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COMMENTS

DOES CONGRESS HAVE THE CONSTITUTIONAL AUTHORITY TO EXPATRIATE AMERICAN CITIZENS?

INTRODUCTION

In 1967, in the landmark case of *Afroyim v. Rusk*,[1] the United States Supreme Court appeared to settle once and for all the question of whether Congress had the statutory power under the Constitution to involuntarily expatiate American citizens.[2] Giving an unequivocal negative answer, Mr. Justice Black wrote:

> We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against . . . forcible destruction of his citizenship. . . . Our holding . . . give[s] to [each] . . . citizen that which is his own, a constitutional right to remain a citizen in a free country unless he *voluntarily relinquishes* that citizenship.[3]

Nevertheless, a scant four year later, the Court, in *Rogers v. Bellei*,[4] held that the fourteenth amendment was inapplicable[5] to citizens who were born outside of the United States and enjoy their citizenship solely on the basis of being children of American citizens. Thus, plaintiff Bellei, born in Italy, the son of an American mother and an Italian father, was denationalized for failing to comply with the five-year continuous residency requirement of the statute conferring him with citizenship.[6] Mr. Justice Blackmun, writing for the majority,

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1. 387 U.S. 253 (1967).
2. Strictly speaking, "expatriation" is a voluntary renunciation of citizenship, while "denationalization" refers to a statutory confiscation. This comment will treat these terms as being identical.
3. Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (emphasis added).
4. 401 U.S. 815 (1971).
5. U.S. CONST. amend. XIV, §1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."
6. Immigration and Nationality Act of 1952, 8 U.S.C. § 1401 (1970). Section 1401(a)(7) confers citizenship, while section 1401(b) prescribes the residency requirement:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> . . . .
>
> (7) a person born outside the geographical limitations of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of

found that provision to be a valid condition subsequent. This decision marked the end of a thirteen-year Court trend holding various congressional denationalization provisions unconstitutional. It has, at least in part, undermined *Afroyim,* and once again raised the question of the congressional expatriation power. This paper will attempt to analyze the implications of *Rogers v. Bellei,* in view of the shift in the law that it may portend.

I. THE EARLIER CASES

A. *The Voluntary Act Standard*

The question of expatriation is an old legal problem. The English common law and early nineteenth century American cases followed the feudal doctrine of "indefeasible allegiance," whereby a citizen could not voluntarily expatriate himself without sovereign approval. In *Shanks v. DuPont,*[7] the Marshall Court, per Mr. Justice Story, said:

> The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance and become aliens.[8]

The vast majority of expatriation cases, however, have involved an involuntary expatriation of a citizen by the government. In *Osborne v. Bank of the United States,*[9] Chief Justice Marshall said, in dictum:

> 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.[10]

In 1868 the fourteenth amendment was ratified. Its effect on expatriation law was discussed in *United States v. Wong Kim Ark.*[11] In

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such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years. . . .

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present . . . for at least five years: *Provided,* that such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

7. 28 U.S. (3 Pet.) 242 (1830).
8. *Id.* at 246.
9. 22 U.S. (9 Wheat.) 738 (1824).
10. *Id.* at 827.
11. 169 U.S. 649 (1898).

this case the Court held that a person born in the United States to alien parents of Chinese ancestry could not be kept out of the country by the Chinese Exclusion Acts, since he was a citizen by birth and had not voluntarily renounced his citizenship. The Court stated that "[t]he power of naturalization, vested in Congress . . . is a power to *confer* citizenship, not a power to take it away."[12] However, it was said in dicta that the fourteenth amendment:

> has not touched the acquisition of citizenship by being born *abroad* of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power . . . to establish an uniform rule of naturalization.[13]

During the first half of the twentieth century, the Court upheld the denationalization authority of Congress under the foreign affairs or war powers. In order to be expatriated, the citizen had to commit a *voluntary act.* However, this voluntary act did not have to be performed with the intent or desire to renounce United States citizenship. It was sufficient that Congress had statutorily provided that a given act would result in denationalization and that the citizen had voluntarily committed that act. Thus, in the leading case of *Mackenzie v. Hare*,[14] the Court unanimously sustained a law involuntarily expatriating American women who married foreign nationals,[15] even though the plaintiff and her husband were domiciled in the United States. Under the power to regulate foreign affairs, Mr. Justice McKenna found that Congress could have decided that:

> [Such] an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected.[16]

In *Perkins v. Elg*,[17] the Court refused to apply a statute denationalizing United States citizens who become naturalized citizens of another country.[18] In this case, plaintiff, a native-born citizen, had been

