requiring the government to prove an intent to expatriate, the number of embarrassing situations that can be alleviated by expatriation will certainly be few.¹³⁴

129. 8 U.S.C. § 1481(a)(3) (1970). Such service may, however, be authorized by the Secretary of State and the Secretary of Defense.

130. 8 U.S.C. § 1481(a)(5) (1970). The possibility of embarrassment is greatest where the foreign government is not stable and the United States government desires to maintain healthy relationships with all factions.

131. An attorney for the United States Department of State, Passport Office, has stated:

The rulings of the Supreme Court culminating in *Afroyim* have emasculated, but not totally nullified, the loss of nationality provisions of the Immigration and Nationality Act. . . . The practical effect of *Afroyim* will be to reduce the number of final determinations of expatriation, to increase the number of US citizens with dual nationality, and to facilitate the involvement of US citizens in the community life and processes of foreign states without jeopardizing their citizenship. It is too early to predict with certainty whether these changes in expatriation will significantly affect the conduct of American foreign relations. . . . But the potential effects . . . demand anticipatory concern and attention.

Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search For a Philosophy of American Citizenship*, 56 VA. L. REV. 408, 451-52 (1970). Other authors have not been so cautious in their evaluations of the effect of *Afroyim* upon United States foreign relations. See, e.g., Note, *Fourteenth Amendment—Loss of Citizenship*, 29 OHIO ST. L.J. 797, 800 (1968); cf. note 132 *infra*.

132. Murphy, *Loss of Nationality Under United States Law and Practice: A Foreign Policy Perspective*, 19 KAN. L. REV. 89, 90 (1970).

133. See text accompanying notes 58-63 *supra*.

134. Anyway, expatriation can never do more than lessen damage already done. It does not make the foreign country whole although it may reflect the United States' good faith and minimize any harm done to its image abroad. Alternatively, the foreign nation may look upon the use of expatriation as a scapegoat tactic. See 29 OHIO ST. L.J. 797, 799 (1968).

But even considering that some *jus sanguinis* citizens may be expatriated because *Afroyim* does not protect them, the effect on foreign relations will be insubstantial. Not only is the number of such citizens relatively small, but there are numerous possible exceptions to the *Bellei* rule.¹³⁵

Thus, after *Bellei* and *Afroyim*, expatriation can no longer serve its primary purpose. It is not true, however, that limited availability of expatriation will undermine the development of international law and substantially endanger vital United States interests. This assertion assumes there are no other effective means to limit foreign embarrassment. On the contrary, there is an alternative method of minimizing United States embarrassment caused by the acts of citizens abroad. Rather than removing the citizenship of those who threaten the maintenance of foreign relations, the government should withdraw the right to diplomatic protection. The individual would retain his citizenship, and his obligations to the United States (primarily to pay taxes and serve in the military) would remain intact. He would at all times be free to return to the United States. But if a foreign government imprisons or otherwise harrasses him because of his conduct, the United States would not have to approve his actions implicitly by intervening on his behalf.

Prior to the 1940 compilation of the immigration and nationality laws, three Cabinet members advocated the adoption of involuntary expatriation sections, rejecting the sanction of withholding diplomatic protection on the ground that it was theoretically inconsistent with the notion of citizenship.¹³⁶ As a matter of international legal theory, their view was clearly incorrect. The diplomatic protection of one's government is a moral rather than legal right, and there are no legal means for its enforcement.¹³⁷ Moreover, their position was inconsistent with the government's course of action for the previous seventy years during which the State Department had exercised the power of withholding diplomatic protection from some citizens who were abroad.¹³⁸

135. See text accompanying note 110 *supra*.

136. Letter of June 1, 1938, from Cordell Hull, Secretary of State, Frances Perkins, Secretary of Labor, and Homer Cummings, Attorney General, to the President. Hearings on H.R. 6127, Superseded by H.R. 9980, Before the House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess., 407-10 (1940).

137. E. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 29-30 (1928). Mr. Borchard, an ex-solicitor for the Department of State, observed that even in Germany where the right to diplomatic protection is contained in the constitution, no legal remedy or means of enforcing the right has been granted. *Id.* at 30.

138. The right to withhold diplomatic protection was recognized as early as 1804 when Chief Justice Marshall wrote in *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 120 (1804):

The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no

This practice was explicitly approved by Congress in 1907, and in 1910 the Department of State established a number of tests and presumptions to be used in determining whether an individual had so far identified himself with a foreign nation that he could be deemed to have renounced his right to American protection.¹³⁹

The Constitution does not forbid this approach as a means to limit embarrassments in foreign affairs. Only a dictum by the Supreme Court has suggested that United States citizens have a right to protection when within the jurisdiction of a foreign government.¹⁴⁰ Even if such a right does exist, it would presumably be subject to necessary limitation, as are other constitutional rights. For example, the constitutional right to travel abroad has been held subordinate to the President's power over foreign affairs, and, since the Court has recognized foreign policy decisions are the province of the executive and legislative branches, it has generally refused to review or nullify such decisions.¹⁴¹ The only possible statutory limitation on the government's power to withhold diplomatic protection is a provision requiring the President, when informed a United States citizen has been imprisoned by a foreign government, to demand of that government the reasons for its action. If the imprisonment appears to be wrongful, the President must demand release of the citizen and use any necessary and proper means to secure

other act changing his condition, entitled to the protection of his own government. . . . But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power.

