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## Constitutional Law - Citizenship - Power of Congress to Effect Involuntary Expatriation

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CONSTITUTIONAL LAW—CITIZENSHIP—POWER OF CONGRESS TO EFFECT INVOLUNTARY EXPATRIATION—In four recent cases the United States Supreme Court has dealt with the power of Congress to effect the denationalization of native-born citizens without their consent. Three cases, *Perez v. Brownell*,<sup>1</sup> *Trop v. Dulles*,<sup>2</sup> and *Mendoza-Martinez v. Mackey*<sup>3</sup> dealt with the constitutionality of sections 401(e), 401(g) and 401(j), respectively, of the Nationality Act of 1940.<sup>4</sup> The fourth case, *Nishikawa v. Dulles*,<sup>5</sup> dealt only with the burden of proof when duress is alleged under section 401(c), but contained one opinion of constitutional significance. The purpose of this comment is to analyze and evaluate these decisions.

## I. THE HOLDINGS

### A. *Perez v. Brownell*

*Perez v. Brownell* involved two subsections of section 401 of the Nationality Act of 1940. Those provisions read as follows:

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

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

“(j) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. . . .”

Petitioner in the case was born in Texas in 1909 and moved to Mexico in 1919 or 1920. He learned in 1928 that he had been born in Texas, and knew of his duty in World War II to register for the draft but failed to do so. He voted in a political election in 1946, apparently for Mexico's president.

Justice Frankfurter, speaking for Justices Brennan, Burton, Clark and Harlan held that subsection (e) was constitutional

<sup>1</sup> 356 U.S. 44 (1958).

<sup>2</sup> 356 U.S. 86 (1958).

<sup>3</sup> 356 U.S. 258 (1958).

<sup>4</sup> 54 Stat. 1137 (1940), as amended, 8 U.S.C. (1952) §1481, as amended, 8 U.S.C. (Supp. V, 1958) §1481(a)(9).

<sup>5</sup> 356 U.S. 129 (1958).

and that under it petitioner had lost his citizenship. They did not pass on the validity of subsection (j). After reviewing statutory and administrative history and international usages,<sup>6</sup> Frankfurter first argued that Congress has the inherent power to deal with foreign affairs as an attribute of sovereignty. He then stated that the constitutional test was whether withdrawing citizenship bore a reasonable relationship to the regulation of foreign affairs and found that included within the foreign affairs power was the power to deal with the voting of American citizens in foreign elections because such voting might well be a source of embarrassment to our government. He argued that a reasonable method of achieving that end was to divest the voter of citizenship, because termination of citizenship terminates the problem, and further that it was "not without significance" that Congress had found that such conduct involved "elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."<sup>7</sup> The Fourteenth Amendment was dismissed in a footnote.<sup>8</sup> Frankfurter finally argued that while *Mackenzie v. Hare*<sup>9</sup> and *Savorgnan v. United States*<sup>10</sup> indicate that citizenship can be destroyed only for voluntary conduct, it is unnecessary for that conduct to evince an intent on the part of the citizen to expatriate himself.

Chief Justice Warren wrote the principal dissenting opinion in which Justices Black and Douglas joined. While apparently accepting the doctrine of inherent power, he argued that since the government derives its power from the consent of the governed, it has no power to destroy the relationship that gives rise to its existence. He emphasized, however, that a citizen may voluntarily expatriate himself and that the constitutional test for questioning the subsection's validity was therefore "whether the conduct it describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship."<sup>11</sup> Under this test he found the statute inadequate because the election might be a relatively insignificant one or because the voting might have been legal in the foreign country. *Mackenzie v. Hare* was distinguished as involving only

<sup>6</sup> His historical survey went no further back, however, than 1868.

<sup>7</sup> *Perez v. Brownell*, 356 U.S. 44 at 61 (1958).

<sup>8</sup> *Id.* at 58, note 3.

<sup>9</sup> 239 U.S. 299 (1915).

<sup>10</sup> 338 U.S. 491 (1950).

<sup>11</sup> *Perez v. Brownell*, 356 U.S. 44 at 75 (1958).

a suspension of citizenship during coverture, and both that case and *Savorgnan v. United States* were distinguished as meeting the test the Chief Justice proposed, since in both the citizen acquired another allegiance.

Justice Douglas, joined by Justice Black, dissented, arguing that while the Fourteenth Amendment absolutely granted citizenship to one born here, no power is found in the Constitution to destroy that citizenship. He emphasized that both *Mackenzie* and *Savorgnan* involved the acquisition of another citizenship, and would place citizenship in the constitutionally preferred position he presently feels First Amendment freedoms occupy since "it is a grant absolute in terms."

Justice Whittaker in a "memorandum" expressly accepted the premise of Frankfurter's opinion, but argued that since the voting could have been legal in Mexico, it bore no rational nexus to embarrassment of foreign affairs or to a dilution of allegiance to this country.

### B. *Trop v. Dulles*

*Trop v. Dulles* involved subsection (g):

" . . . deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces. . . ."

Petitioner had deserted for one day in 1944 while serving in the Army in Morocco. He had voluntarily turned himself in and had not deserted to the enemy. Chief Justice Warren wrote the principal opinion, speaking for Justices Black, Douglas and Whittaker. The Chief Justice first reaffirmed his argument in *Perez*, and would find this statute unconstitutional for, since desertion to the enemy was not involved, the conduct showed no dilution of allegiance to this country. As a second ground for his opinion, Warren argued that the statute was penal in character, and after assuming that it bore a rational relationship to the congressional exercise of the war power, found that it was a "cruel and unusual punishment" within the meaning of the Eighth Amendment.<sup>12</sup>

<sup>12</sup> U.S. CONST., Amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Justice Black, joined by Justice Douglas, concurred, arguing that in any case citizenship could not be divested on the finding of a *military* tribunal.

Justice Brennan concurred separately and it was his shift which caused subsection (e) to be upheld while subsection (g) was struck down. He argued that there was no rational connection between the war power and expatriation following desertion within the *Perez* test. He found first that denationalization for desertion was a penal clause, second that it did not aid in rehabilitating the prisoner, third that it did not deter desertion since it was a less strong sanction than the death penalty which could be imposed for desertion and fourth that it was irrational since some technical desertions bear no relation to conduct even faintly disloyal.

Justice Frankfurter dissented, joined by Justices Burton, Clark and Harlan. Frankfurter first argued that the subsection bore a rational relationship to the war power, and that Congress could have supposed that it would help military commanders maintain discipline and morale. Frankfurter then argued that this was a "non-penal" purpose, but that even assuming *arguendo* that it was punishment, the Eighth Amendment was not transgressed since it could not be "seriously urged that loss of citizenship is a fate worse than death,"<sup>13</sup> a punishment which could clearly be applied to a deserter.