12. *Id.* at 703 (emphasis added).
13. *Id.* at 688 (emphasis added). The naturalization power is conferred on Congress by the Constitution via art. I, § 8, cl. 4.
14. 239 U.S. 299 (1915).
15. Act of March 2, 1907, ch. 2534, 34 Stat. 1228.
16. 239 U.S. at 312. The government has recently conceded that such a provision is unconstitutional. Rocha v. Immigration and Naturalization Serv., 450 F.2d 946 (1st. Cir. 1971).
17. 307 U.S. 325 (1939).
18. Act of March 2, 1907, ch. 2534, 34 Stat. 1228.

taken to Sweden by her parents as a child, thereby becoming a Swedish citizen under that country's laws. At the age of twenty-one, she chose to return to America to live. Following the earlier *Mackenzie* theme, albeit to achieve a different result, Chief Justice Hughes held that the statute was only aimed at voluntary acts, and that "the intent not to return could not properly be attributed to her during minority . . . ."[19] While this construction of the statute avoided the issue of its constitutionality, it is clear that the authority of Congress to pass such legislation was not seriously doubted.

Similar reasoning was applied in *Savorgnan v. United States*,[20] where, in order to marry an alien, appellent signed an oath renouncing her American citizenship and swearing allegiance to the King of Italy. The documents, however, were in Italian, which Mrs. Savorgnan could not read. Although a federal district court found that plaintiff had not *intended* to renounce her allegiance to the United States, the Supreme Court found this to be immaterial. Once again, the test of renunication of citizenship was an objective one; the fact that the documents had been signed voluntarily was a sufficient ground for expatriation. The Court did not consider any constitutional issues.

The case of *Kawakita v. United States*[21] is an unusual one in that defendant, a dual national born in the United States of Japanese parents, was "trapped" in Japan during World War II. Kawakita eventually registered in Japan as a citizen, swore allegiance to the Emporer, joined the Japanese armed forces, and committed atrocities against American prisoners of war. The Court, per Mr. Justice Douglas, refused to find as a matter of law that the defendant had renounced his American citizenship, allowing a conviction for treason and sentence of hanging to stand.

B. *The Voluntary Renunciation Standard*

The trend toward a voluntary renunciation of citizenship standard for denationalization started with two companion cases which were decided in 1958. In *Perez v. Brownell*,[22] the Court held constitutional

19. Perkins v. Elg, 307 U.S. 325, 339 (1939). *Cf.* Mandoli v. Acheson, 344 U.S. 133 (1952), holding that a native-born American taken to Italy as a child retained his citizenship even though he had not expressly elected to become a United States citizen on reaching his majority.
20. 338 U.S. 491 (1950).
21. 343 U.S. 717 (1952).
22. 356 U.S. 44 (1958).

a statute providing that a United States citizen, "by birth or naturalization, shall lose his nationality by . . . [v]oting in a political election in a foreign state . . . ."[23] Writing for a five to four majority, Mr. Justice Frankfurter said that in order for Congress to validly legislate, a rational nexus must exist between the act of Congress and some specific power given to it under the Constitution. Here, Congress could act under the foreign affairs power, and since an American citizen participating in the political affairs of another country could well prove to be a source of embarrassment to this country, there was such a rational nexus. In addition, voting in a foreign election implies an element of allegiance to that country. Thus, the provision was upheld as a reasonable exercise of congressional power. To emphasize his views, Mr. Justice Frankfurter remarked that "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."[24]

In a thoughtful dissent, Chief Justice Warren concluded that *Congress* has no power to denationalize, even though a citizen, by certain acts, may expatriate *himself*. Thus,

> citizenship may not only be voluntarily renounced through exercise of . . . expatriation but also by other actions in derogation of undivided allegiance to this country . . . . Any action by which [a citizen] manifests allegiance to a foreign state may be so inconsistent with the retention of citizenship as to result in loss of that status.[25]

According to the Chief Justice, the mere act of voting in a foreign election, regardless of the surrounding circumstances, should not be held sufficient per se to automatically forfeit United States citizenship;[26] the statute's language was too broad. In a separate dissent, Mr. Justice Douglas went further, saying that while the fourteenth amendment *grants* citizenship, nothing in the Constitution allows it to be taken away; it can only be lost if intentionally waived.[27]

Perez thus presents the three principal views on denationalization: the Frankfurter (and Harlan) idea that Congress may prescribe reasonable conditions for loss of citizenship; the absolutist idea of Douglas (and Black) that Congress may prescribe no conditions for involuntary

23. Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(5) (1970).
24. Perez v. Brownell, 356 U.S. 44, 61 (1958) (emphasis added).
25. *Id.* at 68.
26. *Id.* at 78.
27. *Id.* at 83.

loss of citizenship; and the intermediate view of Warren that although *Congress* cannot denationalize, a citizen, by his actions, may forfeit his American citizenship.

