Vanderbilt Journal of Transnational Law

Volume 15
Issue 1 *Winter 1982*

Article 4

1982

A Comparison between the Constitutional Protections against the Imposition of Involuntary Expatriation and a Taxpayer's Right to Disclaim Citizenship

Terri R. Reicher

A COMPARISON BETWEEN THE CONSTITUTIONAL PROTECTIONS AGAINST THE IMPOSITION OF INVOLUNTARY EXPATRIATION AND A TAXPAYER'S RIGHT TO DISCLAIM CITIZENSHIP

TABLE OF CONTENTS

I. INTRODUCTION

Expatriation is the voluntary act of abandoning one's country and becoming a citizen of another nation. When Congress established the expatriation standards over a century ago, it assumed that all people have an inherent right to voluntarily expatriate themselves. The Supreme Court cases interpreting the expatriation legislation have focused primarily on the element of "voluntariness." Typically, the Government claims that a citizen has participated in some conduct that has resulted in "voluntary" expatriation pursuant to the established congressional standards, while the accused challenges that claim by asserting that he has not satisfied the element of voluntariness. There are, however, instances in which the citizen claims that he has adequately manifested his intention to part voluntarily with his United States citizenship, and the Government challenges his right to relinquish his citizenship. These arguments commonly are made in treason[1] and tax[2] cases. Despite the citizen's fulfillment of all the legislative prerequisites to expatriation outlined in the Immigration and Nationality Act (INA) and upheld as valid by the Supreme Court, the Government also scrutinizes the motive for renunciation.[3] This Note examines both sides of the coin: the constitutional protections given the individual fighting to retain his citizenship will be compared with the burdens, particularly the tax consequences,

---

1. See, for example, Kawakita v. United States, 343 U.S. 717 (1952), in which a petitioner, tried for treason for maltreating United States prisoners of war in Japan, defended himself on the ground that he had renounced or abandoned his United States citizenship. He was convicted of treason because the acts which he performed were done voluntarily and were not necessitated by compulsion associated with his employment.

2. *See, e.g.,* Kronenberg v. Comm'r, 64 T.C. 428 (1975) and text accompanying notes 73-80 *infra;* Rexach v. United States, 390 F.2d 631 (1st Cir. 1968) and text accompanying notes 29-38 *infra;* United States v. Matheson, 532 F.2d 809 (2d Cir. 1976) and text accompanying notes 265-82 *infra.*

3. If in a tax case, for example, the formalities of expatriation have been satisfied but the Government can prove that avoidance of United States taxes is one of the principal purposes of the expatriation, the burden of proof shifts to the citizen to refute this presumption. I.R.C. § 877(e).

imposed on individuals wanting to relinquish citizenship. Section II examines the classic constitutionally-based expatriation material. It discusses the legislative history of expatriation law, including the 1978 amendments to the INA, reviews the major expatriation case law, and concludes with an analysis of *Vance v. Terrazas*,[4] the most recent Supreme Court pronouncement on the nature of the "voluntary" conduct required to constitute expatriation. Section III deals with the tax aspects of expatriation. In order to demonstrate the tension existing in this area prior to the 1966 enactment of the Internal Revenue Code (IRC) provisions[5] specifically addressing expatriation, section III examines the early judicial approach to attempted expatriation for tax avoidance reasons and the response of the Internal Revenue Service to that approach. A detailed analysis of the applicable income, estate, and gift tax provisions,[6] including the legislative history, the fundamentals of each section, and relevant planning strategies, follows. Section IV employs an analysis of *United States v. Matheson*[7] to address the impact of the tax consequences vis-a-vis the particular IRC provisions involving expatriation in juxtaposition to the constitutional safeguards examined in Section II.

II. Constitutional Basis of Expatriation

A. *Historical Development of Legislative Standards Governing Expatriation*

1. Historical Analysis of Expatriation Legislation

The English common law doctrine of perpetual or indissoluble allegiance, which states that no man can renounce allegiance to his homeland,[8] has been repudiated in the United States. Instead,

---

4. 444 U.S. 252 (1980).

5. These sections were enacted as part of the Foreign Investors Tax Act of 1966 (F.I.T.A.), Pub. L. No. 89-809, 80 Stat. 1551 (1967), to prevent United States citizens from trying to take advantage of the tax inducements offered foreign investors. *See* text and accompanying notes 150-54 *infra*.

6. These provisions generally provide that a person who chooses to leave the United States and subsequently relinquishes his citizenship rights will be subject to United States income, gift, and estate taxation for a period of ten years following his expatriation; so long as one of the principal purposes of his actions is the avoidance of taxes. *See*, I.R.C. §§ 877(a), 2107(a), 2501(a)(3)(B) and text accompanying notes 155-72 and 215-53 *infra*.

7. 532 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976).

8. I. Tsiang, The Question of Expatriation in America Prior to 1907, 11

the concept that every individual enjoys a right to voluntarily abandon his citizenship was adopted during the early development of United States jurisprudence. Thomas Jefferson was the foremost advocate of the individual's freedom to renounce his citizenship by an unequivocal act or declaration[9] but not until 1868,[10] two years after the fourteenth amendment had been proposed,[11] did Congress support Jefferson's proposition with the first statutory recognition of the right to expatriate.[12] The Act of 1868 became the statutory source of contemporary expatriation law by providing that the right of expatriation is a natural and inherent right of all people.[13] The Legislature's immediate purpose was to protect the expatriation rights of immigrants and to assure them that naturalization within the United States served to dissolve the tie of allegiance with their former sovereign.[14] The Act of 1868 further declared that once acquired, this fourteenth amendment citizenship right was not to be shifted, cancelled, or diluted at the will of the Government.[15]

Contrary to the intent of the founding fathers, subsequent congressional review interpreted the Act of 1868 as a general declaration of the federal right of voluntary expatriation.[16] The contem-

---

(1942).

9. *Id.*

10. In 1818 a proposed bill, which provided a means by which a citizen could voluntarily renounce his citizenship, was rejected. Afroyim v. Rusk, 387 U.S. 253, 264 (1967) (citing CONG. GLOBE, 40th Cong., 2d Sess. 968, 1130 (1818)).

11. The citizenship clause of the fourteenth amendment to the United States Constitution provides in relevant part that: "All persons born or naturalized in the United States . . . are citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

12. Act of July 27, 1968, ch. 249, § 1, 15 Stat. 223, 25 Rev. Stat. § 1999 (1875).

13. *Id.*

14. Note, *Expatriation Legislation,* 6 HARV. J. LEGIS. 95, 97 (1968-69). The United States, which had become the melting pot of all nations, decided to penalize naturalized United States citizens who chose to remain citizens of their native countries.

15. The Act provided in relevant part: "any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs or questions the right of expatriation, is hereby declared inconsistent with the fundamental principle of the government." Ch. 249, § 1, 15 Stat. 223, 224, 25 Rev. Stat. § 1999 (1875).

16. I. TSIANG, *supra* note 8, at 25-26. On three occasions, in 1794, 1797, and 1818, Congress considered and rejected proposals to enact laws that would prescribe expatriation as the consequence of certain conduct. For further history of

porary constitutional debate, therefore, focuses on the circumstances under which the Government can invoke expatriation not as a right, but as a sanction for conduct harmful to the sovereign. The Expatriation Act of 1907,[17] unlike its predecessor, provided for expatriation by means other than a formal declaration.[18] The notion of "voluntariness" thus took on new meaning.[19] Thus, a person lost his citizenship merely by performing certain designated acts presumed to be expatriating.

The number of designated acts presumed to be expatriating grew with each amendment to the 1907 Act. The Nationality Act of 1940,[20] which eventually replaced the 1907 Act, was reenacted with modification as part of the INA of 1952.[21] The INA, amended in 1954,[22] enumerated many actions that resulted in loss of nationality. These actions included obtaining naturalization in a foreign state,[23] taking an oath of allegiance to a foreign state,[24] serving in the armed forces of a foreign state,[25] performing the duties of any office under a foreign government,[26] voting in a foreign election,[27] deserting the United States armed forces in time

---

the early American view of the right of expatriation, see generally J. ROCHE, THE EARLY DEVELOPMENT OF UNITED STATES CITIZENSHIP (1949); Dutcher, *The Right of Expatriation,* 11 AM. L. REV. 447 (1877); Slaymaker, *The Right of the American Citizen to Expatriate,* 37 AM. L. REV. 191 (1903).

17. Ch. 2534, § 2, 34 Stat. 1228 (1907).

18. Roche, *The Loss of American Nationality — The Development of Statutory Expatriation,* 99 U. PA. L. REV. 25 (1950). The Act was no longer treated as merely a protective mechanism of the right to expatriate, but was seen as a means to withdraw United States citizenship.

19. Ch. 2534, § 2, 34 Stat. 1228 (1907).

20. Ch. 876, 54 Stat. 1137 (1940).

21. Ch. 477, §§ 349-357, 66 Stat. 163, 267-72 (1952). For legislative history and purpose of the INA, see [1952] U.S. CODE CONG. & AD. NEWS 1653.

22. The Expatriation Act of 1954, Ch. 1256, 68 Stat. 1146 (codified at 8 U.S.C. §§ 1101-1503 (1976)). For legislative history see [1954] U.S. CODE CONG. & AD. NEWS 3925.

23. 8 U.S.C. § 1481(a)(1) (1976).

24. *Id.* § 1481(a)(2). Making an affirmation or other formal declaration of allegiance is also included.

25. *Id.* § 1481(a)(3).

26. *Id.* § 1481(a)(4).

27. *Id.* § 1481(a)(5). This basis of expatriation has been described as "perhaps unique to the practice of the United States." McDougal, Lasswell & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas,* 83 YALE L.J. 900, 937 (1974). The precursor of this provision was held unconstitutional in Afroyim v. Rusk, 387 U.S. 253 (1967). *See* text accompany-

of war,[28] committing treason against the United States,[29] advocating or conspiring to overthrow the Government of the United States or its political subdivisions,[30] engaging in any rebellion against the authority or laws of the United States,[31] and departing or remaining outside the jurisdiction of the United States in time of war or during a period of national emergency for the purpose of draft evasion.[32] By 1954, the designated acts constituting the bases of expatriation clearly exceeded the simple unequivocal renunciation endorsed by the Act of 1868.[33] As one source noted, "after a century of Congressional manipulation, the statute once designed to protect the voluntary right of expatriation is now buried beneath provisions proscribing arguably equivocal conduct and mandating involuntary denationalization."[34]

---

ing notes 87-93 *infra*.

28. 8 U.S.C. § 1481(a)(8) (1976). Trop v. Dulles, 356 U.S. 86, 101 (1958), held that expatriation for desertion violates the eighth amendment. *See* text accompanying notes 69-95 *infra*.