### C. *Mendoza-Martinez v. Mackey*

*Mendoza-Martinez v. Mackey* involved subsection (j) previously quoted which was left open in *Perez*. In this case petitioner left the United States in 1942 apparently for the purpose of avoiding the draft, and did not return until 1946. Upon his return he was convicted of draft evasion.<sup>14</sup> Petitioner brought an action for a declaratory judgment that he was a citizen. The Supreme Court in a *per curiam* opinion vacated the judgment against him and "remanded [the cause] to the United States District Court for determination in light of *Trop v. Dulles*. . . ."<sup>15</sup>

<sup>13</sup> *Trop v. Dulles*, 356 U.S. 86 at 125 (1958).

<sup>14</sup> 54 Stat. 894 (1940), as amended, 50 U.S.C. App. (1952) §462. See *Mendoza-Martinez v. Mackey*, (9th Cir. 1956) 238 F. (2d) 239.

<sup>15</sup> *Mendoza-Martinez v. Mackey*, 356 U.S. 258 (1958).

*D. Nishikawa v. Dulles*

In *Nishikawa v. Dulles*, Chief Justice Warren, speaking for Justices Black, Brennan, Douglas and Whittaker, held that when duress is raised as a defense under section 401(c), which includes ". . . entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state . . .," the government has the burden of proving that the petitioner acted voluntarily. Justice Frankfurter, joined by Justice Burton, concurred separately and would limit the holding to cases where the petitioner was inducted by command of a penal statute. Justice Harlan, joined by Justice Clark, dissented, arguing that the one alleging duress should have the burden of proving it, particularly when as here the facts were almost exclusively with the knowledge of petitioner.

The opinion in that case of interest in this inquiry was a concurring opinion of Justice Black in which Justice Douglas joined. Black argued that Congress had no power to destroy citizenship, whether for acts bearing a rational nexus to some substantive power or for acts showing a transfer of allegiance. In his view the question was always whether an *individual himself* intended to relinquish his citizenship, and Congress could do no more than establish rebuttable presumptions that certain acts evidenced that intent. To the extent that they held to the contrary, *Mackenzie v. Hare* and *Savorgnan v. United States* should be overruled.

*E. Conflict of Judicial Philosophy*

Throughout the cases ran a thread of disagreement as to the basic policy the Court should follow in reviewing acts of Congress.<sup>16</sup> Frankfurter continuously advocated a policy of judicial restraint in the Holmesian tradition: "The awesome power

<sup>16</sup> Compare Frankfurter's opinion in *Perez v. Brownell*, 356 U.S. 44 at 62: "To deny the power of Congress to enact the legislation challenged here would be to disregard the constitutional allocation of governmental functions that it is this Court's solemn duty to guard" with Douglas' dissent (at 79): "The philosophy of the opinion that sustains this statute is foreign to our constitutional system," and Black's concurrence in *Nishikawa v. Dulles*, note 5 *supra*, at 139: "In my view the notion that citizenship can be snatched away whenever such deprivation bears some 'rational nexus' to the implementation of a power granted Congress by the Constitution is a dangerous and frightening proposition." To the effect that some caustic asides accompanied the delivery of the opinions, see N.Y. TIMES, April 3, 1958, p. 17:2.

of this Court to invalidate such legislation, because in practice it is bounded only by our own prudence in discerning the limits of the Court's constitutional function, must be exercised with the utmost restraint."<sup>17</sup> Warren, on the other hand, asserted the Court's power and responsibility to enforce the Constitution's prohibitions as it understood them: "Courts must not consider the wisdom of statutes but neither can they sanction as being merely unwise that which the Constitution forbids. . . . When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence."<sup>18</sup>

## II. RELEVANT HISTORY<sup>19</sup>

In the view of early English common law, allegiance was indissoluble even with the consent of the sovereign. The citizen was born with a tie to his government that only an act of Parliament could destroy.<sup>20</sup> Voluntary expatriation was an unknown concept. As a concomitant of a citizen's duty to his country, however, was the concept of the sovereign's duty to the citizen, apparently developed in this country as a justification and explanation for the Declaration of Independence and the Revolutionary War.<sup>21</sup> Thus it was argued that the English Government, by its illiberal conduct toward its colonies, had forfeited the right to have their perpetual allegiance.

After the Revolution, there developed a decided split in American thinking. One group, led by Thomas Jefferson and with the American Revolution immediately before them, argued that voluntary expatriation was a natural right, and that the colonists in rebelling from the English despotism had merely exercised it. Thus Jefferson was apparently the drafter of the Virginia legislation which first gave a right (or expressed a mode for its exercise) to a state citizen to expatriate.<sup>22</sup>

His view was met with considerable opposition, however,

<sup>17</sup> *Trop v. Dulles*, 356 U.S. 86 at 128 (1958).

<sup>18</sup> *Id.* at 103.

<sup>19</sup> That historical background which bears on the constitutional question has been emphasized. For a general discussion, see the authorities cited in notes 20, 21, 23, 25, 44, 48, 50 and 58 *infra*.

<sup>20</sup> COCKBURN, NATIONALITY 63, 64 (1869); Slaymaker, "The Right of the American Citizen to Expatriate," 37 AM. L. REV. 191 at 192, 193 (1903).

<sup>21</sup> Dutcher, "The Right of Expatriation," 11 AM. L. REV. 447 at 448-451 (1877).

<sup>22</sup> See TSIANG, EXPATRIATION IN AMERICA PRIOR TO 1907, 26 (1942).

from, as might be expected, Alexander Hamilton. Hamilton argued that the Jefferson doctrine was "an altogether new invention unknown and inadmissible in law."<sup>23</sup> Quite naturally, since most states had adopted the common law of England and since it did not provide for voluntary expatriation, it was thought that Jefferson's doctrine was not a part of our law. Judicial decisions as they developed were in some conflict although they generally supported the more conservative views of Hamilton.<sup>24</sup>

The adoption of the Constitution brought with it one other problem, not ultimately settled until the passage of the Fourteenth Amendment: was there a separate United States citizenship or was it merely derivative from state citizenship?<sup>25</sup> The feeling that citizenship was predominately a state matter was partially responsible for the defeat of one of the first attempts to pass a federal statute detailing a mode for exercising the right of voluntary expatriation.<sup>26</sup>

This brief examination of early historical attitudes is important to our problem not for the controversies that were involved, but for those that were not involved. That is, at the time of adoption of the Constitution, the right or power of the government to effect involuntary expatriation was not a burning issue, or even an issue at all. The problem simply was not raised, presumably because no one at that time thought that the government should or did have the power to divest a citizen of his citizenship.<sup>27</sup> Therefore, to the extent which a thing not considered can be said to have been permitted or denied by the Constitu-

<sup>23</sup> Quoted in Morrow, "The Early American Attitude Toward the Doctrine of Expatriation," 26 AM. J. INT. L. 552 at 554 (1932).

<sup>24</sup> See cases discussed in Slaymaker, "The Right of the American Citizen to Expatriate," 37 AM. L. REV. 191 (1903).