Immediately succeeding *Perez* was *Trop v. Dulles*,[28] the first decision of the Supreme Court to invalidate an expatriation statute. In another five to four decision, Chief Justice Warren, this time writing for the majority, voided a law prescribing denationalization for wartime desertion.[29] Although the Chief Justice retained the principles articulated in his *Perez* dissent, he recognized that they had just been rejected by the majority. Thus, an alternative rationale was given—Congress was using denationalization as a *punishment* to deter wartime desertion. In view of the possible consequence of being a stateless person, such punishment was found to be *cruel and unusual*, violating the eighth amendment.[30] This was so in spite of the fact that wartime desertion was also punishable by the death penalty.

The concurring opinion of Mr. Justice Brennan, who had joined in the Court's decision to uphold the involuntary expatriation in *Perez*, purported to follow the rational nexus rationale. In *Trop*, however, Mr. Justice Brennan simply did not find a sufficient connection between the war power of Congress and denationalization for wartime desertion, analogizing this situation to expatriation of a taxpayer for shirking his duty to pay taxes.[31]

Dissenting, Mr. Justice Frankfurter not surprisingly found the nexus "between refusal to perform this ultimate duty of American citizenship and legislative withdrawal of that citizenship."[32] As for the cruel and unusual punishment argument, Frankfurter somewhat sarcastically questioned whether loss of citizenship was "a fate worse than death."[33]

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28. 356 U.S. 86 (1958).

29. Nationality Act of 1940, 54 Stat. 1168-69, *as amended* 8 U.S.C. § 1481(a)(8) (1970).

30. Trop v. Dulles, 356 U.S. 86, 102 (1958). *But see* Marks v. Esperdy, 377 U.S. 214 (1964), where an evenly divided Court affirmed the denationalization of an American who served in the rebel army of Fidel Castro during the Cuban Revolution. The lower court had found no cruel and unusual punishment.

31. 356 U.S. at 113.

32. *Id.* at 122.

33. *Id.* at 125. The subsequent case of Nishikawa v. Dulles, 356 U.S. 129 (1958), reversed a lower court's decision denationalizing an American citizen and dual national, who was drafted into the Japanese army during World War II. That case turned on the government's failure to meet the requisite burden of proof that plaintiff's conduct was voluntary.

The consolidated cases of *Rusk v. Cort*, and *Kennedy v. Mendoza-Martinez*,[34] refused to allow plaintiffs' expatriation for leaving the country for the purpose of draft evasion during time of war or national emergency.[35] In these cases, Mendoza-Martinez had been convicted of draft evasion and ordered deported, while Cort had never been tried. Unable to reach a majority view, the Court's five to four decision was fragmented into five separate opinions. The principal opinion by Mr. Justice Goldberg managed to avoid the constitutional question of Congress' expatriation power. Instead, it held that the loss of citizenship here was primarily *penal*, and thus could not be validly accomplished by the statute's automatic forfeiture provision. Such a punitive measure required judicial or administrative proceedings, with appropriate due process safeguards: the right of confrontation of witnesses, assistance of counsel, etc.

Justices Black and Douglas joined in the opinion of the Court, but also concurred separately, repeating their position that Congress was proscribed by the fourteenth amendment from denationalizing American citizens. Mr. Justice Brennan concurred in the result, finding the statute unconstitutional under either the lack of a rational nexus or cruel and unusual punishment approaches of *Trop v. Dulles*.[36] The principal dissent, by Mr. Justice Stewart, would have sustained expatriation under the war power as legitimately "removing a corrosive influence upon the morale of a nation at war."[37]

In *Schneider v. Rusk*,[38] the Court invalidated a statutory provision calling for automatic expatriation of a naturalized citizen who resided for three years "in the territory of a foreign state of which he was formerly a national . . . ."[39] Mr. Justice Douglas would have preferred to apply the reasoning of the dissenters in *Perez*. Since that position did not command a majority, however, he decided the case on due process grounds. Starting with the assumption that the citizenship rights of the foreign-born naturalized citizen are equivalent to those of the native-born,[40] the Court found that the statute assumes

34. 372 U.S. 144 (1963).

35. Both cases involved provisions currently found in the Immigration and Nationality Act of 1952, § 349(a)(10), 8 U.S.C. § 1481(a)(10) (1970).

36. 356 U.S. 86 (1958).

37. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 213 (1963).

38. 377 U.S. 163 (1964).

39. Immigration and Nationality Act of 1952, § 352(a)(1), 8 U.S.C. § 1484(a)(1) (1970).

40. Note, however, that only native-born Americans may be elected President of the United States. U.S. CONST. art. II, § 1.

> that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make.[41]

Thus, since the native-born American citizen is totally free to spend as much time as he wishes in any foreign country without suffering denationalization, the statute created a "second-class citizenship."[42] Such discrimination is so unjust, it is a violation of due process of law.[43]

The dissent of Mr. Justice Clark pointed out that plaintiff, Mrs. Schneider, had returned to her native land (Germany), had lived there for the previous eight years, had married a German national, had borne four sons there, and admitted having no intention of returning to the United States. Mr. Justice Clark concluded that plaintiff

> wishes to retain her citizenship on a standby basis for her own benefit in the event of trouble. There is no constitutional necessity for Congress to accede to her wish.[44]

Thus, whatever the merits of the statute, as to this plaintiff, under the instant circumstances, the dissent found no violation of due process and would have sustained the provision.