29. 8 U.S.C. § 1481(a)(9) (1976).

30. *Id.* (incorporating 18 U.S.C. §§ 2384-2385 (1976)).

31. 8 U.S.C. § 1481(a)(9) (1976)(incorporating 18 U.S.C. § 2385 (1976)).

32. *Id.* § 1481(a)(10) (1970)(repealed 1976). Draft evasion as a basis for expatriation was held unconstitutional in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). *See* text acccompanying notes 77-82 *infra*. The statutorily defined acts of expatriation enumerated in § 1481 do not include all conduct that may result in the loss of nationality. *See, e.g.*, 8 U.S.C. § 1451 (1976)(specifying circumstances under which naturalized United States citizens may lose citizenship by "revocation.") In 1934, one authority reported that a total of 86 different actions could result in loss of United States citizenship. C. SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES 22 (1934).

33. In addition to the evolution of a vast list constituting expatriatory conduct, the INA further emasculates the intent of the 1868 Act by providing a rebuttable presumption that the designated acts were performed voluntarily if certain conditions are satisfied. 8 U.S.C. § 1481(b) (1976). This section provides that "[a]ny person who commits or performs any act specified . . . [above] . . . shall be conclusively presumed to have done so voluntarily . . .," yet purports to retain the requirement of voluntariness espoused in the original expatriation legislation of 1868.

34. Note, *Expatriation After Terrazas v. Vance: Right or Retribution?* 19 VA. J. INT'L L. 107, 113 (1978). This note was written prior to the Supreme Court's consideration of the *Terrazas* case, and its analysis concentrated on the court of appeals holding, at 577 F.2d 7 (7th Cir. 1978), which the Supreme Court reversed.

2. 1961 Amendment to the INA — The Burden of Proof Controversy

In 1961 Congress amended the INA by adding section 1481(c), which provides that the Government's burden of proof in an expatriation case is satisfied by a mere preponderance of the evidence.[35] This amendment is a result of congressional dissatisfaction with the 1958 "clear, convincing, and unequivocal burden of proof" standard[36] adopted in *Nishikawa v. Dulles*.[37] Recently, in *Vance v. Terrazas*,[38] the Court upheld Congress right to legislate a minimal burden of proof in expatriation cases.

3. Recent Amendments to the INA

Congress has trimmed the list of conduct that results in automatic loss of citizenship. The most recent amendments to the expatriation sections of the INA were passed in September of 1978,[39] when Congress repealed those provisions of the INA that

---

35. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 650, 656 (1961)(codified at 8 U.S.C. § 1481(c) (1976)).

36. H.R. REP. No. 1086, 87th Cong., 1st Sess. (1961), *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984-85.

37. 356 U.S. 129 (1958). Nishikawa was a dual national — a native-born American and a Japanese national under Japanese law. He entered the Japanese army in 1941. This case was not decided on constitutional grounds. The issue was whether the plaintiff had lost his United States citizenship under § 401(c) of the Nationality Act of 1940, which provided that a United States citizen would lose his citizenship by "[e]ntering, 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. . . ." Ch. 2534, 34 Stat. 1137, 1168-69 (1940). Subsequent amendments pertaining to service in foreign armies eliminated the necessity that the expatriate have or acquire the nationality of the foreign state. *See* Immigration and Nationality Act of 1952, § 349(a)(3); 8 U.S.C. § 1481(a)(3) (1976). The plaintiff claimed that he was inducted into the Japanese army pursuant to compulsory conscription and that rumors of harsh punishment of draft evaders made him afraid to evade service. Reversing the court of appeals, the Court held that in any expatriation case in which the *voluntariness* of the expatriating act is in issue, the burden is upon the government to prove voluntariness by clear, convincing and unequivocal evidence, and that this burden was not met by the government. 356 U.S. at 133.

38. 444 U.S. 252 (1980). The Court clearly affirmed § 1481(c). This judicial affirmation of the preponderance of the evidence standard provides further indicia of the de minimis nature accorded the voluntariness standard required by the Legislature and the courts. *See* text accompanying notes 100-125 *infra*.

39. Act of Oct. 10, 1978, Pub. L. No. 94-432, 92 Stat. 1046 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2521.

had either been declared unconstitutional or given limited application by the Supreme Court.

The major objective of the 1978 bill was to update the INA to comply with Supreme Court holdings. The sections of the INA that had been declared unconstitutional and were now repealed included section 349(a)(5),[40] providing for loss of citizenship for voting in a foreign election and held unconstitutional in *Afroyim v. Rusk*;[41] section 349(a)(8),[42] mandating the loss of citizenship for desertion in time of war and found unconstitutional in *Trop v. Dulles*;[43] and section 352,[44] requiring loss of citizenship by a naturalized citizen through residence abroad and considered unconstitutional in *Schneider v. Rusk*.[45]

Another component of the 1978 bill corrected an inconsistency in the citizenship law by repealing the residency requirement for persons born abroad of one alien parent and one United States citizen.[46] A corresponding provision, section 350 of the INA[47] gov-

---

40. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (repealing 8 U.S.C. § 1481(a)(5) (1976)).

41. 387 U.S. 253 (1967).

42. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (repealing 8 U.S.C. § 1481(a)(8) (1976)).

43. 356 U.S. 86 (1958).

44. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046 (repealing 8 U.S.C. § 1484 (1976)).

45. 377 U.S. 163 (1964).

46. Section 301(b) of the INA (codified at 8 U.S.C. § 1401(b)) provided that persons who derived their citizenship through the operation of § 301(a)(7) of the INA (codified at 8 U.S.C. § 1401(a)(7)) shall lose their United States citizenship if they are not physically present in the United States for a period of at least two years between the ages of 14 and 28. In a five to four decision, the Court in Rogers v. Bellei, 401 U.S. 815 (1971), upheld the constitutionality of § 301(b). The Third Circuit applied the *Bellei* decision in Rucker v. Saxbe, 552 F.2d 998 (1977). The *Bellei* Court held that the narrow class of persons who are United States citizens by virtue of their birth abroad were not born or naturalized in the United States. Therefore, those who acquired United States citizenship solely by statute were not protected to the same extent as those who acquired it under the fourteenth amendment. Despite the constitutionality of § 301(b), Congress recognized the inequity of treating such persons as second class citizens. The transmission requirements of § 301(a)(7) were, however, maintained as a safeguard. Section 301(a)(7) provides that in order for a United States citizen to transmit United States citizenship to his child born abroad of one alien parent, the United States citizen must have resided in the United States for ten years; five of these years must occur after the individual is fourteen years of age. This provision assured that repeal of § 301(b) would not create the possibility of generations of citizens residing abroad with little or no contact with the United

erning the retention of United States citizenship by dual nationals at birth, was also repealed.[48] No longer will dual nationals automatically lose their citizenship if they reside abroad for three years after the age of twenty-two. Revocation of citizenship under section 350 will be upheld only if the citizen clearly intended relinquishment of United States citizenship or performed an act of derogation to the United States.[49] This section was repealed because it was rarely applicable, was difficult to administer, and had needlessly caused anxiety among United States citizens living abroad.[50]

Congress delayed for several decades before updating the immigration laws, even though the changes were viewed mainly as technical corrections to the legislation.[51] Perhaps that delay is indicative of the priority which Congress assigns to the matter of expatriation. Reduction in the number of acts constituting voluntary expatriation does not signal a return to a congressional philosophy in which loss of citizenship is likened to banishment and exile. These amendments were merely a matter of necessity to ensure consistency between the judiciary and the Legislature.

B. *Supreme Court's Response—Constitutional Development*

The provision of the fourteenth amendment citizenship clause that "all persons born or naturalized in the United States . . . are Citizens of the United States"[52] sets forth the two principal modes for acquiring citizenship: birth or naturalization. The fourteenth amendment is, however, silent as to the right to remove citizenship. As a result, a conflict has developed regarding the existence, and extent of, Congress' power to withdraw citizenship. The Court enunciated its classic limitation on the fourteenth

---

States.

47. 8 U.S.C. § 1482 (1976).

48. The repeal of §§ 301(b) and 350 is prospective only. Citizens who have previously lost their United States citizenship will not be restored to citizenship. H.R. REP. No. 1493, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2521-29.

49. [1978] U.S. CODE CONG. & AD. NEWS 2521, 2524.

50. *Id.*

51. The Justice Department viewed deletion of the retention requirement of § 301(b) as the only significant change in existing laws. H.R. REP. No. 1086, *supra* note 36, at 2527.

52. U.S. CONST. amend. XIV, § 1.

amendment in *Perkins v. Elg*[53] when it held that citizenship must be deemed to continue unless it is deprived through the operation of a treaty or congressional enactment, or by voluntary action in conformity with legal principles.

The attitude of the Court in the first half of this century towards enforcement of statutory expatriation was objective and noninterventionist. When a citizen had performed one of the designated acts of expatriation prescribed by Congress, he had lost his citizenship regardless of his intent or knowledge of the law.[54] The Court found ample authority for Congress power in the "necessary and proper clause"[55] and the power to regulate foreign affairs.[56]

Perez v. Brownell[57] was the final reaffirmation of the noninterventionist trend in judicial thought. The Court, in a five-to-four decision, upheld the Nationality Act of 1940 (Act)[58] as reasonably related to the power of Congress to regulate foreign affairs. Such power includes the right to expatriate American citizens who have voted in foreign elections.[59] Justice Frankfurter reasoned that Congress power to regulate foreign affairs encompassed the authority to impose involuntary expatriation so long as a "rational nexus" existed between the end sought and the method em-

---

53. 307 U.S. 325, 329 (1939).

54. See, for example, Savorgnan v. United States, 338 U.S. 491 (1950), in which the Court sustained the denationalization of Mrs. Savorgnan, although she had no present or fixed intention to expatriate herself when she applied for Italian citizenship and made an oath of allegiance to the Italian government. She voluntarily acquired Italian citizenship in order to obtain the consent of the Italian government to her marriage to a member of the Italian Foreign Service. *See also* Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915). Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily. Marriage of an American woman to a foreigner is considered tantamount to voluntary expatriation.

55. U.S. CONST. art. 1, § 8, cl. 18.

56. *Id.* cl. 3.

57. 356 U.S. 44 (1958).

58. The Nationality Act of 1940 was the precursor to the INA. The 1940 Nationality Act was reenacted as part of the INA in 1952 and later incorporated into 8 U.S.C. § 1481 (1975). *See* notes 20-22 *supra*.