<sup>25</sup> See ROCHE, *THE EARLY DEVELOPMENT OF UNITED STATES CITIZENSHIP* (1949).

<sup>26</sup> Roche, "Loss of American Nationality: The Years of Confusion," 4 WEST. POL. Q. 268 at 276 (1951).

<sup>27</sup> Thus, in the 1818 debates discussed in the text *infra*, Anderson of Kentucky argued: "Although the intention with which [the bill to provide a means of exercising the right of voluntary expatriation] was introduced, and the title of the bill declare that it is to insure and foster the right of the citizen, the direct and inevitable effect of the bill, is an assumption of power by Congress to declare that certain Acts when committed shall amount to a renunciation of citizenship." 1 ANNALS OF CONG., 15th Cong., 1st sess., p. 1039 (1818). Lowndes of South Carolina argued similarly: "If you pass this bill, said he, you have only one step further to go, and say that such and such acts shall be considered as presumption of the intention of the citizen to expatriate, and thus take from him the privileges of a citizen." *Id.* at 1050. The supporters of the measure clearly had no such intention, and Cobb of Georgia answered Lowndes' argument: "It is to remove any difficulties arising from such presumption, that this law is introduced." *Id.* at 1068.



tion, it is arguable that the power to cause forfeiture of citizenship was denied.

Apparently the first thorough<sup>28</sup> consideration of the power of Congress to effect expatriation was in the House debates surrounding the attempt in 1818 to adopt the federal measure previously mentioned detailing a method for exercising the right of voluntary expatriation.<sup>29</sup> Although the measure had the support of several representatives, and most apparently favored the right itself, many felt that even its modest terms exceeded the constitutional power of Congress. Thus Pindall of Virginia argued: "The power to establish a uniform rule of naturalization cannot be made to comprehend the power to change the law of expatriation."<sup>30</sup> Lowndes of South Carolina expressed a similar sentiment: "[I]f the Constitution had intended to give to Congress so delicate a power, it would have been expressly granted,"<sup>31</sup> as did McLane of Delaware: "It will not be contended that the power in question is expressly given; . . . and . . . it is not necessary to the execution of any express power."<sup>32</sup> Abbott of Georgia argued to the same effect: "The people have delegated no power to Congress to define a rule for expatriation."<sup>33</sup> Williams of North Carolina also felt the act would be unconstitutional: "The framers of the Constitution would also have found inseparable objections, against the exercise of this power by Congress, from the nature of our political institutions,"<sup>34</sup> and he emphasized that citizenship was essentially a state concern. Cobb of Georgia, however, thought the act constitutionally supportable: "In my opinion, it is clearly incidental to the power

<sup>28</sup> But see TSIANG, *EXPATRIATION IN AMERICA PRIOR TO 1907*, 37-43 (1942) for a discussion of two previous House debates.

<sup>29</sup> "That, whensoever any citizen of the United States shall, by a declaration in writing, made and executed in the district court of the United States, within the state where he resides, in open court, to be by said court entered of record, declare that he relinquishes the character of a citizen, and shall depart out of the United States, such person shall, from the time of his departure, be considered as having exercised his right of expatriation, and shall thenceforth be considered no citizen." 1 *ANNALS OF CONG.*, 15th Cong., 1st sess., p. 1054 (1818). The statute, it will be seen, assumed a "right of expatriation," and was concerned merely with providing a means of exercising it.

<sup>30</sup> 1 *ANNALS OF CONG.*, 15th Cong., 1st sess., p. 1045 (1818). Anderson of Kentucky argued that the existence of a power to naturalize "furnishes evidence, negatively, that [the power to prescribe a manner of expatriation] was omitted from design, and not from inattention." *Id.* at 1037.

<sup>31</sup> *Id.* at 1050.

<sup>32</sup> *Id.* at 1057.

<sup>33</sup> *Id.* at 1087.

<sup>34</sup> *Id.* at 1079.

of establishing 'an uniform rule of naturalization.' It necessarily results from it—it is, indeed, a correlative power."<sup>35</sup> Johnson of Kentucky also appeared to support the constitutionality of the measure.<sup>36</sup> After being amended several times the act was ultimately defeated. In commenting on these debates, Tsiang, whose book makes a significant contribution in this area, observed:

"In the course of debate and maneuvering it became evident that most of the speakers were in favor of allowing expatriation, though they also felt that Congress had not been delegated the power to act on the matter and that federal regulation would infringe upon states' rights. At first, the trend of the voting was toward acceptance of the proposed principle. The entire proposal was dropped only after the majority of the House became convinced that the measure was definitely unconstitutional."<sup>37</sup>

These debates must be viewed with caution. The makeup of the House in 1818 certainly was not identical with the makeup of the Constitutional Convention. In our system it is generally considered that the courts rather than the legislature determine the meaning of our fundamental law. The debates were held at a time when principles of constitutional construction were much stricter than they have evolved to be. Nevertheless they should not be disregarded, particularly since all parts of the Constitution which could be alleged to give Congress the power to denationalize were then in existence. Moreover the constitutional doubts were expressed as to providing a means for effecting *voluntary* expatriation and would presumably have been far greater if the legislation had concerned forfeiture.<sup>38</sup> Finally, representatives in 1817 probably were not completely out of touch with the frame of reference of those who drafted the Constitution.

The view that the power to prescribe uniform rules for naturalization did not give Congress the power to effect expatriation was given powerful support by Chief Justice Marshall's dictum in 1824 in *Osborn v. Bank of the United States*:

"He [the naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and

<sup>35</sup> Id. at 1067.

<sup>36</sup> Id. at 1043.

<sup>37</sup> TSIANG, EXPATRIATION IN AMERICA PRIOR TO 1907, 60-61 (1942). See also note 26 *supra*.

<sup>38</sup> See note 27 *supra*.

standing, in the view of the constitution, on the footing of a native. The *constitution* does not authorize Congress to enlarge or abridge those rights. The simple *power of the national Legislature*, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual."<sup>39</sup>

Of course the statement was mere dictum, but in the emphasized portions the Chief Justice seemed to assume that the power to abridge the rights of citizens, if one existed, must be implied from the power to naturalize, but that no such implication could be drawn from that power.<sup>40</sup>

The question whether a right of voluntary expatriation existed in a United States citizen continued as previously indicated. Courts generally tended to deny the right (the federal courts usually on ambiguous grounds) and administrative practice vacillated.<sup>41</sup> A strong position was taken by Buchanan in the 1840's while secretary of state, although abandoned by succeeding secretaries. It was reasserted when Buchanan became president,<sup>42</sup> with an opinion of Attorney General Black in the case of Christian Ernst being particularly notable.<sup>43</sup> The position was not vigorously asserted during the civil war, primarily because we were in the position other countries had previously been in, that of asking for the return of our citizens who had sought refuge from our draft laws in another country.<sup>44</sup> Following the war, however, a controversy concerning the imprisonment by Britain of former Irish citizens who had been naturalized ensued and the result was the passage in 1868 of an act which declared that it is a "fundamental principle of the Republic" that "the right of expatriation is a natural and inherent right of all people."<sup>45</sup> Whether this act had any legal effect is at least questionable,<sup>46</sup> although some courts apparently applied it,<sup>47</sup> but

<sup>39</sup> 9 Wheat. (22 U.S.) 738 at 827 (1824). Emphasis added.