Three years after *Schneider,* and despite the absence of a change in Court personnel, the voluntary renunciation theory of Justices Black and Douglas appeared to win a total victory in *Afroyim v. Rusk.*[45] *Afroyim* involved the denationalization of a naturalized United States citizen who had spent ten years in Israel and had voted there. The statute in question was section 349 of the Immigration and Nationality Act of 1952,[46] the same provision that had been found constitutional nine years earlier in *Perez v. Brownell.*[47] The five to four majority opinion by Justice Black specifically overruled *Perez,* stating:

> [W]e reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. . . . [I]t cannot . . . be sustained as an implied attribute of sovereignty possessed by all nations.[48]

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41. Schneider v. Rusk, 377 U.S. 163, 168 (1964).
42. *Id.* at 169.
43. U.S. CONST. amend. V.
44. 377 U.S. at 178.
45. 387 U.S. 253 (1967).
46. 8 U.S.C. § 1481(a)(5) (1970).
47. 356 U.S. 44 (1958).
48. Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

Not only did the Court find no *affirmative* Congressional expatriation power, it held that the citizenship clause of the fourteenth amendment ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . .") conferred an absolute citizenship that could not be revoked by Congress. The Court thus abandoned its policy of piecemeal invalidation of denationalization statutes, and, in effect, struck them all down. No longer could loss of citizenship be predicated on the mere voluntary performance of some act which Congress declared would result in denationalization. In order to be expatriated, an American citizen must voluntarily renounce his allegiance.[49]

The rationale behind the sweeping opinion in *Afroyim* is questionable, and the case was immediately criticized.[50] Mr. Justice Black at first sought to give an historical analysis and justification for the Court's new interpretation of the citizenship clause. However, even he admitted that this argument was less than convincing.[51] Mr. Justice Black ultimately relied on the language of the fourteenth amendment to sustain his position. But, as one commentator has noted, the language of the citizenship clause "is singularly ambiguous"[52] and supports an opposite interpretation equally well.

Finding the majority's historical analysis "wholly inconclusive," Mr. Justice Harlan presented his own version in a vigorous dissent.[53] He found the purpose of the citizenship clause was to reverse the *Dred Scott* decision[54] and to provide for a national citizenship. According to Mr. Justice Harlan:

> [N]othing in the history, purposes, or language of the [citizenship] clause suggests that it forbids Congress in all circumstances to withdraw the citizenship of an unwilling citizen. . . . [I]t is not proper to create . . . an additional, and entirely unwarranted, restriction upon

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49. *Id.* at 268.

50. *See, e.g.*, 54 CORNELL L. REV. 624 (1969); 53 CORNELL L. REV. 325 (1968); *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 126 (1967).

51. 387 U.S. at 267. Mr. Justice Black also stated that he agreed with Chief Justice Warren's dissent in *Perez*. However, Warren's dissent did *not* support Black's position, since the former believed that the commission of certain acts *other* than voluntary expatriation could result in loss of citizenship. *See* text at *supra* note 25.

52. *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 126, 136 (1967).

53. 387 U.S. at 291.

54. Scott v. Sanford, 60 U.S. (19 How.) 393 (1856), held that Negroes "are not . . . and were not intended to be included . . . under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. *Id.* at 404.

> the legislative authority. The construction now placed on the Citizenship Clause rests . . . simply on the Court's *ipse dixit,* evincing little more . . . than the present majority's own distaste for the expatriation power.[55]

II. *Rogers v. Bellei*—Retreat From Absolute Citizenship?

Aldo Mario Bellei was born in Italy on December 22, 1939, the son of an American mother and an Italian father. While Bellei was thus a United States citizen at birth, via the provisions of the Immigration and Nationality Act of 1952,[56] he would lose his citizenship under section 301 (b) of that Act if he did not reside in the United States for five consecutive years between the ages of fourteen and twenty-eight.[57] Plaintiff Bellei had visited America five times: twice as a child under his mother's passport, twice (at ages fifteen and twenty-three) under his own United States passport, and once (age twenty-five) as an alien visitor under his Italian passport. He spent a total of approximately one year in this country, concededly failing to fulfill the statutory requirements for maintenance of citizenship. Before reaching the age of twenty-three, Bellei was twice given official written warnings about the regulation. Plaintiff sued to enjoin the Secretary of State from enforcing the denationalization provisions, and for a declaratory judgment that it was unconstitutional. In *Bellei v. Rusk,*[58] a three-judge federal district court held the provision to be invalid, based on the authority of *Schneider* and *Afroyim.*[59] The district court recognized that the latter two cases were distinguishable on their facts, in that both involved naturalization—a form of citizenship expressly protected by the fourteenth amendment—while the instant case merely involved conferral by congressional act. Nevertheless, the court did not find this distinction to be controlling. The court reasoned that Mr. Justice Black's

55. 387 U.S. at 292-93.