59. Section 401(e) of the Nationality Act of 1940 provided in relevant part that a citizen of the United States shall lose his nationality by "voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory." Section 401(e) was reenacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(5) (1976)(repealed in 1978).

ployed.[60] The end sought was the avoidance of embarrassment in foreign affairs and the means to achieve that end was the divestiture of citizenship. A citizen might seriously injure relations with another country by becoming involved in that country's political processes. Chief Justice Warren vehemently dissented in *Perez* on the ground that the Government is without power to divest citizenship for the mere act of voting in a foreign election absent consideration of the circumstances attending the participation. For conduct to be expatriating the Government must adequately demonstrate a dilution of individual allegiance and a voluntary abandonment of citizenship.[61] Emphasizing the paramount importance of citizenship, Warren stated, "Citizenship is man's basic right for it is nothing less than the right to have rights."[62]

The two companion cases to *Perez, Nishikawa v. Dulles*[63] and *Trop v. Dulles,*[64] marked a new trend toward limitation of congressional expatriation powers. In *Nishikawa* the plaintiff, a native-born American who was also a Japanese national under Japanese law, had lost his United States citizenship under section 401(c) of the Act[65] by entering the Japanese armed forces. Chief Justice Warren, writing for the majority of the Court, held that the Government's burden is to prove by "clear, convincing, and unequivocal evidence"[66] that an individual's renunciation of citizenship is voluntary.[67] The Justices believed that the drastic con-

60. 356 U.S. at 58.

61. *Id.* at 75 (Warren, C.J., dissenting).

62. *Id.* at 64.

63. 356 U.S. 129 (1958); *see* note 37 *supra.*

64. 356 U.S. 86 (1958).

65. Section 401(c) of the Nationality Act of 1940 provides in relevant part that a United States citizen shall lose his nationality by entering or serving in the armed forces of a foreign state. Section 401(c) was reenacted as § 349(a)(3) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(4) (1976).

66. The Court relied on its earlier holdings in Schneiderman v. United States, 320 U.S. 118 (1943), which required denaturalization cases to construe the facts and law in the light most favorable to the defendants, and Gonzales v. Landon, 350 U.S. 920, (1955)(per curiam), in which the Court established the clear, convincing, and unequivocal standard of proof in expatriation cases arising under § 401(j)(draft evasion) of the 1940 Nationality Act. The *Nishikawa* Court expressly extended the strict standard to expatriation cases arising under all subsections of § 401 of the 1940 Nationality Act. 356 U.S. at 133.

67. 356 U.S. at 133. For a discussion of the congressional response to the Court's enunciated standard in *Nishikawa,* see text accompanying notes 35-38 *supra.* The burden of proof issue in expatriation cases was not addressed again by the Supreme Court until Vance v. Terrazas, 444 U.S. 252 (1980). *Terrazas*

sequences of loss of citizenship so mandate application of a strict standard of proof.[68]

In *Trop v. Dulles*[69] a private in the United States Army was court-martialed for desertion during the Second World War. Section 401(g) of the Act[70] provided for loss of citizenship for wartime desertion. In a plurality opinion, Chief Justice Warren[71] challenged the validity of section 401(g). Citizenship cannot be divested by the exercise of the general power of the national Government.[72] Even if such divestiture were possible, the eighth amendment[73] ban against cruel and unusual punishment bars the use of denationalization as a punishment[74] because "[d]eprivation of citizenship is not a weapon that the government may use to express its displeasure at a citizen's conduct."[75] So long as a per-

---

marks the beginning of an age in which the Supreme Court returns to its posture of the pre-*Perez* era and countenances Congressional revisionism.

68. 356 U.S. at 129, 134. It was uncertain, however, whether the *Nishikawa* standard originated from policy concerns or the Constitution.

69. 356 U.S. 86 (1958).

70. Section 401(g) of the Nationality Act of 1940 provided that a person shall lose his nationality by "deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged. . . ." Section 401(g) was reenacted as § 349(a)(8) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(8) (1976)(repealed in 1978).

71. The Chief Justice was joined by Justices Black, Douglas, and Whitaker. These were the same four who dissented in the *Perez* decision on the basis that a vote by an expatriate in a foreign election does not reasonably constitute the abandonment of United States allegiance which warrants such a drastic measure as loss of citizenship. *See* Perez v. Brownell, 356 U.S. at 62-68.

72. "Citizenship is not a license that expires upon misbehavior. . . . The citizen who fails to pay his taxes or to abide by the law safeguarding the integrity of elections deals a dangerous blow to his country." He is not deprived, however, of his nationality for evading a basic responsibility of citizenship. 356 U.S. at 92.

73. "[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

74. Justice Brennan concurred separately, on the ground that expatriation for wartime desertion has no rational connection with any other power of Congress. He thereby asserted that § 401(g) was unconstitutional because Congress lacked the power to enact the statute. "Congress asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power." 356 U.S. at 113. Quite to the contrary, a person who attempts to avoid taxes vis-a-vis expatriation may lose his citizenship but will not be relieved of his duty to pay taxes. *See* text accompanying notes 126-264 *infra*.

75. 356 U.S. at 92-93.

son does not renounce or abandon his citizenship voluntarily, his fundamental right of citizenship[76] is secure. In balancing the rights of a citizen against the constitutional grant of authority to Congress, the dissent, however, asserted that the statute was enacted within that authority.

Kennedy v. Mendoza-Martinez[77] involved a challenge to another subsection of section 401 of the Act[78] and continued the momentum generated by the 1958 Warren Court decisions. Plaintiff, a dual national,[79] left the United States in 1942 and went to Mexico solely for the purpose of evading military service.[80] The Court categorized the statute as penal[81] and not regulatory. Justice Goldberg's opinion, which expressed the view of five members of the Court, invalidated section 401(j) as an imposition of punishment without the procedural safeguards of the fifth and sixth amendments.[82] After *Kennedy,* therefore, one no longer forfeited citizenship by leaving or remaining outside of the United States

---

76. *Id.* Viewing this right from an international perspective, the Court noted that civilized nations do not impose statelessness as a punishment for crime. *Id.*

77. 372 U.S. 144 (1963).

78. Section 401(j) of the Nationality Act of 1940, ch. 876, 54 Stat. 1137, *as amended by* Act of Sept. 27, 1944, ch. 418, 58 Stat. 746, *reenacted as* § 349(a)(10) of the INA, 8 U.S.C. § 1481(a)(10) (1970)(repealed in 1976) provided in relevant part that a United States citizen shall lose his nationality by "departing from or remaining outside 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 military, air, or naval forces of the United States."

79. Plaintiff was an American by birth and a Mexican citizen by reason of parentage.

80. *Mendoza-Martinez* was decided in conjunction with *Rusk v. Cort.* Cort, an American, refused induction into the United States military by remaining overseas during the Korean conflict. Since 349(a)(10) covered both those persons who departed from the United States and those maintaining their residence outside the United States, the two cases were decided in tandem.

81. 372 U.S. at 163-67. The legislative history of § 401(j) at H.R. REP. No. 1229, 78th Cong., 2d Sess. 2-3 (1944); S. REP. No. 1075, 78th Cong., 2d Sess. (1944) affirms the penal nature of the statute.

82. 372 U.S. at 165-66. The fifth amendment provides in relevant part that no person shall "be . . . deprived of life, liberty, or property, without due process of law." The sixth amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The protections of the fifth and sixth amendments assure the accused that his motive will be examined. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 229 n.10 (1978).

to evade military service.

The trend to limit Congress power to expatriate continued in *Schneider v. Rusk*,[83] in which Justice Douglas, speaking for five members of the Court, invalidated section 352(a)(1) of the INA.[84] Section 352(a)(1) provided that a naturalized citizen lost his nationality by continuously residing for three years in a foreign state of which he was formerly a citizen, or in the country of his birth. The Court held the provision unconstitutional because it discriminated unjustifiably against naturalized citizens[85] in violation of the fifth amendment due process of law standard.[86]

In *Afroyim v. Rusk*[87] the Court sustained a decade-long trend by declaring unconstitutional another statutory provision that allowed specific conduct to result in the loss of United States citizenship. The Court expressly overruled *Perez*, refusing to make voting in a foreign election an expatriating act.[88] Justice Black, speaking for the Court, declared that a United States citizen has "a constitutional right to remain a citizen . . . unless he *voluntarily relinquishes* that citizenship."[89] *Afroyim* required intent to

---

83. 377 U.S. 163 (1964). *See also* notes 138-40 *infra* and accompanying text. *Cf.* Marks v. Esperdy, 377 U.S. 214 (1964), in which the Court upheld 8 U.S.C. § 1481(a)(3), which provides that a United States national shall lose his nationality by serving in the military of a foreign nation. The Court considered § 1481(a)(3) a legitimate exercise of congressional power to regulate foreign relations that violated neither the fourteenth amendment citizenship clause, nor the eighth amendment prohibition against cruel and unusual punishment.

84. 8 U.S.C. § 1484(a)(1) (1976)(repealed in 1978).

85. The Court affirmed that a naturalized citizen possesses all the rights of a native citizen except for his ineligibility to be President. 377 U.S. at 165.

86. 377 U.S. at 168. The Court noted that a naturalized or native born citizen does not indicate a lack of allegiance by living abroad nor does such action evidence a voluntary renunciation of nationality. *Id.*

87. 387 U.S. 253 (1967). Petitioner, Afroyim, was born in Poland and immigrated to the United States where he became a naturalized citizen. After residing in Israel for ten years, he applied in 1960 for renewal of his United States passport, but the Department of State refused him on the ground that his voluntary participation in a 1951 Israeli political election terminated his American citizenship under § 401(e) of the Nationality Act of 1940.

88. The Court invalidated § 401 of the 1940 Nationality Act, reenacted as § 349(a)(5) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1481(a)(5) (1964)(repealed in 1978). While *Afroyim* only dealt with whether voting in a foreign election justified expatriation, the language of the decision far exceeded that necessitated by the facts of the case.

89. 387 U.S. at 268 (emphasis added).

relinquish citizenship as a prerequisite for expatriation.[90] Justice Black did not rely on an historical analysis to defeat the conclusion that power to expatriate is an implied general regulatory power, but found that the requirement of "intent" was grounded in the citizenship clause of the Constitution.[91] This analysis was a departure from the constitutional theories developed in prior cases.[92]

Justice Harlan's dissent clearly presented the major analytical shortcoming of the majority opinion: *Afroyim* did little to establish a clear definition of "voluntary." The phrase "voluntarily relinquishes" is ambiguous. It can be read "to describe both a specific intent to renounce citizenship and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship."[93]

With the exception of *Rogers v. Bellei,*[94] which represented a narrow reading of the fourteenth amendment, no major expatriation cases were decided by the Court in the 1970s. In *Bellei,* Justice Blackmun, writing for the majority,[95] announced that indi-

---

90. For instance, Afroyim voluntarily performed the act of voting but he did not "voluntarily" (*i.e.,* intentionally) relinquish his United States citizenship by participating in an Israeli election.