<sup>40</sup> But see 64 YALE L. J. 1164 at 1184 (1955).

<sup>41</sup> See note 24 supra; generally Flournoy, "Naturalization and Expatriation," 31 YALE L. J. 702 (1922).

<sup>42</sup> See generally Moore, "The Doctrine of Expatriation," 110 HARP. MO. MAG. 225 (1905).

<sup>43</sup> 9 Op. Atty. Gen. 356 at 357, 358 (1859).

<sup>44</sup> TSIANG, EXPATRIATION IN AMERICA PRIOR TO 1907, 83, 84 (1942); Moore, "The Doctrine of Expatriation," 110 HARP. MO. MAG. 225 at 230, 231 (1905).

<sup>45</sup> 15 Stat. 223 (1868).

<sup>46</sup> Dutcher, "The Right of Expatriation," 11 AM. L. REV. 447 at 474-476 (1877).

<sup>47</sup> E.g., In re Look Tin Sing, (C.C. Calif. 1884) 21 F. 905 (dictum).

its main usefulness was in furnishing the basis for securing treaties with foreign countries in which a reciprocal right of expatriation was recognized.<sup>48</sup> It should be emphasized that its thrust was only to recognize the long-disputed right of a citizen voluntarily to expatriate himself, although the methods by which he might do so were not defined.

Just prior to this, in 1865, Congress, partly in response to the dilemma mentioned above of asserting a claim to our citizens who were avoiding our draft while denying the claim of other governments to their citizens who had become naturalized in this country for evading military service in their native country, and partly in response to a general feeling of revulsion to those Americans who refused to do their military duty,<sup>49</sup> passed an act providing for the forfeiture of the "rights of citizenship"<sup>50</sup> of persons who deserted beyond the borders of the United States.<sup>51</sup> The act apparently was one primarily of expediency and received no serious constitutional attention.

About this same time the Fourteenth Amendment was passed providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."<sup>52</sup> Thus a personal status, that of citizenship, was conferred by a constitutional grant. At least two questions arise from this clause: whether it by implication permits Congress to destroy citizenship obtained through its operation, and whether it by implication prohibits Congress from destroying citizenship under other powers it might have. Frankfurter apparently answered the latter question in the negative by dismissing it in a footnote in *Perez*.<sup>53</sup> The first, however, was answered adversely to congressional power in *United States v. Wong Kim Ark*. There the Court said:

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. . . . The Fourteenth Amendment, while it

<sup>48</sup> Borchard, "Decadence of the American Doctrine of Voluntary Expatriation," 25 AM. J. INT. L. 312 (1931).

<sup>49</sup> Note 44 *supra*.

<sup>50</sup> See discussion of this term in Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," 99 UNIV. PA. L. REV. 25 at 61, 62 (1950). Compare, in a different statutory context, *In re Watson's Repatriation*, (E.D. Ill. 1941) 42 F. Supp. 163, with *In re Shee Mui Chong Yuen's Repatriation*, (D.C. Hawaii 1944) 73 F. Supp. 12.

<sup>51</sup> 13 Stat. 490 (1865).

<sup>52</sup> U.S. CONST., Amend. XIV.

<sup>53</sup> *Perez v. Brownell*, 356 U.S. 44 at 58, note 3 (1958).

leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."<sup>54</sup>

If, as was implied in Chief Justice Marshall's dictum in *Osborn*,<sup>55</sup> which was quoted by the Court in *Wong Kim Ark*, the only power to denationalize must be derived from the power to naturalize, then the quoted statement also answers the second question contrary to the answer given by Justice Frankfurter. This follows because if the only basis for authority prior to the Fourteenth Amendment lay in the power to naturalize, and none lay there, and the Fourteenth Amendment granted none, then none exists. The question whether the above-quoted statement from *Wong Kim Ark* was dictum therefore becomes quite important and the commentators are divided.<sup>56</sup> The case involved the citizenship status of a Chinese person born in this country and the principal argument was that he was not "subject to the jurisdiction" of this country. A subsidiary point was raised that the Chinese Exclusion Acts and a treaty with China had made Chinese not subject to naturalization, thus excluding them from the operation of the amendment. The Court held generally that "subject to the jurisdiction thereof" meant no more than subject to the laws of this country, and that appellee was subject to our laws when born, but answered the latter argument also in the omitted portion of the previously quoted excerpt:

"Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori* no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation."<sup>57</sup>

Therefore, the arguments run either that the basic holding mooted the other question, making an expression of opinion on

<sup>54</sup> 169 U.S. 649 at 703 (1898).

<sup>55</sup> 9 Wheat. (22 U.S.) 738 (1824).

<sup>56</sup> Compare Hurst, "Can Congress Take Away Citizenship?" 29 *Rocky Mt. L. Rev.* 62 at 78, 79 (1956) (holding), with 21 *Univ. Cin. L. Rev.* 59 at 63 (1952), and Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," 99 *Univ. Pa. L. Rev.* 25 at 26, 27 (1950) (dictum).

<sup>57</sup> Note 54 *supra*.

it mere dictum, or that the latter argument was necessary to refute the contention that Congress had by statute taken a group, i.e., the Chinese, out from under the normal operation of the first clause of the Fourteenth Amendment. Which of these contentions is accepted would seem to depend on whether or not the claim that a later statute can destroy an expressly granted constitutional status is considered wholly frivolous. Since in essence *Perez* held that a later statute had precisely that effect, apparently it cannot be considered frivolous, with the result that the two quoted statements must be considered necessary to the opinion and must be considered overruled *sub silentio* by *Perez*. The only thing that can be said with certainty is that the Fourteenth Amendment problem deserved more than a footnote reference in the majority opinion.

Following the two statutes and the constitutional amendment passed in the 1860's, the administrative branch of the government found itself deciding cases on an *ad hoc* basis with virtually no guidance from Congress.<sup>58</sup> Finally, following an extensive study of the problem by three representatives of the state department,<sup>59</sup> the Act of March 2, 1907 resulted.<sup>60</sup> In the act in relation to native-born citizens, Congress provided: "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."<sup>61</sup> This provision seems merely to provide a method which a citizen desiring to expatriate himself may use to do so, and fills the vacuum left by the 1868 act. The Report of the State Department confirms this suggestion.<sup>62</sup>

Only one other provision related to loss of citizenship by a native-born citizen, section 3 of the act:

" . . . That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning

<sup>58</sup> See Flournoy, "Naturalization and Expatriation," 31 YALE L. J. 702 and 848 (1922); Roche, "Loss of American Nationality: The Years of Confusion," 4 WEST. POL. Q. 268 at 287 et seq. (1951).