56. 8 U.S.C. § 1401(a)(7) (1970).

57. *Id.* at § 1401(b). *See supra* note 6 and accompanying text. A 1957 amendment specified that absences from the country for a total of less than twelve months would not break the five-year continuous residency requirement. 8 U.S.C. § 1401(b) (1970).

58. 296 F. Supp. 1247 (D.D.C. 1969). In this case plaintiff, a United States citizen at birth, stipulated that he did not meet the statutory requirements. If the facts had been in dispute the burden of proof on the issue of compliance would have been on the government. It is uncertain whether such a burden would require a showing of "clear, unequivocal and convincing evidence" or whether a mere "preponderance of the evidence" would suffice. Gonzalez-Gomez v. Immigration and Naturalization Serv., 450 F.2d 103, 105 (9th Cir. 1971).

59. 296 F. Supp. at 1252.

broad language in *Afroyim* did not contemplate leaving an entire group of United States citizens beyond the constitutional protection.[60] *Afroyim* absolutely barred the involuntary expatriation of American citizens.

The district court found somewhat more favor with the government's alternate argument that

> section 301(b) is simply a reasonable way of [Congress'] assuring that children of hybrid origin give some affirmative indication of desiring to be part of our society as well as avail themselves of our protection and the opportunity to come to this country whenever it proves expedient.[61]

The court acknowledged that Congress has a legitimate concern that children of such a marriage should in fact have some connection with the United States if they are to be its citizens. However, once Congress *conferred* such citizenship at birth, *Afroyim* precluded its withdrawal without the citizen's consent.

A concurring opinion implied that the principal difficulty of the statute in question was that it stated a condition *subsequent*—it conferred citizenship contingent upon the future performance of an act. If the statute had instead imposed a condition *precedent,* deferring the grant of citizenship until after the act was completed, the provision would have met constitutional requirements, assuming the condition was reasonable.[62] Failure to perform such a condition (a five-year residency requirement) would not involve involuntary expatriation, since no citizenship would have been conferred in the first place.

Bellei v. Rusk was decided by the district court in 1969. Its result seems compelled by *Afroyim.* However, by the time the government appealed to the Supreme Court, history had intervened. Mr. Justice Fortas, one of the *Afroyim* majority, had resigned.[63] Thus, when the appeal was argued before an eight-member Court in January, 1970, one might have expected a deadlock to result. At any rate, after the appointment of Mr. Justice Blackmun, the case was reargued in November and was decided the following April. Appropriately, the five to four

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60. *Id.* at 1251.
61. *Id.*
62. *Id.* at 1253.
63. The replacement of Mr. Justice Clark by Mr. Justice Marshall in 1967 and Chief Justice Warren by Chief Justice Burger in 1969 can be considered to cancel each other out for present purposes.

majority opinion was written by Mr. Justice Blackmun, who cast the deciding vote.

In *Rogers v. Bellei*,[64] the Supreme Court reversed the district court, upholding the denationalization provision. More interesting than the result, however, is the manner in which it was achieved. The simplest approach would have been to flatly overrule *Afroyim* and limit that case's holding to the proposition that merely voting in a foreign election was not a constitutionally permissible reason for automatic involuntary expatriation. The majority, however, would not so emasculate an opinion written a mere four years earlier. Instead, *Afroyim* was merely undermined. One commentator has stated that in *Bellei* "the Court did not . . . either affirm or overrule *Afroyim*."[65] In fact, while *Bellei* referred to the *Afroyim* broad holding of barring all involuntary expatriation, it seemed to do this *arguendo*, tolerating it for the moment, because the Court was able to find that it did not apply to the instant case.

Mr. Justice Blackmun started with the fourteenth amendment's citizenship clause: "All persons *born or naturalized in* the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."[66] He then applied a very strict, literal construction to it. Plaintiff Bellei was neither born, nor naturalized, in the United States. He was not subject to its jurisdiction. Thus, the citizenship clause did not apply to him. "He simply [was] not a Fourteenth-Amendment-first-sentence citizen."[67] The Court thus accepted the very argument summarily rejected by the district court, which had based its holding on *Afroyim*.[68] In the latter case, plaintiff was naturalized in the United States; thus the two cases were deemed distinguishable.

Since Bellei was not protected by the citizenship clause, his claim was solely within the congressional statutory power, subject to the limitations of the Constitution. The opinion presented an historical analysis: under the common law, citizenship depended solely on the place of birth and did not descend to offspring.[69] Of course, this was subject to legislative enlargement. The Constitution itself empowers

64. 401 U.S. 815 (1971).

65. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 72 (1971). *Cf.* Comment, *Involuntary Expatriation: Rogers v. Bellei—A Chink in the Armor of Affroyim [sic]*, 21 AM. U.L. REV. 184 (1971); 40 FORDHAM L. REV. 141 (1971).

66. Emphasis added.

67. 401 U.S. at 827.

68. *See* text at *supra* note 60.

69. 401 U.S. at 878.

Congress to "establish an uniform Rule of Naturalization."[70] The Court quoted with approval the dictum from *Wong Kim Ark*,[71] that citizenship acquired by being born of American parents outside the territorial limits of the United States was unaffected by the citizenship clause. Thus, such a conferral of citizenship is "to be regulated . . . by Congress, in the exercise of the power . . . to establish an uniform rule of naturalization."[72] It is clear that Congress may grant or deny citizenship to the foreign-born children of American parents at its pleasure. In addition, Congress may unquestionably prescribe, as a condition precedent to citizenship, a period of residency in this country,[73] a point conceded even by plaintiff's counsel. The question then becomes whether Congress may specify a residency requirement as a condition subsequent within the bounds of due process. In answering this question affirmatively, the Court recognized that there is a legitimate concern as to the allegiance of a dual national such as the plaintiff. "One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting."[74] Thus, it is not unreasonable to fear that the dual national child has a primary loyalty to the country of one parent's citizenship and his own birth. For Congress to thus impose upon plaintiff a five-year residency requirement "may not be the best [solution] that could be devised, but . . . [it cannot be said] that it is irrational or arbitrary or unfair."[75] Why then, if the identical condition precedent is valid, should a condition subsequent be less so? If anything, the Court found the latter to be an act of *generosity*.[76] Congress can choose from four alternatives with respect to someone in Bellei's position. It can refuse to grant citizenship, grant it on a condition precedent, a condition subsequent, or absolutely. Since Congress will not, and need not, make an absolute grant, the next best alternative for plaintiff is a condition subsequent.[77] Such a

70. U.S. CONST. art. I, § 8, cl. 4.

71. 169 U.S. 649 (1898). *See* text at *supra* note 13.

72. *Id.* at 688.

73. 401 U.S. at 828.

74. Kawakita v. United States, 343 U.S. 717, 733 (1952). *See* N. BAR-YAACOV, DUAL NATIONALITY 4-5 (1961).

75. 401 U.S. at 833.

76. *Id.* at 835.

77. While a condition subsequent must meet due process requirements of reasonableness, a condition precedent might not have to satisfy as strict a standard. *Cf.* United States v. Trevino Garcia, 440 F.2d 368, 369 (5th Cir. 1971): "The Constitution does not mention the citizenship status of persons born outside the United States. . . . Thus the Congress has a completely free hand in defining citizenship as it relates to persons

rule would treat the child as an American citizen, allowing the benefits of free access to the United States, travel on an American passport, and diplomatic protection, *before* the residence requirement need be met. To strike down section 301 (b) would probably cause Congress to simply postpone the grant of citizenship until *after* the residency requirement has been satisfied, withholding all benefits until that time.

Finally, the Court points out that Bellei will not become a stateless person:

> His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country . . . . He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision . . . .
>
> . . . §301(b) has no constitutional infirmity in its application to plaintiff Bellei.[78]

This seems to suggest that had an application of the statute in fact made the plaintiff stateless, a different result would have occurred—perhaps on the basis of estoppel.[79]

The dissent of Mr. Justice Black was unusually bitter. Alleging that *Afroyim's* broad construction had been overruled, he stated that "precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court."[80] He reiterated his view that Congress has no power, in view of the citizenship clause, to pass a statute that involuntarily denationalizes an American citizen, unless and until that citizenship has been freely renounced. The dissent viewed the majority position as a reversion to Frankfurter's rational nexus standard in *Perez*. Thus, Congress can now "rob a citizen of his citizenship just so long as five members of this Court can satisfy themselves that the congressional action was not 'unreasonable, arbitrary,' . . . or 'irrational' . . . ."[81]

Mr. Justice Black rejected the "narrow, restrictive, and super-technical interpretations"[82] of the fourteenth amendment contained in the

born abroad." *But see* Bellei v. Rusk, 296 F. Supp. 1247, 1253 n.1 (D.D.C. 1969): "While Congress would have wide latitude in drafting a condition precedent to its grant of citizenship, such conditions would have to comply with the fundamental requirements of equal protection and due process." (Leventhal, J., concurring).