91. The constitutional source cited by *Afroyim* was § 1 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 . . . ." U.S. CONST. amend. XIV, § 1. The fourteenth amendment was designed to protect the newly freed Negroes by reinforcing their status of citizenship so that it was equal to that of all persons born in the United States.

92. Compare *Trop,* in which the Court relied on the eighth amendment. *See* text accompanying notes 69-76 *supra.* The *Mendoza-Martinez* and *Schneider* Courts relied on the fifth amendment due process clause. *See* text accompanying notes 77-82 *supra.* Like the founding fathers, Mr. Justice Black viewed congressional authority restrictively, requiring that citizenship may not be lost without the citizen's "assent." The *Afroyim* decision does, however, represent a return to the view of citizenship that prevailed when the fourteenth amendment was adopted. During the nineteenth century, expatriation was viewed as a natural right that required both voluntariness and unequivocalness in the relinquishment of citizenship.

93. 387 U.S. at 269 n.1 (Harlan, J., dissenting).

94. 401 U.S. 815 (1971). The Court upheld the requirements of § 301(b) of the INA, which revokes the United States citizenship of a child with derivative citizenship unless he comes to the United States between the ages of fourteen and twenty-eight, and resides here continuously for at least five years.

95. Justice Black's dissent viewed the majority decision as implicitly overruling *Afroyim,* because the *Bellei* case is an example of a citizen losing his citizen-

viduals who acquire derivative citizenship, *i.e.*, nationality which is conferred upon the foreign-born children of United States citizens, are not entitled to fourteenth amendment protections because they were not born in the United States, nor were they naturalized citizens.[96] The Court upheld a residency requirement as a condition subsequent to citizenship for those who acquire United States citizenship by virtue of having been born abroad to at least one parent with United States citizenship.[97] The *Bellei* decision denotes a retreat from the spirit of *Afroyim*. This marked change is ascribed to the changed composition of the Court since the 1967 *Afroyim* decision.[98]

C. *Vance v. Terrazas*[99]

1. The Case

Lawrence J. Terrazas, a dual national, was born in the United States to the son of a Mexican citizen. While attending college in Mexico, Terrazas, at the age of twenty-two, signed an oath[100] of allegiance to Mexico that expressly renounced his United States citizenship.[101] This conduct violated section 1481(a)(2),[102] which

---

ship without his consent. The dissenters contend that one born abroad of an American parent is naturalized in the United States within the meaning of the fourteenth amendment.

96. 401 U.S. at 827.

97. *Id.* at 830.

98. Chief Justice Warren and Justice Fortas, members of the *Afroyim* majority, left the Court. Chief Justice Burger and Justice Blackmun, both Nixon appointees, joined Justices Harlan, Stewart, and White, the surviving dissenters of *Afroyim*, to form a five-man majority in *Bellei*. *See* Schwartz, *American Citizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1021 n.68 (1975).

99. 444 U.S. 252 (1980).

100. The application contained the following statement:

> I therefore hereby expressly renounce —— citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of ——, of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America) respectively. 444 U.S. at 255 n.2.

101. 444 U.S. at 255. Plaintiff claimed he was required to sign the oath in order to graduate from the university. *See* note 123 *infra*.

mandated loss of nationality for taking an oath to another nation. The Department of State issued a certificate of loss of nationality. The Board of Appellate Review of the State Department conducted a full hearing and affirmed that Terrazas had voluntarily renounced his United States citizenship. Appellee brought suit in United States District Court pursuant to 8 U.S.C. section 1503(a).[103]

The District Court concluded that Terrazas knowingly, understandingly, and voluntarily took an oath of allegiance to Mexico and concurrently renounced his United States citizenship.[104] The Court of Appeals[105] reversed, denying that Congress had the power to regulate the evidentiary standard.[106] The Seventh Circuit ruled that the Constitution requires that the government prove by clear, convincing, and unequivocal evidence appellee's intent to renounce his United States citizenship.[107] The United States Supreme Court reversed and upheld the preponderance of the evidence standard set forth in the INA.[108]

---

102. The Immigration and Nationality Act of 1952, § 349(a)(2), 8 U.S.C. § 1481(a)(2) (1970). This section provides in pertinent part that a person shall lose his nationality by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision."

103. Section 360 of the INA of 1952, 8 U.S.C. § 1503(a) (1970) provides that any person who is denied nationality may bring an action in district court only within five years after the final administrative denial.

104. The Court relied upon the reasoning of United States v. Matheson, 532 F.2d 809 (2d Cir. 1976), *cert. denied,* 429 U.S. 823, (1976), an opinion noting that the combination of a declaration of allegiance to a foreign state and renunciatory language of his United States citizenship leaves no room for conjecture as to the intent of the applicant. See text accompanying notes 265-97 *infra* for detailed discussion of *Matheson,* in which the decedent's estate, premised upon decedent's oath of allegiance to Mexico, claimed that she had voluntarily relinquished citizenship; but the court held that the decedent lacked the requisite intent.

105. 577 F.2d 7 (7th Cir. 1978).

106. 444 U.S. at 257. The Court relied upon *Afroyim v. Rusk* for this assertion.

107. *See* Nishikawa v. Dulles, 356 U.S. 129 (1958) and notes 36-37, 65-68 *supra* and accompanying text in which the Supreme Court held that the government has the burden of persuading the trier of fact by *clear, convincing, and unequivocal evidence* that a citizen has voluntarily renounced his American citizenship.

108. 444 U.S. 252 (1980). The Immigration and Nationality Act of 1952, § 349(c), 8 U.S.C. § 1481(c) (1970), provides in pertinent part that "[w]henever the loss of United States nationality is put in issue . . . the burden shall be upon the person or party claiming that such loss occurred to establish such

In a three-part opinion, the Court held that both an expatriating act and intent to renounce citizenship must be proved by a preponderance of the evidence before citizenship may be revoked. First, the Court clarified standards governing loss of nationality. Justice White, writing for the majority, held that the "preponderance of the evidence" standard of proof contained in section 349(c)[109] does not violate the citizenship clause of the fourteenth amendment or due process clause of the fifth amendment. Proof in expatriation proceedings no longer requires the evidence to be clear and convincing.[110] Second, the Court attempted to define "voluntary relinquishment" which it had not done in the *Afroyim* opinion. The Court declared that the Government is required to prove a specific intent to renounce United States citizenship, not just the voluntary commission of an expatriating act such as swearing allegiance to a foreign nation. Last, the Court held that the presumption of voluntariness contained in section 349(c) is constitutionally sound.

Justice Marshall agreed with the majority[111] that a citizen of the United States may not lose his citizenship absent a finding of specific intent to renounce citizenship.[112] Because he considered citizenship a fundamental right within the scope of the fourteenth amendment due process clause, Justice Marshall noted that a claim concerning this right is entitled to strict scrutiny. Therefore, he concluded, "a citizen may not lose his citizenship in the absence of clear and convincing evidence that he intended to do so."[113]

Justice Stevens also filed a separate opinion concurring in part and dissenting in part.[114] Although agreeing with the majority that Congress had the authority to establish certain standards for determining whether a renunciation of United States citizenship has occurred, he did not view swearing allegiance to another state

---

claim by a *preponderance* of the evidence . . . . [A]ny person who commits . . . any act of expatriation . . . shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." (Emphasis added.)

109. *Id.*
110. *See* note 107 *supra.*
111. 444 U.S. at 270.
112. *Id.*
113. *Id.* at 271-72.
114. *Id.* at 272.

as being necessarily inconsistent with United States citizenship.[115] Agreeing with Justice Marshall, Justice Stevens asserted that due process requires clear and convincing proof before any deprivation of liberty through expatriation may occur.[116]

Justice Brennan filed a separate dissent,[117] claiming that a person can lose his citizenship only by formal renunciation.[118] He reasoned that dual citizenship is not per se inconsistent with United States citizenship;[119] since Terrazas was born a Mexican citizen, his oath to Mexico added nothing to his preexisting allegiance and took nothing away from his United States citizenship.[120] He further contended that Terrazas' oath was not expatriating.[121]

2. Significance of *Vance v. Terrazas*

Since the *Afroyim* decision, the question of the proper evidentiary standard for expatriation has been a source of judicial conflict.[122] The standard established in *Terrazas* decreased the protection that had previously been afforded to an individual's United States citizenship. This can be examined by considering the functionally distinct stages of an expatriation proceeding. The Government's inquiry first requires proof of an expatriating act. Next, the Government must show that the individual voluntarily committed the act and that he intended to relinquish his citizenship. The conduct, however, is presumed voluntary unless the citizen demonstrates that he did not willfully perform the act.[123] If

---

115. *Id.*

116. *Id.* at 274.

117. *Id.* Despite the three separately filed dissenting opinions, the Court was unanimous in reiterating *Afroyim*'s specific intent requirement for expatriation proceedings.

118. *Id.*

119. *Id.* at 276. Justice Stewart joined in this part of Justice Brennan's dissent. *Id.*

120. *Id.*

121. *Id.* at 275.

122. Some lower courts have applied the clear and convincing evidence standards set forth in *Nishikawa*. *See, e.g.*, United States v. Matheson, 553 F.2d 809 (2d Cir.), *cert. denied*, 429 U.S. 823 (1976) (discussed in text accompanying notes 253-76 *infra*); Peter v. Secretary of State, 347 F. Supp. 1035 (D.D.C. 1972). Others have applied the preponderance of the evidence standard set forth in § 1481(c). *See, e.g.*, King v. Rogers, 463 F.2d 1188 (9th Cir. 1972); Baker v. Rusk, 296 F. Supp. 1244 (C.D. Cal. 1969).

123. In *Terrazas*, the citizen claimed duress because he was told that ob-

the presumption of voluntariness is not successfully rebutted, the parties proceed to consider difficult question of citizen's intent. The *Terrazas* Court interpreted *Afroyim*'s requirement of "assent" to mean nothing less than specific intent.[124] To find the existence of this specific intent, the Court has adopted a subjective standard. In light of all of the circumstances, the Government must prove by a preponderance of the evidence that the citizen has, in his own mind, diluted his allegiance to or shifted his loyalty from the United States. For instance, in *Terrazas,* the citizen's voluntary naturalization in a foreign country was an act inconsistent with United States citizenship, and the additional renunciation of allegiance to the United States evidenced a specific intent to abandon citizenship.