<sup>59</sup> H.R. Doc. 326, 59th Cong., 2d sess. (1906).

<sup>60</sup> 34 Stat. 1228 (1907).

<sup>61</sup> *Id.*, §2.

<sup>62</sup> H.R. Doc. 326, 59th Cong., 2d sess., p. 23 (1906).

to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.”<sup>63</sup>

It will be noted that, unlike the other section quoted, there is no mention of expatriation. Further, section 3 speaks in terms of *resuming* her citizenship, which appears to indicate that it was held in abeyance, so to speak, during coverture. This is made clear by the State Department report which did not consider this question under the heading “Expatriation” as the previous section quoted was, but under the heading, “Effect of Naturalization Upon Status of Wife and Minor Children.”<sup>64</sup> Further the initial sentence of the first recommendation under this heading stated “[t]hat an American woman who marries a foreigner shall take *during coverture* the nationality of her husband. . . .”<sup>65</sup> Finally, it should be noted that the statute is nonsense from the point of view of international law, for certainly as to other states, American law cannot decree that a woman “shall take the nationality of her husband.” Only the laws of the state of which the husband is a citizen can do that.<sup>66</sup> The phraseology of the statute, however, undoubtedly disguised the possible result under its operation—that of turning American citizens while coverture lasted into virtually stateless persons.

That statute came before the Supreme Court in 1915 in *Mackenzie v. Hare*.<sup>67</sup> Mrs. Mackenzie was a native-born citizen who married an alien and continued to live in the United States. She was refused the right to vote by the Board of Election Commissioners of San Francisco and brought a writ of mandamus to compel it to register her. The court affirmed denial of the writ. After stating in dictum that the government may have inherent power to deal with foreign states, a power under which Mrs. Mackenzie’s status could be regulated, the Court said:

“There need be no dissent from the cases cited by plaintiff [*Osborn* and *Wong Kim Ark*, among others]; there need be no assertion of very extensive power over the right of citizenship or of the imperative imposition of conditions

<sup>63</sup> Note 60 *supra*.

<sup>64</sup> See H.R. Doc. 326, 59th Cong., 2d sess., pp. 23, 29 (1906).

<sup>65</sup> *Id.* at 29. Emphasis added.

<sup>66</sup> See the argument of Williams of North Carolina in the 1818 debates, 1 ANNALS OF CONG., 15th Cong., 1st sess., p. 1084 (1818).

<sup>67</sup> 239 U.S. 299 (1915).

upon it. It may be conceded that change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."<sup>68</sup>

The Court then held that in view of the historical unity of man and wife, that after her voluntary acceptance of his citizenship by her marriage, that "*as long as* the relation lasts it is made *tantamount* to expatriation." (Emphasis supplied.) The emphasized portions of the sentence support the construction of the act previously suggested.

What does the opinion mean in relation to the principal cases? It probably is not a controlling precedent, for carefully read in conjunction with the statute, it does not involve full expatriation. Apparently a residuum of citizenship must remain even during marriage, for citizenship in the case of a widow living in the United States is resumed by doing nothing at all. Chief Justice Warren therefore seems to be correct in his reading of the actual holding of the case.<sup>69</sup> Justice Frankfurter, however, is also surely right when he suggests that the case stands for the proposition that citizenship can be affected by acts which are not *intended* to affect American citizenship. Black tacitly recognizes this when he suggests in his dissent in *Nishikawa* that *Mackenzie* must be overruled if his thesis that citizenship must always turn on the intent of the individual is to prevail. Nevertheless, since British citizenship was acquired by the marriage under the Naturalization Act, 1870, section 10(1),<sup>70</sup> the case also supports Warren's thesis that the act must indicate "derogation of undivided allegiance . . ." before citizenship may be affected. It would seem therefore that it was not determinative of the recent cases; it did not involve true involuntary expatriation, and in any case its holding can be used to support the thesis of either the majority or minority.

No significant further legislative activity occurred until 1940 when Congress made a sweeping revision of the nationality laws generally. In the Nationality Act of 1940, with the possible exception of the ambiguous 1865 act involving the loss of "rights of citizenship" for desertion, Congress provided for involuntary complete loss of citizenship for the first time. The act is presently

<sup>68</sup> *Id.* at 311.

<sup>69</sup> *Perez v. Brownell*, 356 U.S. 44 at 69-73 (1958).

<sup>70</sup> 33 Vict., c. 14. See VAN PITTIUS, NATIONALITY WITHIN THE BRITISH COMMONWEALTH OF NATIONS 81-83 (1930).



recodified in the Immigration and Nationality Act of 1952.<sup>71</sup>

Before returning to the recent cases under consideration, brief mention must be made of *Savorgnan v. United States*.<sup>72</sup> In that case a native-born woman, wishing to marry an Italian diplomatic official, signed a paper written in Italian, which she did not understand, but which contained both a renunciation of United States citizenship and an acquisition of Italian citizenship. Without deciding whether the 1907 or the 1940 act governed, the Court held that she had been expatriated. She apparently did not intend to lose her American citizenship, but did know that the document concerned citizenship and that she was acquiring Italian citizenship. This case then would also support the positions of both Frankfurter and Warren—the woman did not subjectively intend to lose her citizenship, but her voluntary act in acquiring Italian citizenship indicated a transfer of allegiance.

### III. ANALYSIS OF THE RECENT CASES

#### A. *Inherent Power*

Neither of the cases, *Mackenzie* and *United States v. Curtiss-Wright Export Corp.*,<sup>73</sup> cited to sustain the proposition that the government has inherent power as an attribute of sovereignty to deal with foreign affairs, directly supports that proposition. As previously indicated, the statements in *Mackenzie* to that effect were clearly *dictum*. In *Curtiss-Wright*, Justice Sutherland's argument generally went, not to proving that the *government* had inherent power, but that the *President* had inherent power and exercised a broad discretion in the matter of foreign affairs.<sup>74</sup> Moreover, the holding is not consistent with the conventional doctrine that ours is a federal government of delegated powers.<sup>75</sup>

Nevertheless the inherent power argument had been accepted

<sup>71</sup> Note 4 *supra*.

<sup>72</sup> 338 U.S. 491 (1950).

<sup>73</sup> 299 U.S. 304 (1936).

<sup>74</sup> See Riesenfeld, "The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions," 25 CALIF. L. REV. 643 at 665-669 (1937); generally PASCHAL, MR. JUSTICE SUTHERLAND 221-232 (1951) and SCHWARTZ, THE SUPREME COURT 81-86 (1957). Cf. *Carter v. Carter Coal Co.*, 298 U.S. 238 at 295 (1936).