78. 401 U.S. at 836.
79. *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 69 n.33 (1971).
80. 401 U.S. at 837.
81. *Id.*
82. *Id.* at 839.

majority's holding that since Bellei was not born or naturalized in the United States, he is not a constitutional citizen. The majority now makes the citizenship of all children born abroad to American citizens merely second-class, outside the protection of the Constitution, and subject to the whim of Congress. Coming on the heels of *Afroyim,* the dissent pointedly comments that this construction is not "strict," but "proceeds on the premise that a majority of this Court can change the Constitution day by day . . . and year by year, according to its shifting notions of what is fair, reasonable, and right. . . . [This] is the loosest construction that could be employed."[83]

Mr. Justice Black's argument seems to ignore much of the history of the Court, wherein a shift of one vote has often meant significant changes in constitutional doctrine.[84] He also neglects to mention that it took the Court nearly one hundred years to "recognize" that the citizenship clause gives the broad and sweeping protection construed by *Afroyim,*[85] and then only by a bare five to four majority with strong opposition. Further, it took a shift in personnel (principally the replacement of Frankfurter by Fortas) to allow *Afroyim* to overrule *Perez,* decided only nine years earlier. Thus, Mr. Justice Black perhaps should have been satisfied that *Bellei* did not flatly overrule *Afroyim,* but merely limited it.

III. THE AFTERMATH: WHAT IS THE EXPATRIATION POWER AFTER *Bellei?*

The immediate question raised after *Bellei* is: What does that case do to the absolute citizenship doctrine promulgated by *Afroyim?* The answer is not at all clear. One possibility is that it does relatively little—a minor modification affecting only that class of citizens not born or naturalized in the United States. True, for people in that category the Court has, in effect, devised a new form of citizenship which has certain earmarks of being "second-class." Nevertheless, for someone in Bellei's position, neither the residency requirements nor the instant result would appear to be particularly unfair. There is clearly

83. *Id.* at 844.

84. For example, during the "New Deal" era, the sudden shift in position of Mr. Justice Roberts in 1937 meant that five to four decisions consistently striking down congressional legislation became five to four decisions upholding similar acts. *See, e.g.,* L. PFEFFER, THIS HONORABLE COURT 299-324 (1965).

85. The fourteenth amendment was adopted in 1868; *Afroyim* was decided in 1967.

a legitimate apprehension on the part of Congress as to the allegiance of a child born outside the United States of one citizen parent. Interestingly, the Immigration and Nationality Act of 1952 does not require such a residency on the part of a child born abroad of two American parents,[86] although this could, of course, be amended in the future. For the present, *Bellei* may work its greatest hardship on families of Americans in the diplomatic service who have spent most of their time abroad.

Another possible intepretation of *Bellei* would go further. *Afroyim* did not merely hold that Congress was forbidden by the fourteenth amendment to involuntarily withdraw citizenship. It also stated that even in the absence of that amendment, Congress had no express or implied constitutional power to denationalize one who is at that time an American citizen.[87] In *Bellei,* however, the Court, in the absence of fourteenth amendment protection, unquestionably allowed the expatriation of one who was already a citizen. This clearly represents a considerable undermining of Black's absolute citizenship position, which now rests entirely on his interpretation in *Afroyim* of the scope and effect of the citizenship clause. *Bellei* avoided a direct ruling on the citizenship clause. Since plaintiff was expressly held not to be a "fourteenth amendment citizen," there was no need to consider what that phrase entailed. In fact, any such discussion would have been dicta.

As to the future, one can expect the government to appeal any case involving a reaffirmation of *Afroyim* principles by a lower federal court. If that should happen in the near future, considering the additional changes in the Court since *Bellei,* it would not be surprising to see *Afroyim* further limited, or even overruled.

To this writer, a future decision limiting *Afroyim* to its facts, *i.e.,* that voting in a foreign election regardless of circumstances is not sufficient to denationalize, would be most welcome. Just as the Frankfurter rational nexus approach[88] in *Perez* goes too far in its allowance of congressional power to involuntarily expatriate—precluding a judicial inquiry into the citizen's subjective motives—the Black absolute citi-

86. 8 U.S.C. § 1401(a)(2) (1970) provides that the following shall be United States citizens at birth: "a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person . . . ."

87. *See* text at *supra* note 48.

88. *See* text at *supra* notes 22-24.

zenship theory goes too far in the opposite direction in limiting governmental power. It is undesirable to absolutely forbid Congress, as *Afroyim* apparently does, from denationalizing a citizen, regardless of circumstances, unless he expressly renounces his allegiance.[89] Surely a more reasonable approach is that of Chief Justice Warren in his *Perez* dissent (joined by Black and Douglas), whereby certain acts manifesting allegiance to a foreign country would allow the inference of voluntary renunciation of citizenship.[90] The most obvious such act would be the deliberate acquisition of foreign citizenship.[91] At the very least, *Afroyim* should not be able to totally preclude involuntary expatriation under such circumstances.