The *Terrazas* standard of proof will make it easier for the Government to expatriate individuals. After *Terrazas,* the individual's conduct itself is an element of the preponderance of the evidence that is adequate to support the jury's finding of specific intent. The significance of *Terrazas* is that it changes the perception of expatriation proceedings so that the individual consequences of expatriation are less apparent.

Theoretically, a liberty is not lost in an expatriation proceeding; rather, its renunciation is proven. The *Terrazas* majority attributed inadequate importance to a citizen's right to retain his United States citizenship. Prior to the *Terrazas* decision citizenship had been treated as a fundamental right,[125] and the rigors of the standard of proof in an expatriation proceeding were commensurate with the status right protected. By embracing a preponderance of the evidence standard, the Court implicitly relegated citizenship to the status of a lesser right entitled to lesser protection.

The Court adopted congressionally suggested standards of proof for expatriation proceedings. *Terrazas* posits a preponderance of the evidence test combined with a rebuttable presumption

---

taining a certificate of Mexican nationality was a prerequisite to graduation from a Mexican university. This, however, was viewed as insufficient to establish duress and thereby rebut the presumption of voluntary action.

124. 444 U.S. at 260.

125. *See Afroyim* discussion at notes 87-93 *supra* and accompanying text. In general, fundamental rights are those rights that have evolved in the area of constitutional law to which one attributes preferred status. They include rights of communication and expression, political participation, religious autonomy, privacy and personhood.

that the expatriating act was voluntarily performed. This standard reduced the protections granted citizenship in *Afroyim* and moved expatriation back toward the unintentional relinquishment of citizenship under *Perez*. The unfortunate result of this standard is that citizenship will be deemed relinquished by conduct that previously would not have constituted the necessary volition.

III. Tax Consequences of Expatriation

A. *Introduction*

As discussed in part II, the cases under the INA typically balance the constitutional protections claimed by citizens who wish to retain their citizenship against the Government's assertion that actions inconsistent with the retention of United States citizenship constitute a voluntary relinquishment of citizenship resulting in expatriation. From 1958 to 1966, the Court manifested increasing doubt about the constitutionality of statutes expatriating citizens who merely committed acts that showed diluted allegiance to the United States. In 1967, *Afroyim v. Rusk*[126] obliterated the concept of statutory involuntary expatriation.

The Supreme Court recently has attempted to narrow its holding in *Afroyim* and lessen the constitutional protections that case had prescribed. In *Rogers v. Bellei*[127] the Court adhered to a very literal reading of the fourteenth amendment and limited application of that amendment's protection to citizens born or naturalized in the United States. The Court continued its retreat from the *Afroyim* standard in *Vance v. Terrazas*[128] by upholding Congress' right to prescribe a minimal standard of proof in an expatriation case. In that case, the Government's proof by a mere preponderance of the evidence that Terrazas had acted voluntarily and with intent to renounce his citizenship successfully established that he had lost his citizenship.

There are few instances in which the courts have had to reconcile the provisions of the INA with those of the Internal Revenue Code. The Supreme Court cases that clarify the law on the legislature's power to impose involuntary expatriation have involved claims of citizenship, whereas the tax expatriation cases present

126. 387 U.S. 253 (1967).
127. 401 U.S. 815 (1971).
128. 444 U.S. 252 (1980).

disclaimers of citizenship. The Supreme Court's recent decisons reducing the citizen's protection from involuntary expatriation without affecting his right of voluntary expatriation provide a background for the tax issues considered in the discussion below.

B. *The Judicial Approach*

1. *Rexach v. United States*

In *Rexach v. United States*[129] the taxpayer[130] renounced his United States citizenship in 1958[131] and received a certificate of loss of nationality pursuant to the INA of 1952.[132] Soon after the assassination of Trujillo, the dictator of the Dominican Republic,[133] the taxpayer applied for a United States passport claiming that his 1958 renunciation was not voluntary. The taxpayer, having succumbed to economic pressure and physical threats, asserted that he had been compelled to relinquish his United States citizenship against his will. On appeal, the taxpayer's testimony was accepted and his certificate of loss of nationality was cancelled. In response to the taxpayer's renewed interest in his United States citizenship, however, the Internal Revenue Service assessed an income tax deficiency for the income earned in the Dominican Republic during the four years following his renunciation.[134] The taxpayer was precluded as a matter of law from claiming that he had ever ceased to be a United States citizen. He did assert, however, that he was a de jure citizen, living as a

---

129. 390 F.2d 631 (1st Cir. 1968).

130. Felix Benitez Rexach is a native-born Puerto Rican who became a United States citizen by virtue of the Jones Act of March 2, 1917, 48 U.S.C. §§ 731-755 (1976).

131. The taxpayer left Puerto Rico in 1944 and became a resident of the Dominican Republic where he remained until 1961. He did not renounce his United States citizenship until 1958 when he executed a written renunciation before a United States consulate official.

132. Section 349(a)(6), 8 U.S.C. § 1481(a)(6) (1970), provides in pertinent part that a person "shall lose his nationality by making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State."

133. The taxpayer was engaged in large scale contracting activities in the Dominican Republic in connection with Trujillo's regime.

134. 390 F.2d at 632. The IRS assessed the taxpayer with a deficiency that the taxpayer ignored. The present suit was brought to foreclose liens in payment of such taxes.

United States alien, and not a de facto citizen.[135] The taxpayer based his unsuccessful argument upon the reciprocal obligation language in *Cook v. Tait*[136] and claimed that he owed no tax since the United States owed him no protections of citizenship. The court did not find that the reciprocal obligations are mutual; it held that the assessment of benefits is not a prerequisite to the assessment of taxes.[137]

Rexach apparently had renounced his United States citizenship for a business purpose, believing such an action would aid him in securing contracts in the Dominican Republic. There was no evidence that the avoidance of income taxes was one of his principal purposes for relinquishment of United States citizenship. The price one pays for maneuvering one's citizenship to secure economic advantage, according to *Rexach,* is continued liability for United States taxes. The obligation to pay taxes is thus clearly applicable although the taxpayer who has abandoned the United States receives no reciprocal benefits from the Government. The Government's right to tax is premised on the citizenship protections that the taxpayer has previously enjoyed and voluntarily chose to forego.

2. *Schneider v. Rusk*

a. The Case

In the landmark decision of *Schneider v. Rusk,*[138] the Court invalidated section 352(a)(1) of the INA, which provided that a "*naturalized* United States citizen will lose his United States citizenship if he resides continuously for three years in the foreign state of which he was formerly a national or in which he was born."[139] The Court held that the statute discriminated so unjustifiably against naturalized citizens, compared to the treatment received by native-born citizens, that it was violative of due process under the fifth amendment of the Constitution.[140]

---

135. *Id.* A de jure citizen is one who is in total compliance with all requirements of the law compared to a de facto citizen who is an actual citizen.

136. 265 U.S. 47 (1924).

137. 390 F.2d at 632. The rejection of the reciprocal obligation argument in *Rexach* has carried through to the Internal Revenue provisions designed explicitly to discourage tax motivated renunciations of citizenship.

138. 377 U.S. 163 (1964); *see* text and accompanying notes 83-86 *supra.*

139. 8 U.S.C. § 1484(a)(1) (1970)(emphasis added).

140. 377 U.S. at 168. *Schneider* is interpreted to apply equally to § 352(a)(2)

b. Revenue Ruling 70-506

In Revenue Ruling 70-506,[141] the Service grappled with the tax consequences of *Schneider v. Rusk*. Were the citizens affected by *Schneider* taxable as United States citizens or as nonresident aliens? This question is significant because the tax burden of a nonresident United States citizen is generally much greater than that of a nonresident alien.[142]

As a result of *Schneider v. Rusk*, certificates of loss of nationality of the United States issued by reason of section 352(a) of the INA are null and void. The individual continues to be a naturalized citizen of the United States; he is deemed to have never lost his citizenship rather than to have regained it. The Service ruled that any affected individual is thereby a "citizen" of the United States and is taxable under sections 1 or 1201(b) of the Code on income received from sources within and without the United States, contrary to the taxpayer's desire to receive preferential "nonresident alien" tax status.

Revenue Ruling 70-506 is not applicable for taxable years beginning prior to January 1, 1971.[143] Therefore, individuals who lost their citizenship by operation of section 352(a) of the INA are not subject to the same income taxes as United States citizens for years prior to January 1, 1971, but are taxed as nonresident aliens.[144] An individual who is considered a nonresident alien pursuant to the nonretroactive application of this Revenue Ruling will be subject to tax under section 871.[145]

---

of the INA, which provides that a naturalized citizen loses his citizenship if he resides continuously for five years in any foreign state other than the state with which he was formerly a national or in which he was born.

141. Rev. Rul. 70-506, 1970-2 C.B. 1.

142. I.R.C. § 871 taxes a nonresident alien, but the types of income subject to tax and the rates of tax differ depending on whether the amount so received is or is not effectively connected with the conduct of a trade or business within the United States.

143. *See* Retroactivity of Regulations or Rulings, I.R.C. § 7805(b).

144. This retroactive exception, however, is not applicable to an individual who affirmatively exercised a right of citizenship prior to January 1, 1971. Such individuals are liable for income tax as United States citizens (not nonresident aliens) beginning with the taxable year in which such specific right of citizenship was exercised. In addition, the mere fact that an individual affected by the *Schneider* decision and this Revenue Ruling takes affirmative steps before January 1, 1971, to establish noncitizen status, will not be considered evidence of tax avoidance motive for purposes of § 877 of the Code.

145. *See* note 142 *supra*.

Commentators have criticized Revenue Ruling 70-506[146] on the grounds that it ignores reality by treating the decision in *Schneider* as establishing unbroken continuity of citizenship for all persons to whom section 352(a) had been applied. The *Schneider* decision was intended to provide relief—not to impose a hardship or burden upon the citizen. The Service, by failing in 1964 to publish a clarifying Revenue Ruling on the tax effect of *Schneider v. Rusk,* failed in its obligation to furnish critical guidance to taxpayers. Because of the dilatory tactics demonstrated by the Service, fairness dictates that it be estopped from retroactively taxing the affected citizen. The scope of Revenue Ruling 70-506 also creates uncertainty. It is unclear whether it covers only those individuals affected by the *Schneider* decision or whether it includes all persons expatriated by operation of a section of the INA that has since been held unconstitutional. Further, there is an inconsistency in this Ruling. Although the Ruling holds that individuals under *Schneider* are "citizens," section 7805(b)[147] mandates that they be taxed as "nonresident aliens" prior to 1971. Fairness, according to one source, requires that the taxpayer be allowed to elect between citizenship or nonresident taxing status for the years prior to 1971.[148]

The above cases illustrate the tension that existed in this area prior to the enactment of specific Code sections. The right of United States citizens to expatriate themselves has come into question with the advent of Internal Revenue Code provisions[149] that provide that even if a citizen properly executes his oath of renunciation, he will be treated as a citizen for tax purposes for ten years following his loss of citizenship. Although no longer experiencing the benefits of citizenship, the taxpayer is subject to the burdens and responsibilities of citizenship — particularly liability to taxation. Not until 1966 did the Treasury Department begin to take an assertive position and encourage Congress to enact legislation which would prevent individuals from easily changing their citizenship status for economic gain. The Internal Revenue Service, ignoring the Court's original motivation for judicial

146. *See, e.g.,* Note, *The Income Tax Consequences of a Holding of Unconstitutionality of Expatriation Statutes,* 1 BALT. L. REV. 49 (1971).