<sup>75</sup> Compare Patterson, "In re the United States v. the Curtiss-Wright Corporation," 22 TEX. L. REV. 286, 445 (1944), with CORWIN, THE PRESIDENT, 4th ed., 170-175 (1957).

by a majority of the Court even before *Mackenzie* was decided<sup>76</sup> and has been referred to in several cases since then.<sup>77</sup> In *Perez* it was expressly accepted as the basis for the decision by a five-justice majority, and Warren, speaking for the minority, appeared also to accept the doctrine: "Generally, when congressional action is challenged, constitutional authority is found in the express and implied powers with which the National Government has been invested or in those inherent powers that are necessary attributes of a sovereign state."<sup>78</sup> Therefore, if the question ever was in doubt, *Perez* clearly settles that the inherent power doctrine is firmly established in our constitutional law. As international relations become more complex, the doctrine may have an increasingly important role to play.

### B. Majority and Minority Approaches Contrasted

Frankfurter's approach in *Perez* was essentially as follows: Congress has inherent power to control foreign relations; that power includes the right to regulate citizens voting in foreign elections because such political activities may cause embarrassment to our government; expatriation bears a "rational nexus" to solving this problem since the voter ceases to be a citizen after he votes and the United States can thus disclaim his activities. If this approach is accepted, does the analysis stand up? Under the act the expatriating act is voting; it is not political activity. Speech-making, electioneering, bribery, and all other sorts of intermeddling will not cause loss of citizenship because the statute has not so provided.<sup>79</sup> Since Mexico has adopted the secret ballot,<sup>80</sup> the question then must turn not on the candidate or political party supported, but on the naked fact that a ballot was cast. Finally, since in expatriation questions the government

<sup>76</sup> *Fong Yue Ting v. United States*, 149 U.S. 698 at 711-713 (1893). See also Clayton, "The Evolution and Basis of Our Nationality," 24 N.J.L.J. 579 (1901). But see Quarles, "The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished From Delegated," 32 GEO. L.J. 375 at 381 (1944).

<sup>77</sup> See discussion of the cases in Hurst, "Can Congress Take Away Citizenship?" 29 ROCKY MOUNTAIN L. REV. 62 at 67-72 (1956).

<sup>78</sup> *Perez v. Brownell*, 356 U.S. 44 at 63 (1958). Emphasis added.

<sup>79</sup> Were it so to provide, an interesting First Amendment problem would be raised. While it may be presumed that the First Amendment does not guarantee the right to speak freely anywhere, and while voting itself may not be speech, it is arguable that sanctions could not be imposed in this country by our laws for speech in other countries which would be protected by the First Amendment if delivered here.

<sup>80</sup> See Ley Electoral Federal, Capitulo VII, Seccion Segunda, Articulo 84 II, 189 DIARIO OFICIAL, Dec. 4, 1951, p. 11.

has the burden of proof,<sup>81</sup> and since it put in no evidence on the legality of petitioner's voting in Mexico, he would apparently be entitled to assume for constitutional purposes that his voting was authorized by Mexican law.<sup>82</sup> The constitutional question then is: does the fact of casting a ballot in a Mexican election when permitted by Mexican law pose a sufficiently serious problem of embarrassment to our government to justify Congress in determining that there is a rational nexus between expatriating the voter and the successful conduct of foreign policy? If Mexico by her law gives an American the right to vote, it is difficult to suppose a rational objection based solely on the exercise of the right so given. If it is argued that Mexico might irrationally object, a sufficient answer would seem to be that Americans should not lose their citizenship because of the irrational conduct of foreign governments, and that it would be irrational of Congress so to provide. Perhaps little else can be said.<sup>83</sup>

Unlike Black's concurrence in *Nishikawa*, the Warren approach in *Perez* also seems to involve a "rational nexus" test, directed however to an entirely different question. For Warren the test would seem to be whether the congressional act bore a reasonable relationship to a transfer of allegiance from this

<sup>81</sup> *Gonzales v. Landon*, 350 U.S. 920 (1955).

<sup>82</sup> This, however, is not true. The Mexican Constitution provides: "Art. 35. The prerogatives of *citizens* are: (1) To vote at popular elections; . . ." [Emphasis supplied.] Art. 33. . . . "No alien may meddle in any way whatsoever in the political affairs of the country." 2 PEASLEE, *CONSTITUTIONS OF NATIONS*, 2d ed., 675 (1956). Although neither the Supreme Court nor the court of appeals, (9th Cir. 1956) 235 F. (2d) 364, indicated the parentage of petitioner, Clemente Martinez Perez, it is possible that his parents were Mexican nationals. Were that true, he would also be of Mexican nationality since Article 30 of the Mexican Constitution provides: "(A) The following are Mexican by birth: . . . (II) Children born in foreign countries of Mexican parents; of Mexican father and alien mother; of Mexican mother and unknown father." PEASLEE at 674. Thus Perez would be a dual national. The constitutional question would therefore be substantially different. The exercise of political rights in a country in which petitioner was already a citizen could indicate an acceptance of his obligations of citizenship in that country inconsistent with continued allegiance to the United States within the Warren test. Moreover, problems of statelessness would not be present. See note 104 infra.

<sup>83</sup> Apparently the participation in the Saar plebiscite by German citizens who had become naturalized Americans was the motivating force behind §401(e). *Perez v. Brownell*, 356 U.S. 44 at 54. The House Report in which the section was originally (though unsuccessfully) proposed, however, revealed no embarrassment to our foreign relations by such voting, but only a somewhat querulous objection that such conduct was improper. H. Rep. 216, 74th Cong., 1st sess. (1935). The Report was implicitly directed at dual nationals, in any case. The plebiscite might represent a situation, however, when voting permitted to our citizens by Germany would embarrass our foreign relations, although with France rather than with Germany.

country. For example, he would probably uphold a statute providing for loss of citizenship for voting in a foreign election in which only citizens of that country could vote, at least if the voter knew of this law, for his act would then indicate an allegiance to that country inconsistent with United States citizenship.<sup>84</sup> The fact that the individual was subjectively completely loyal to this country would be irrelevant.

Despite this superficial similarity of approach the two tests rest on basically differing philosophies. For Frankfurter expatriation is merely one of a number of techniques available to Congress for regulating or controlling or implementing any of the many substantive powers which it possesses. Thus Congress may grant licenses, or provide a federal forum in which to litigate, or expatriate, or set up an investigative committee, if it feels that the chosen technique would implement its policy in an area in which it has power. The Fourteenth Amendment and Marshall's interpretation of the naturalization clause become relatively irrelevant, for the question is not one of substantive power, but of whether a regulatory technique is appropriate to its end.

Warren on the other hand sees expatriation as a substantive subject for legislation, such as bankruptcy, and for which a specific grant of power must be found. Since use of the naturalization power and the Fourteenth Amendment, the only readily available clauses from which the substantive power to effect expatriation might be implied, has been foreclosed by *Osborn* and *Wong Kim Ark*, he understandably can find permission to legislate in the area only from the somewhat fictitious concept that by providing forfeiture of citizenship for acts normally evidencing lack of allegiance, Congress is only recognizing the legal effect of the citizen's own voluntary renunciation. Working from his premises, he is therefore allowing Congress considerable discretion,<sup>85</sup> despite Frankfurter's charges of judicial intervention.