The result in *Rogers v. Bellei* is clearly not demanded by the prior decisions of the Supreme Court. It seems obvious that the district court's opinion could have been affirmed on authority of *Afroyim*. The instant decision is against the trend of thirteen years of contrary holdings by the Court, and would seem to strongly signal a basic change of policy in this area. The majority proclaims that not all United States citizens are protected by the fourteenth amendment's citizenship clause. This finding was indeed achieved, as Mr. Justice Black lamented, by a "super-technical" construction of the clause.[92] The employment of this rationale allowed the Court to escape a head-on collision with *Afroyim*. This is unfortunate. It leaves the area once again unsettled and can only represent, at most, a postponement of the inevitable. In obtaining the *Bellei* result, it would have been better, and more honest, for the Court to expressly renounce the broad holding of the former case. This would have allowed the validation of the residency requirement of section 301 (b) without the need for the strained reasoning of the majority.

Rogers v. Bellei will have an immediate impact in at least one other area. The same provision of the Immigration and Nationality

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89. *Cf.* Jolley v. Immigration and Naturalization Serv., 441 F.2d 1245 (5th Cir. 1971), where the plaintiff went to Canada and voluntarily renounced his citizenship in order to avoid the draft. He later tried to rescind his renunciation on the ground of its having been made under duress—he would otherwise have been forced to break the Selective Service laws. The court rejected this argument, finding the renunciation to be voluntary.

90. Perez v. Brownell, 356 U.S. 44, 68 (1958).

91. *Id. Cf.* 54 CORNELL L. REV. 624, 632 (1969), suggesting that voluntary naturalization in a foreign country raises a rebuttable presumption of renunciation of United States citizenship.

92. 401 U.S. at 839 (dissenting opinion).

Act of 1952 which grants citizenship to the foreign-born child of an American citizen also provides that, before the birth of the child, the American citizen must have resided for ten years in the United States, at least five of which were spent after attaining the age of fourteen.[93] The purpose of this restriction is to prevent "the specter of generations of child emigres who will return to this country to claim citizenship . . .,"[94] none of whom have ever been here or had any ties to the United States. Recently, this proviso has been under attack as violating due process, based on authority of *Afroyim, Schneider v. Rusk,*[95] and *Bellei v. Rusk.*[96] In *Gonzalez de Lara v. United States,*[97] this claim was rejected by the Fifth Circuit. That court distinguished the former cases as involving involuntary denationalization of citizenship already conferred, while the present case merely dealt with the imposition of a condition precedent for foreign-born children, within the constitutional power of Congress.[98] It seems clear that this result, coming a month before *Rogers v. Bellei,* partly anticipated the latter; thus, an attack on such a condition precedent in the present Court would seem fruitless.

CONCLUSION

Since the passage of the fourteenth amendment, the power of the government to involuntarily expatriate American citizens, as construed by the Supreme Court, has varied considerably. In the first half of the twentieth century, the explicit and implied powers of Congress were held sufficient to sustain statutory denationalization for the commission of a specified act, if there was a reasonable connection between an acceptable purpose desired by the national legislature and the use of enforced loss of citizenship to accomplish that purpose.[99] The act in question must have been performed voluntarily, but no subjective intent to renounce citizenship was required, or even relevant. In the late 1950s, the Court started a trend to reverse the congressional expatriation power. This culminated in *Afroyim,* where a majority held that under the fourteenth amendment Congress had absolutely no con-

93. 8 U.S.C. § 1401(a)(7) (1970).
94. Bellei v. Rusk, 296 F. Supp. 1247, 1252 n.17 (D.D.C. 1969).
95. 377 U.S. 163 (1964).
96. 296 F. Supp. 1247 (D.D.C. 1969).
97. 439 F.2d 1316 (5th Cir. 1971).
98. *Id.* at 1317 n.4. *Accord,* United States v. Trevino Garcia, 440 F.2d 368 (5th Cir. 1971); Uribe-Temblador v. Rosenberg, 423 F.2d 717 (9th Cir. 1970).
99. *See* text at *supra* notes 14-24.

stitutional power to denationalize; American citizenship could only be lost by voluntary relinquishment. The scope of this holding was unwarrantedly broad, and has been somewhat diluted by *Bellei*. Unfortunately, the latter case has, perhaps, served to raise more questions than it answers. The lower federal courts will surely find application of its holding difficult.[100] Whether *Bellei* ultimately represents only a slight undercutting of *Afroyim*, or whether it presages a return to the rational nexus doctrine of *Perez*, or hopefully something in between, remains to be seen. What is clear is that at the present time the denationalization power of Congress is once again uncertain.

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100. *But cf.* Hein v. Immigration and Naturalization Serv., 456 F.2d 1239 (5th Cir. 1972), recently citing *Rogers v. Bellei* in support of its holding that a statute automatically conferring citizenship on the biological children of naturalized aliens, but denying such an automatic grant to adopted children, did not invidiously discriminate against the latter. *See* 8 U.S.C. § 1432 (1970).