147. *See* text accompanying note 143 *supra.*

148. Note, *supra* note 146, at 58.

149. I.R.C. § 877 (income tax); § 2107 (estate tax); § 2501(a)(2), (3); § 2511(a) (gift tax).

intervention, interceded in this area as custodian of the Treasury and not as a guardian of a fundamental right.

C. *The Internal Revenue Code*

1. Legislative History

The Foreign Investors Tax Act of 1966[150] (FITA) introduced extremely favorable provisions for foreign investors. The FITA made fundamental changes in the taxation of nonresident aliens and foreign corporations in order to encourage investment by foreigners in the United States. In general, the bill eliminates progressive taxation of nonresident alien income that is not effectively connected with the conduct of a trade or business within the United States and reduces the estate tax rates applicable to the estates of nonresident aliens.[151]

In passing FITA, Congress recognized the possibility that United States citizens may be encouraged to surrender their citizenship to take advantage of the more liberal rules applicable to nonresident aliens.[152] Congress responded with provisions which limited the benefits of expatriation. Persons who become nonresident aliens when one of the principal purposes of their expatriation is the avoidance of United States income, estate, or gift taxes are governed by these special punitive Code provisions.[153]

The typical expatriate is one who otherwise would be a nonresident alien neither engaged in trade or business in the United States, nor performing any personal services in this country. Generally, the expatriate derives passive income from United States sources such as dividends, interest, rent, royalties, pensions, or annuities. He may also derive profits from the sale of United States securities. Persons affected by the expatriate provisions are not given the status of United States citizens or residents, nor do they enjoy the full benefits afforded nonresident aliens. The

---

150. Pub. L. No. 89-809, 80 Stat. 1541, *amended by* Technical Corrections Act of 1979, Pub. L. No. 96-222, 94 Stat. 194; Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763; The Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520; Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829.

151. For details concerning FITA, see Tillinghust, *The Foreign Investors Tax Act of 1966*, 20 No. 2, at 87 (1967).

152. H.R. REP. No. 1707, 89th Cong., 2d Sess. 54 (1966); S. REP. No. 1707, 89th Cong., 2d Sess. 9 (1966).

153. *See* note 149 *supra*.

FITA imposes a hybrid status on expatriates so that they have some of the attributes of both resident and nonresident taxpayers.[154]

2. Income Tax

a. Overview of IRC Section 877

Code section 877 is designed to discourage United States citizens from relinquishing their citizenship and moving abroad in order to avoid the United States graduated income tax rates on United States investment income. If a person has lost his citizenship[155] within the past ten years[156] and one of his principal purposes of expatriation was the avoidance of United States income, estate, or gift taxes, he is taxed on all his United States source income at regular tax rates. The expatriated United States citizen is subject to ordinary tax on effectively connected income and on any United States source income to the extent that such tax would exceed the tax imposed on a nonresident.[157] The special treatment is applicable only if the tax produced is higher than the tax under the normal rules governing nonresident aliens. Section 871(a) of the Code provides the guidelines necessary to calculate the thirty percent tax (or less if reduced by treaty) on the specific kinds of income not connected with the United States business taxable to nonresident aliens, and should be compared with the special expatriate provision of section 877. The citizen will be taxed on the higher amount.

A flat thirty percent tax is imposed on nonresident aliens who are not engaged in trade or business in the United States but who receive particular kinds of income from sources within the United States including interest, dividends, rents, premiums, and other types of periodical income[158] and capital gain under specified cir-

---

154. Ness, *Federal Tax Treatment of Expatriates Entitled to Treaty Protection*, 21 TAX LAW. 393, 394 (1967).

155. The effective date of the ten year rule is December 31, 1966. Any citizen, however, who lost his citizenship from March 8, 1965, is governed by the ten year rule.

156. The bill proposed by the House of Representatives called for only a five year rule, but the more inclusive ten year rule was adopted.

157. Spuehler, *So You Want to Leave? Tax Planning for the Departing Alien or U.S. Expatriate*, 47 L.A. BAR BULL. 18 (1972).

158. I.R.C. § 871(a)(1)(A).

cumstances.[159] The expatriate, however, receives different treatment. A person subject to section 877 is taxable at regular individual income tax rates on *all* income from sources within the United States,[160] not just specified kinds of income. Deductions are allowed only to the extent that they are properly allocable to the gross income of the expatriate.[161]

b. Special Sources Rules

In addition to exposing the expatriate to a higher tax rate on more sources of income,[162] the Code[163] contains special source rules to be used in determining United States source income. Gain from sales or exchanges of property located in the United States and stock of domestic corporations or debt obligations of the United States[164] are treated as income from sources within the United States,[165] regardless of where the sale or exchange occurs or title is transferred. This represents a departure from the typical situs rules which state that the place in which the sale is consummated governs the transaction.[166]

c. Capital Gains

The different treatment afforded to the expatriate is evident also in the area of capital gains. A nonresident alien who is present in the United States 183 days or more during the taxable

---

159. I.R.C. § 871(a)(1)(B)-(C).

160. I.R.C. § 877(a)-(b).

161. I.R.C. § 877(b)(2). I.R.C. § 1212(b) capital loss carryover, however, is not applicable.

162. The expatriate's United States source income that is not effectively connected with the conduct of a United States trade or business as well as his income that is "effectively connected" regardless of its source, is taxed at regular income tax rates not limited by a flat rate of 30%. I.R.C. § 877(a)-(c).

163. I.R.C. § 877(c).

164. I.R.C. § 877(c)(1)-(2). This provision is also applicable to debt obligations of a state or political subdivision or the District of Columbia.

165. I.R.C. § 877(c).

166. Generally, if the sale of any personal property including stock of United States corporations is consummated outside the United States it is considered income for sources without the United States. See Treas. Reg. § 1.861-7(c) (1957), which recognizes the passage of title as determining source of income on a sale of personal property except when the primary purpose of the transaction arrangement is tax avoidance.

year is subject to a thirty percent tax on capital gains,[167] but the expatriate subject to section 877 treatment is taxed without any reference to the length of his presence in the United States.[168]

d. Burden of Proof

Section 877 provides special rules with respect to the burden of proof.[169] The Commissioner is required to establish only that it is "reasonable to believe" that the loss of citizenship would result in a substantial reduction in the individual's income, estate, or gift taxes.[170] Once the Service has met the reasonable belief requirement, the burden of proving "absence of tax avoidance motive" shifts to the expatriate. Although the literature refers to section 877(e) as the special burden of proof rules,[171] the section is more aptly described as a special provision relating to the burden of proof. The burden of proof provisions of section 877(e) add nothing to the normal burden of proof usually adopted by the Code, which views the Commissioner's initial determination as presumptively correct and places the ultimate burden of persuasion on the taxpayer.[172]

e. Applicable Case Law Under IRC Section 877

One of the leading cases interpreting section 877 involved the liquidation of a closely held corporation.[173] Mr. Kronenberg[174] was president and sole officer of this corporation. Prior to liquidation he owned approximately ninety-five percent of the outstanding capital stock, the remainder of which was held by his wife and sons. The terms of the executory contract between Mr. Kronenberg and Mr. Marshall, the new buyer, provided that Mr. Kronenberg would remain employed by the importing business for

---

167. I.R.C. § 871(a)(2).

168. I.R.C. § 877(b).

169. I.R.C. § 877(e).

170. Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 130, 80 Stat. 1541, 1547, provides that the amount of the reduction is measured by the expatriate's probable income for the taxable year.

171. *See, e.g.*, Kronenberg v. Comm'r, 64 T.C. 428, 436 (1975); notes 173-80 *infra* and accompanying text.

172. Ness, *The Role of Statutory Presumptions in Determining Federal Tax Liability*, 12 TAX. L. REV. 321, 328-34 (1957).

173. Kronenberg v. Comm'r, 64 T.C. 428 (1975).

174. Mr. Kronenberg was born in Switzerland and subsequently obtained United States citizenship through naturalization.

five years following the sale. For the first year, Mr. Kronenberg was required to remain in the United States, but during the remaining four years he would perform his duties in his native Switzerland. Upon his accountant's advice that his distribution would not be subject to United States taxes if he lost his United States citizenship prior to receiving the distribution,[175] Mr. Kronenberg made final preparation for departure. The Kronenbergs left the United States on February 21, 1967, and voluntarily renounced their United States citizenship before the United States consul in Switzerland on the 23rd. The Kronenbergs did not report the liquidating distribution on the United States return they filed for 1967 and the Commissioner assessed a deficiency.

The petitioner contended that his gain on the distribution was excluded from tax under section 871(a)(2) because he was not present within the United States for 183 days or more during the taxable year 1967. The Commissioner contended that section 877 controlled because the petitioner had been a United States citizen and one of his principal purposes for renouncing such citizenship was to avoid United States income taxes. Rejecting petitioner's claim for the preferential treatment afforded non-resident aliens, the court ruled that a taxpayer who renounced his United States citizenship and moved abroad shortly before receiving a liquidating distribution from his controlled corporation could be taxed on the gain under Code section 877.[176]

The controversy in *Kronenberg* revolved around whether the petitioner had a tax avoidance purpose at the time he relinquished his United States citizenship. The court's opinion relied heavily upon the legislative history of section 877.[177] Although the court conceded that Mr. Kronenberg may have desired to return to Switzerland for other motives entirely, the evidence failed to show that his renunciation was not based on tax considerations. The court concluded that at least one of his principal reasons for expatriation was to secure the tax advantage which he first had

175. The information that Mr. Kronenberg received from his accountant in December 1966 was incorrect. Section 877(a) applies to every nonresident alien who at any time after March 8, 1965 renounces his citizenship for tax avoidance reasons. Although this is a 1975 Tax Court opinion, the circumstances involved occurred soon after the enactment of the new legislation. The accountant, however, did not give current tax advice to Mr. Kronenberg.