### C. *The Fourteenth Amendment*

While the relevance of the Fourteenth Amendment has already been substantially discussed, one more comment might

<sup>84</sup> *Perez v. Brownell*, 356 U.S. 44 at 75 (1958).

<sup>85</sup> Compare Black's approach in *Nishikawa*, 356 U.S. 129 (1958).

be pertinent. The question ultimately is whether the creation of a status in absolute terms also carries with it the implication that the status so created shall not be destroyed. The rest of the Constitution does not seem to provide any other particularly useful analogy. The Fourteenth Amendment states: "All persons born . . . in the United States . . . are citizens of the United States. . . ." It could undoubtedly be argued that after the decision in *Perez*, Perez was a person born in the United States who, by congressional mandate, was no longer a citizen of the United States, and that this was in violation of the express terms of the amendment. On the other hand, it could be countered that the amendment merely made clear a person's status when he was "born," and was intended to have no other effect. Apparently all would agree that either formulation would include an exception for truly voluntary expatriation. The question then, if viewed in this light, is whether the amendment has continuing application to the person, or whether it operates once at the moment of birth, and then is spent. The difficulty, of course, is that the amendment was drafted primarily (1) to make the newly liberated Negroes into citizens and (2) to make it clear that citizenship was primarily a federal matter.<sup>86</sup> The problem of expatriation was apparently not considered.

#### D. *Whittaker's Position*

Justice Whittaker's position is somewhat difficult to assess. In his Memorandum in *Perez* he expressly accepted the Frankfurter approach. Yet he also joined without qualification the Warren opinion in *Trop* in which Warren reasserted his thesis advanced in *Perez*. Further, although accepting the Frankfurter approach in *Perez*, he dissented because he felt that since voting in Mexican elections might be legal, such voting bore no rational relationship either to the embarrassment of foreign relations or to dilution of loyalty. The lack of relation to the latter is clear, and Warren also made this point. The lack of relation to the former is not so clear. Brennan advanced the argument in his concurring opinion in *Trop* that one evil of foreign voting was that it might be taken as a representation of United States policy.<sup>87</sup> If this is a major ground for finding embarrassment, it

<sup>86</sup> *Slaughter House Cases*, 16 Wall. (83 U.S.) 36 at 73 (1872).

<sup>87</sup> *Trop v. Dulles*, 356 U.S. 86 at 106 (1958).

could be argued that we could disclaim illegal political activity with greater ease than we could disclaim legal activity.<sup>88</sup> Thus, Whittaker's distinction, while clearly supporting the Warren rationale, does not so clearly support the Frankfurter rationale which he purports to accept, but which he deserted in *Trop*. All this may mean that Whittaker's position in future cases in this area will be somewhat speculative.

### E. *Cruel and Unusual Punishment*

The arguments for finding expatriation a cruel and unusual punishment have been set out thoroughly elsewhere and little would be gained by repeating them here.<sup>89</sup> Two observations will perhaps be helpful, however. The first is in relation to the dissent's opposition to this holding in *Trop* by the majority opinion. Frankfurter there observes,

"It seems scarcely arguable that loss of citizenship is within the Eighth Amendment's prohibition because disproportionate to an offence that is capital and has been so from the first year of Independence. Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?"<sup>90</sup>

Arguably, his rhetorical question is irrelevant. The problem is not disproportionateness (although in some cases it may be)<sup>91</sup> but whether the punishment is "cruel and unusual." A punishment might well be the latter and still not be disproportionate. For example, if one convicted of murder were sentenced to have his ears cut off as his sole punishment, it could hardly be contended that this punishment would be disproportionate—it would be lenient—but surely no one would doubt that it would also be "cruel and unusual." Frankfurter makes another point that is open to scrutiny:

"If loss of citizenship may constitutionally be made the consequence of such conduct as marrying a foreigner, and thus certainly not 'cruel and unusual,' it seems more than incongruous that such loss should be thought 'cruel

<sup>88</sup> This, of course, would not be true under the analysis made of the Frankfurter approach, part III, B *supra*.

<sup>89</sup> 64 YALE L. J. 1164 at 1187-1194 (1955).

<sup>90</sup> *Trop v. Dulles*, 356 U.S. 86 at 125 (1958).

<sup>91</sup> E.g., *Weems v. United States*, 217 U.S. 349 (1910).

and unusual' when it is the consequence of conduct that is also a crime."<sup>92</sup>

Is this the point, or is not the point rather that the Eighth Amendment deals only with "cruel and unusual *punishments*," and that by its terms it simply is not applicable until a "punishment" is found? It is at least arguable that denationalization of the woman who voted in a Canadian local-option election<sup>93</sup> was cruel and unusual in a meaningful sense, but that her difficulty was that she must have proceeded under the Fifth Amendment's due process clause, if at all.

This introduces the second observation. It would seem that some sanctions are inherently penal, regardless of the guise in which they may appear. Thus, surely few would contend that a death sentence was anything but a "punishment" within the meaning of the Eighth Amendment. The same argument could be made as to long prison terms.<sup>94</sup> The argument would then run that denationalization, termed a "drastic" consequence by Frankfurter in his concurring opinion in *Nishikawa*, was sufficiently severe, as well as *arbitrary* and *capricious*,<sup>95</sup> to warrant being classified as per se a criminal sanction. Since the Warren opinion in *Trop* did not limit its finding of a violation of the Eighth Amendment to the crime of desertion, forfeiture would seem always to violate the Eighth Amendment when used as punishment.<sup>96</sup> The result would be, of course, that denationalization would be limited to cases where the act evidenced a change of allegiance. No justice took this approach, but it would not seem wholly frivolous.

#### F. Brennan's Position

Since Justice Brennan's switch from supporting the government in *Perez* to supporting the petitioner in *Trop* caused sec-

<sup>92</sup> *Trop v. Dulles*, 356 U.S. 86 at 126 (1958).

<sup>93</sup> See Roche, "The Loss of American Nationality—The Development of Statutory Expatriation," 99 UNIV. PA. L. REV. 25 at 54, note 164 (1950).

<sup>94</sup> Imprisonment for civil contempt, though it could conceivably encompass many years, would not seem to mitigate against this argument, for there imprisonment is to compel future action rather than to punish past action.

<sup>95</sup> Conceivably, denationalization could mean deportation leading to the status of a political criminal in one case, and resulting in no inconvenience at all in another.