See also Sandifer, *supra* note 124, at 278:

A rule limiting the right of [persons residing abroad] to diplomatic protection, especially as against the state in which they live, would be of considerable value in removing a serious source of friction in international relations. . . . [N]o state enforcing such a rule would suffer from its application.

Sandifer was Assistant to the Legal Adviser, Department of State, when the article was published.

139. Section 2 of the Act of March 2, 1907, ch. 2534, 34 Stat. 1228, although called an expatriation provision, was designed to permit the State Department to withhold diplomatic protection from certain naturalized citizens residing abroad. See Klubock, *Expatriation—Its Origin and Meaning*, 38 NOTRE DAME LAW. 1, 8 (1962). For a discussion of the specific provisions of the State Department's circular containing the tests and presumptions (dated July 26, 1910), see BORCHARD, *supra* note 137 at 810-16.

140. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872). Justice Miller said there is a right to demand the care and protection of the United States government, but because of the context the meaning of this statement is uncertain. It may mean that the right has been fully exercised upon the filing of the demand. Moreover, the Court has recently recommended that the Government withhold diplomatic protection of draft evaders rather than expatriating them. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 185.

141. See *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1947); *Worthy v. Herter*, 270 F.2d 905, 910-11 (D.D.C. 1959); *accord*, *Zemel v. Rusk*, 381 U.S. 1 (1965).

it.¹⁴² This provision, however, would have little effect on the government's choice to withhold diplomatic protection since it only applies where imprisonment is involved. Furthermore, the imprisonment must be wrongful and violate the rights of a United States citizen; this requirement would not be satisfied every time an individual embarrassed the United States. Moreover, any possible conflict between the statute and the practice of denying diplomatic protection could be avoided by amending the statute.

The primary virtue of withholding diplomatic protection rather than expatriating is that it strikes a fairer balance between the government's need to limit embarrassment abroad and the individual's interest in preserving his citizenship. In addition, such a practice should be equally effective in preserving proper foreign relations. For example, if countries X and Y have strained relations and United States citizens are serving in Country X's army, the most expatriation can do to assuage Country Y's displeasure is to assure that country the United States will no longer be responsible for those individuals; expatriation will not prevent them from continuing to fight in Country X's army.¹⁴³ Withholding diplomatic protection achieves the same result. From Country Y's point of view, the United States citizens become no different than the citizens of Country X and may be treated as such without fearing an embroglio with the United States.¹⁴⁴

Furthermore, the individual retains the right to be recognized as a United States citizen when in the United States. Because of this benefit, and since the effectiveness of denying diplomatic protection would approximate that of expatriation, the former remedy should be invoked in some cases even though the facts would support expatriation. The government would have one method of limiting foreign embarrassments that could be used in nearly every case, and expatriation would be resorted to only when complete disassociation seemed necessary and the *Afroyim* requirement of voluntary relinquishment of citizenship could be satisfied.

142. 22 U.S.C. § 1732 (1970). Section 1731 provides that naturalized citizens are entitled to the same protection abroad as native born citizens.

143. See note 134 *supra*.

144. As a caveat to the claim that withholding diplomatic protection would be as effective in preserving proper relations as expatriation, the deterrent value of expatriation may actually be greater. However, the individual must be able to gauge ahead of time whether his conduct will subject him to the possibility of expatriation or only to the denial of United States protection, and such an assessment would be at least difficult and perhaps impossible to make. Even if the deterrent value of denying diplomatic protection is less, this disadvantage should be outweighed by the individual's interest in retaining his right to return to the United States and to be recognized as a United States citizen.

CONCLUSION

Afroyim v. Rusk has by no means sacrificed United States foreign policy by protecting fourteenth amendment citizens from involuntary relinquishment of their citizenship. Congress has ample means to limit foreign embarrassments; *Afroyim* merely circumscribes its choice of weapons.

Rogers v. Bellei, however, holding that certain types of citizenship are not protected by the fourteenth amendment, unnecessarily sacrifices citizenship to foreign policy. Although the Court believed that the conditions subsequent in *Bellei* were reasonably related to Congress' need to maintain proper foreign relations, Congress could have met this need just as effectively by employing the same methods available to it when dealing with the other two types of citizens. By ignoring this alternative and excluding *jus sanguinis* citizens from the fourteenth amendment's protection, the Court has exhumed the discriminations between types of citizens that were buried in *Schneider v. Rusk*.

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