176. 64 T.C. 428, 436 (1975).

177. Notes 150-54 *supra* and accompanying text.

learned about in December 1966.[178]

The petitioner also unsuccessfully claimed that section 877 was intended to affect only those who sought to avoid taxes on regularly received investment income and did not apply to cases in which income was generated from a single transaction. The court turned to the specific provisions of the Code[179] and concluded that Congress indisputably intended to tax capital gain received by those who renounced their citizenship for tax reasons. Congress specifically intended to reach the expatriate who sought to protect capital gains on corporate liquidations.[180]

f. Limitations of IRC Section 877

The breadth of section 877 does have its limitations — it applies only to United States source income so that foreign investments of expatriating United States citizens are unaffected. Additionally, the effectiveness of the expatriate provisions of the Code are diminished by the existence of tax conventions between the United States and foreign countries.

(i) Relationship between the FITA and applicable income tax treaties

To avoid double taxation, the United States enters into tax treaties with other nations. The treaties protect the residents or domiciliaries of each contracting country from certain forms of

---

178. The court specifically refrained from addressing the consequences of the special burden of proof rule of § 877(e), finding that its factual conclusions would be the same regardless of which party had the burden of proof. 64 T.C. at 436.

179. Section 877(a) is broadly worded and covers avoidance of *all* United States income, estate, and gift taxes. Section 877(b) specifically provides that § 1201, which imposes the tax on capital gains, is applicable to expatriates. Furthermore, § 877(c) contains special United States source income rules to be applied to taxable gain realized from the sale of stock of United States corporations wherever the sale occurs.

180. 64 T.C. at 436. The final issue addressed by the *Kronenberg* court was whether the petitioner was entitled to deduct his moving expenses to Switzerland. The court ruled that the expenses were not deductible under § 17 of the Code, since under § 877(b)(2) they were not connected with the income received by virtue of the liquidating distribution. *Id.* at 438. His moving expenses were not connected with any income from United States sources taxable under § 877, but were connected with the compensation he subsequently earned while living in Switzerland. *Id.*

taxation. Pursuant to a "savings clause" the United States reserves the right to tax its citizens, including those who change their residence without effectively relinquishing their citizenship.

If the loss of citizenship is preceded or accompanied by a change of residence to a treaty country, the Code provisions that deal with the taxation of nonresident aliens and expatriates, as well as the applicable tax treaties, should be consulted to determine the probable tax treatment of a particular expatriate. The United States currently has in effect income tax treaties with approximately thirty-five countries,[181] thirteen estate tax conventions,[182] and three gift tax conventions.[183] These income tax treaties generally deal with passive income but their provisions vary widely. The provisions of estate tax treaties which usually contain elaborate situs rules and bilateral credit provisions[184] tend to be more consistent.

Article VI of the Constitution[185] declares both the laws of Congress and treaties to be the "supreme law of the land." Statutes and treaties are on a parity so that "a treaty may supersede a prior Act of Congress and an Act of Congress may supersede a prior treaty."[186] The enabling legislation provides that no section of the FITA shall apply if it is contrary to any treaty obligation of the United States.[187] Thus, if section 877 is contrary to any income tax treaty, the treaty provisions will apply. In addition, the Code provides that none of its provisions are applicable if enforcement would be contrary to any treaty obligation.[188]

---

181. Shockey, *Income Tax Treaties - Administrative and Competent Authority Aspects*, TAX MNGM'T PORT. No. 402, at A-1 (1979).

182. Troxell, *Aliens - Estate and Gift Taxation*, TAX MNGM'T PORT. No. 201-2nd, at A-17 (1980).

183. *Id.* at A-19. These countries include Australia, Japan, and the United Kingdom.

184. Palmer, *Estate, Death and Inheritance Tax Problems of Americans Living Abroad and Expatriates*, in 26TH TAX INST. UNIV. S. CALIF. L. CENTER 277, 290 (1974).

185. U.S. CONST. art. VI, § 2, provides in pertinent part that "[t]his Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties, made or which shall be made under the Authority of the United States, shall be the Supreme Law of the Land."

186. Reid v. Covert, 354 U.S. 1, 18 (1956); The Cherokee Tobacco, 78 U.S. (11 Wall) 616, 621 (1870).

187. Pub. L. No. 89-809, § 110, 80 Stat. 1541, 1575 (1966).

188. I.R.C. § 7852(d). Implied amendment of I.R.C. § 7852(d) was made by the Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, § 110, 80 Stat. 1575

In analyzing the problems of the potential United States expatriate, relevant United States treaties must be a first source of research.[189] For instance, according to articles VI and XIV of an income tax treaty between the United States and the United Kingdom, if a United States citizen with a substantial United States portfolio becomes a resident of the United Kingdom, his interest income from United States corporate stock and the capital gains on sale of United States stock will be completely exempt from United States taxation.[190]

(ii) Consequences of Revenue Ruling 79-152

Contrary to any of the legislative history of the FITA discussed above, the service has recently issued Revenue Ruling 79-152.[191] This Ruling indicates that section 877 applies to deny to expatriated United States citizens the advantages accorded to residents of a treaty country by the relevant treaty. The Ruling has been summarized as an action in which "the Service seems to have published a Ruling which clearly contravenes the Code, the legislative history of section 877, and the treaty it purports to construe. It also raises grave administrative policy issues."[192]

Does section 877 apply to tax the gross income of an expatriate who becomes a resident of a foreign country where the income tax treaty between the United States and that country does not specifically preserve the right of the United States to tax under section 877? The Service held that if the section 877 tax exceeds the tax otherwise imposed pursuant to section 871,[193] an expatriate who departs from the United States for income tax avoidance purposes is still liable for the full amount of taxes specified in section 877(b).[194]

(1966). *See also* I.R.C. § 894(a), which provides that income of any kind, to the extent required by any treaty obligation of the United States, shall not be included in gross income and shall be exempt from taxation. I.R.C. § 894(a) was amended by § 105(a) of the Foreign Investors Tax Act.

189. Spuehler, *supra* note 157, at 119.

190. *Id.*

191. Rev. Rul. 79-152, 1979-1 C.B. 237.

192. Roberts, *Is Revenue Ruling 79-152 Which Taxes an Expatriate's Gain Consistent with The Code?*, 51 J. OF TAX. 204 (1979).

193. I.R.C. § 871 governs the tax on nonresident alien individuals. *See* note 142 *supra.*

194. I.R.C. § 877(b) describes the alternative tax set forth in the Code. In general, the expatriate citizen is taxed as a nonresident alien with certain modi-

(a) Facts

The taxpayer in Revenue Ruling 79-152 was born in Country X and immigrated to the United States where he became a naturalized citizen. Taxpayer[195] is the sole shareholder of domestic corporation Y. Corporation Y adopted a plan of complete liquidation on April 4, 1977, which was to be completed within one year. On March 30, 1978, the taxpayer permanently left the United States and returned to his homeland where he immediately renounced his United States citizenship.[196] The Service found that the avoidance of income tax on the capital gain from corporation Y's liquidation was one of the taxpayer's principal purposes for renouncing United States citizenship.

(b) Treaty

The income tax treaty between Country X and the United States exempts from scrutiny a capital gain received from sources within the United States by a resident of Country X who was present in the United States for fewer than 183 days during the taxable year. The treaty does not specifically preserve the right of the United States to tax under section 877 of the Code,[197] although it does contain a "savings clause" which entitles each country to determine the taxes of its citizens or residents under its revenue laws as though the treaty had not come into effect.

(c) Internal Revenue Service analysis

The Ruling relied heavily upon the treaty's savings clause and referred to legislative intent and the tax court decision in *Kronenberg v. Commissioner*.[198] The Treasury asserts that the purpose of the savings clause is to preserve the United States right to tax on the basis of citizenship. Under section 877 this includes imposition of income tax liability for ten years following a tax-motivated expatriation. Taxpayer's post expatriation income is,

---

fications dictated by the special source rules of § 877(c).

195. Taxpayer files his federal income tax return on a calendar year basis.

196. The revenue ruling does not disclose the form of renunciation. It is assumed that the formalities of renunciation were satisfied.

197. The revenue ruling does not disclose the date on which the treaty was entered. One must presume that the treaty's effective date was after December 31, 1966, the effective date of § 877.

198. 64 T.C. 428 (1975). *See* notes 173-79 *supra* and accompanying text.

therefore, not exempt from taxation because under section 877 the taxpayer remains subject to tax as a United States citizen within the meaning of the treaty savings clause.

(d) Ramifications

Revenue Ruling 79-152 is subject to criticism on several grounds.[199] Although the Ruling, which is designed to forestall tax-motivated expatriation, claims to be consistent with the legislative history of section 877, it is contradictory to specific congressional intent. In his opening remarks upon introduction of this bill, Congressman Wilbur Mills stated that the proposed Code provisions[200] "would not apply if contravened by the provisions of a tax convention with a foreign country."[201] Congress wanted to ensure that nations engaging in tax treaties with the United States would not be denied the benefit of the conventions. Mills' remarks were confirmed by Stanley Surrey[202] who noted that if the application of section 877 were contrary to a tax treaty, the treaty would govern.[203] Although the limited exception of not disturbing treaty relations is explicitly delineated in the legislative history, it is conspicuously absent from Ruling 79-152.[204]

The Ruling commands conclusions contrary to statutory interpretation. Section 894(b)[205] indicates that the Code did not intend the savings clause to deny section 877 taxpayers resident in a treaty country the benefits of the United States treaty with that country.[206] If the Ruling is correct, section 894(b) would become a purposeless provision.

Revenue Ruling 79-152 also defies both the rules of treaty interpretation and United States treaty policy. Classic provisions

---

199. *See* Roberts, *supra* note 192.

200. *See* note 149 *supra.*

201. *Removal of Tax Barriers to Foreign Investment in the United States: Hearing on H.R. 5916 before the House Comm. on Ways & Means,* 89th Cong., 1st Sess. 21 (1965), *reprinted in* 1 HOUSE COMM. ON WAYS & MEANS, LESIGLATIVE HISTORY OF FOREIGN INVESTORS TAX ACT OF 1966, at 119, 143 (1966).

202. Speech by Stanley Surrey, Assistant Secretary of Treasury for Tax Policy, Tax Institute of America Symposium (Dec. 2, 1965).

203. 20 BULL. INT'L FISCAL DOCUMENTATION 89, 101 (1966).

204. Roberts, *supra* note 192, at 204.

205. Income Affected by Treaty—Permanent Establishment in the United States, I.R.C. § 894(b), provides in pertinent part that "[t]his subsection shall not apply in respect of tax computed under § 877(b)."