<sup>96</sup> It might be argued that denationalization would not be "cruel and unusual" when applied to one convicted of treason, but since treason would seem clearly to show a "dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship," denationalization could better be applied on that wholly separate ground.

tion 401(e) to be upheld while 401(g) was found unconstitutional, his opinion is of particular interest. He argued (1) that denationalization was penal, (2) that under the war power Congress could deal with desertion, (3) that denationalization bears no rational relation to rehabilitation for it makes the deserter "an outcast," (4) that it does not deter since the death penalty applies to desertion and is more severe, (5) that it is capricious, since it applies to technical desertions, such as "deserting" to the front in order to fight, which bear no relation to failure to bear arms for your country. All but the fourth point seem to follow. The difficulty with his argument there is that while the death penalty was available,<sup>97</sup> it was seldom imposed;<sup>98</sup> and this was undoubtedly common knowledge among the troops. It is therefore perfectly conceivable that the possibility of a five-year prison term in the United States would be very welcome to a morally weak soldier who felt he faced almost certain death in an impending battle in a Pacific island jungle. Yet, might not Congress rationally suppose that, were such a soldier also to face automatic loss of citizenship on conviction of desertion with its vague connotations of banishment and statelessness, the likelihood of his deserting might be lessened? This would at least seem to be permissible reasoning within the Frankfurter rationale, and in fact four of the five justices who comprised the majority in *Perez* were so persuaded.

The status of Brennan's argument is interesting to consider in view of the treatment of the point in the Warren opinion. He stated:

"Section 401(g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime. If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment."<sup>99</sup>

No other reference to this point upon which Brennan rested his decision is found in the opinion. Perhaps nothing can be

<sup>97</sup> See Art. 85, Uniform Code of Military Justice, 70A Stat. 67 (1956), 10 U.S.C. (Supp. V, 1958) §885.

<sup>98</sup> See HULE, *THE EXECUTION OF PRIVATE SLOVIK* 6-12 (1954).

<sup>99</sup> *Trop v. Dulles*, 356 U.S. 86 at 99 (1958).



said, without giving way to pure conjecture, other than that Warren did not find it necessary to reach this point.<sup>100</sup> One factor does stand out, however. That is that the holding in *Trop* does not command any majority rationale. The result was reached only as a result of the combination of two minorities. This must be contrasted with *Perez* where Frankfurter did speak for a majority, so that, if the dissenters there are willing to accept *Perez* as a basis for stare decisis, its "rational nexus" approach must be regarded as stating the law.

### G. Black's Concurring Opinion in *Nishikawa*

Why Justice Black put what are presumably his true views as to the constitutional issues raised in an opinion which turned solely on burden of proof is difficult to understand. Perhaps he wanted to avoid their possible divisive influence in *Perez* and *Trop* where they would have been relevant. At any rate they seem in line with his somewhat doctrinaire stand for the individual in all Bill of Rights cases. His argument is certainly not unsupported. The entire controversy culminating in the 1868 act was concerned with voluntary expatriation by the individual. *Osborn* and *Wong Kim Ark* support it as does one interpretation of the Fourteenth Amendment. Finally, it is perhaps more straightforward than the fiction which Warren must resort to in order to reach his position. It would involve, however, overruling at least two precedents, and it strongly asserts judicial intervention.

### H. The Future of Section 401(j)

The remand of *Mendoza-Martinez v. Mackey* "for determination in light of *Trop v. Dulles*" is somewhat surprising since *Trop* did not deal with section 401(j) and since its status was expressly left open in *Perez*. Some dictum in *Trop* does bear adversely on section 401(j)'s constitutionality, however.

"[Section 401(g)] is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading

<sup>100</sup> On the other hand, since Justice Brennan did not reach the "cruel and unusual punishment" question, his vote will be decisive if the question is raised subsequently under a section involving "punishment" which bears a reasonable relationship to the exercise of a substantive power.

the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial."<sup>101</sup>

While this observation about section 401(j) is factually true, it should be noted that in *Mendoza-Martinez* the Immigration and Nationality Service started deportation proceedings only *after* petitioner had been convicted of draft evasion.<sup>102</sup> The remand could have several meanings. Perhaps the most probable is that the district court was expected to determine if the sanction was also penal as in *Trop*. The purpose of the remand may be to determine more facts to see if the absence would show a transfer of allegiance within Warren's test, which Frankfurter would also accept as an additional ground for denationalization. It might be to determine simply what was suggested in the quoted *dictum*—whether petitioner had had a fair hearing on the charge of departing the country to avoid military service—although this seems improbable in view of his conviction. The section might raise a problem if interpreted both to be penal so that the Eighth Amendment applied,<sup>103</sup> and also to involve a transfer of allegiance. It would seem that the Court could permissibly ignore the section to the extent it was a penal statute and yet denationalize the individual under the section on the wholly separate ground that his conduct showed a transfer of allegiance.

<sup>101</sup> *Trop v. Dulles*, 356 U.S. 86 at 94 (1958).

<sup>102</sup> Note 14 *supra*. That statute, however, attaches criminality to any person "who shall knowingly fail or neglect to perform such duties," while §401(j) and its successor, §349(a)(10) of the Immigration and Nationality Act of 1952 [66 Stat. 267-268] apply to persons who depart from or remain outside the United States "for the purpose of evading or avoiding training and service in the military. . . ." Since one could conceivably "knowingly fail" to register for the draft while outside the United States and yet remain outside the United States for a "purpose" wholly apart from avoiding military service, conviction under the first statute would not necessarily bring the individual under §401(j). Compare generally *Ward v. United States*, (5th Cir. 1952) 195 F. (2d) 441, *revd.* 344 U.S. 924 (1953), with *Vidales v. Brownell*, (9th Cir. 1954) 217 F. (2d) 136, and *Gonzales v. Landon*, (9th Cir. 1954) 215 F. (2d) 955, *revd.* 350 U.S. 920 (1955).

<sup>103</sup> See note 100 *supra*.

## IV. CONCLUSION

In assessing these cases, it is difficult to disassociate the question of judicial abstention versus judicial intervention from the substantive constitutional questions. As an original proposition, the nature of the early controversies, the debates in 1818, the decisions in *Osborn* and *Wong Kim Ark*, the Fourteenth Amendment, the inconclusiveness of *Mackenzie* and *Savorgnan*, the failure of any statute until 1940 to provide unequivocally for involuntary denationalization and the undesirability of statelessness<sup>104</sup> make the Warren position in *Perez* preferable. Nevertheless, it can be argued that considerations of judicial policy and of the proper relation of the Court to Congress properly dictated the opposite result. Were only a degree question—one of more or less—involved, the argument would be persuasive. Here, however, differing constitutional theories were at stake: is expatriation a regulatory technique which need bear only a rational relationship to the exercise of a substantive power; or is expatriation itself a substantive power requiring its own constitutional basis for exercise, failing which it can only be applied when the individual's acts approach voluntary expatriation. This being true, it would seem that the Court could have accepted the latter constitutional position without being charged with disregarding "the constitutional allocation of governmental functions."

*Robert J. Hoerner, S.Ed.*

<sup>104</sup> See generally SECKLER-HUDSON, *STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES* (1934); WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 127 (1956).