206. Roberts, *supra* note 192, at 205.

such as "a term not otherwise defined in the treaty shall, unless the context otherwise requires, have the meaning which it has under internal tax law"[207] are present in almost all treaties.[208] The interpretive focus should thus be on the term "citizen" to determine whether a section 877 taxpayer is a citizen for purposes of United States taxation.[209] In addition, the Ruling contravenes established United States treaty policy and practices. The Ruling is interventionist in nature. It expands the taxing authority of the United States vis-à-vis treaty partners. The United States may anticipate some future resistance from treaty partners not only because this Ruling may deprive them of revenue, but also because those nations may prefer to preserve treaty advantages for their own residents. Further, developed nations may attempt to limit the United States power to tax its former citizens. Tax critics presume that the extension of the savings clause to foreign residents is a matter that will be resisted by other negotiating authorities.[210]

The current United States negotiating position includes the expanded language of the savings clause to include section 877 taxpayers. However, treaties negotiated and signed in 1976 and 1977, such as those with Korea, the Philippines, and Morocco, do not reflect the expanded language.[211]

Perhaps the most objectionable aspect of the Ruling is that it challenges sound administrative policy. The Ruling should be prospective only, primarily because it was issued thirteen years after enactment of the FITA with no intervening supporting regulations.[212] Furthermore, the Service's role should be limited to interpretation to ensure impartiality, fairness, and predictability.

---

207. *Id.*

208. Since the ruling refers to the foreign nation as X, one must assume that the treaty in question does in fact contain typical treaty provisions.

209. As discussed at notes 149-54 *supra* and accompanying text, the taxpayer is not taxed as a citizen because only his United States source income is taxed and he is governed by the special source rule of § 877(c). The Code does, however, contrary to all rules of interpretation, assume that "citizen" includes one formerly a citizen.

210. Patrick, *A Comparison of the United States and OECD Model Income Tax Conventions*, 10 LAW & POL'Y INT'L BUS. 613, 619 (1978).

211. *Id.*

212. Although no income tax regulations have been issued under § 877, regulations under §§ 2107 and 2501(a)(3) do exist but do not suggest the result in this ruling.

Its function is not to undo the work of Congress but rather to supplement legislative actions. The Treasury maintains that it is merely clarifying and not expanding Congress position. Despite these contentions, the legislative history indicates that the Treasury is in fact usurping an area which Congress explicitly preserved to the parties negotiating the tax conventions.[213]

The ramifications of the Ruling are still uncertain. It is clear that prior to this Ruling clients were advised that because section 110 of the FITA specifically provides that none of its provisions shall supersede the provisions of an existing treaty, the effect of section 877 could be easily mitigated or avoided if the expatriate established residence in a treaty country. According to Revenue Ruling 79-152, even if the taxpayer believes that he will be entitled to exemption or reduced tax rates on United States source income if he becomes a resident of a treaty country he may still have tax exposure under section 877.

There are obvious difficulties in enforcing section 877, especially since no pertinent Treasury regulations have been issued. Section 877 may have some *in terrorem* effect by inducing citizens not to renounce their citizenship and move abroad in order to take advantage of the changes made by the FITA.[214] Revenue Ruling 79-152 indicates, however, that the Treasury believes that section 877 has some bite and is not merely a scare tactic.

3. Estate Tax

a. Overview of Section 2107

Prior to the 1966 enactment of the FITA, it was possible for a United States citizen to avoid United States estate tax entirely by renouncing citizenship and either transferring all his United States assets to a foreign corporation or selling his United States assets and reinvesting the proceeds in foreign securities and other property situated outside the United States. To remove any incentive for United States citizens to renounce citizenship and move to a foreign country, which might exist as a result of the reduced tax rates for estates of nonresident alien individuals, Congress has included an expatriate limitation in the law.[215] The

213. S. EXEC. REP. No. 96-4, 96th Cong., 1st Sess. 10 (1979).

214. Balkin, *Nonresident Individuals—U.S. Income Taxation*, TAX MNGM'T PORT. No. 340 (1977).

215. I.R.C. § 2107.

structure of the estate tax provision is similar both in content and form to that of the parallel income tax provision, section 877.

The law provides that United States property owned by expatriates will be taxed at the regular federal estate tax rates applicable to United States citizens and residents if death occurs within ten years after surrender of United States citizenship[216] and if one of the principal purposes of the loss of citizenship was avoidance of federal income, gift, or estate taxes.[217] If the executor can prove, however, that tax avoidance was not a principal purpose[218] behind the decedent's renunciation of citizenship or that the loss of citizenship resulted from the application of certain provisions of the INA,[219] the estate will be exempt from the provisions of section 2107. The special burden of proof rules that were applicable in the income tax area recur,[220] making it particularly difficult for the executor to disclaim a tax avoidance purpose. The taxable estate is determined under the rules applicable to aliens[221] with one major exception. Certain stock interests in foreign corporations are taxed at rates of up to seventy percent rather than thirty percent.[222] This precludes the expatriate from using a foreign corporation to hold his United States property to avoid federal estate taxes at regular rates. Thus, an expatriate is treated as owning his pro rata share of the United States property held by any foreign corporation to the extent that he alone owns a ten percent interest[223] and that he, together with related parties,[224]

---

216. I.R.C. § 2107(a). The law applies only to those who surrendered their citizenship after March 8, 1965, if death occurs within ten years after surrender of United States citizenship, and only to the estates of those dying after November 13, 1966.

217. *Id.*

218. *Id.*

219. I.R.C. § 2107(d).

220. Once the Government has shown that the expatriate's loss of United States citizenship had tax reduction as one of its principal purposes, § 2107(e), like § 877(e), shifts the burden of proof to the administrator or executor of the expatriate's estate to prove the contrary.

221. I.R.C. § 2103.

222. I.R.C. § 2107(b).

223. Ownership for purposes of this test includes direct ownership and indirect ownership through another foreign corporation or through a foreign partnership, trust, or estate. Ownership is governed by I.R.C. § 958(a)-(b).

224. Ownership for purposes of this test includes ownership attributed to the expatriate under the constructive ownership rules of I.R.C. § 318. In general, these rules attribute to an individual ownership of stock held by members of his

controls more than fifty percent of the total combined voting power. The purpose of the special rules of section 2107 is to prevent the wholesale transfer of United States situs assets owned by an expatriate to a controlled foreign corporation in order to evade the estate tax which would otherwise apply.[225]

Section 2107 is designed to interact with other estate tax provisions. To determine whether the expatriate owns more than ten percent of or controls more than fifty percent of the vote of a foreign company, the expatriate is viewed as owning stock which he transferred during his lifetime although such stock may not have been included in his gross estate for federal tax purposes. These inter vivos stock transfers include all transfers within the meaning of sections 2035 through 2038.[226] The effect is that a tainted method of transferring stock will result in the stock being included in the expatriate's gross estate if his death occurs within ten years after expatriation.

Two sets of rules pertaining to credits exist: rules for taxes paid before January 1, 1977, and rules for estates of decedents dying after December 31, 1976. In computing the estate tax, the expatriate's estate is allowed several credits. These include credits for state death taxes, for gift tax for gifts made before January 1, 1977 and included in the gross estate, and for tax on prior transfers.[227] For estates of decedents dying after December 31, 1976, a unified credit of $13,000 is allowed, but the original $30,000 exemption is repealed.[228] The expatriate's estate is also allowed credits under sections 2011 through 2013.[229]

b. Situs Rules

An expatriate who dies within a ten-year period after the renunciation of his citizenship is not treated as a United States citizen. He is taxed only on that part of the estate "situated in the

---

family, as well as by partnerships, trusts, estates, or corporations in which the individual has certain interests.

225. S. REP. No. 1707, 89th Cong., 2d Sess. 54 (1966).

226. Specifically these transfers include those governed by Code sections: (i) section 2035 — transfers made within three years of death, (ii) section 2036 — transfers with retained life estates, (iii) section 2037 — transfers effective at death, and (iv) section 2038 — revocable transfers.

227. I.R.C. § 2102.

228. I.R.C. § 2106(a)(3) was repealed by § 2001(c)(1)(F) of the Act of Oct. 4, 1976, Pub. L. No. 94-455, 90 Stat. 1521.

229. I.R.C. § 2107(c)(2).

United States,"[230] and not on his worldwide assets. The situs rules controlling inclusion of property in the estates of nonresidents[231] identify property situated in the United States and consequently includable in the expatriate's gross estate.

Generally, assets treated as property located in the United States include stock of domestic corporations[232] and debt obligations[233] owned and held by nonresident aliens if the primary obligor is the United States or a United States business or person.[234] In contrast, certain bank deposits,[235] proceeds of insurance on the life of a nonresident alien, and works of art on exhibit in the United States will be treated as property located "without the United States" for federal estate tax purposes and not includible in the decedent's gross estate.[236]

c. Limitations of IRC Section 2107

Despite convoluted situs rules, there are several benefits under section 2107 that flow from the taxpayer's expatriation and residence abroad. These benefits are immediately available to the expatriate and are unaffected by the ten-year rule.[237] An expatriate is effectively insulated from United States estate taxes for: (1) proceeds of life insurance policies regardless of the country of incorporation of an insurer, (2) deposits in foreign banks, (3) foreign real property, (4) tangible personal property with a situs outside the United States, and (5) a debt obligation of foreign obligors regardless of where evidence of indebtedness is located at

---

230. I.R.C. §§ 2103, 2107(b).

231. I.R.C. §§ 2104, 2105.

232. I.R.C. § 2104(a).

233. Currency is not considered a debt obligation.

234. I.R.C. § 2104(c). This inclusion provision also applies to the primary obligations of various government entities such as a state, other political subdivisions, or the District of Columbia.

235. Under the law prior to November 14, 1966, bank deposits of a nonresident alien in a United States bank were deemed property within the United States under § 2104(c)(2) only if he were carrying on a United States business. For persons dying after November 13, 1966, carrying on a business is no longer the test. If interest on deposits in a United States bank, savings and loan association, United States insurance company, or domestic branch of a foreign corporation is "effectively connected with a trade or business" in the United States, then it is deemed property within the United States.

236. I.R.C. § 2105.

237. Palmer, *supra* note 184, at 299.

death.[238]

There is a noticeable omission in the above list — stock of a non-United States issuer, which ordinarily would not be included in the United States estate of a nonresident alien.[239] The absence of such stock from the preceding list is attributable to section 2107(b), which provides a special rule for shares of foreign corporations controlled by the decedent and possessing assets located within the United States. According to the legislative history,[240] the purpose of this special rule is to prevent wholesale transfer of United States situs assets owned by an expatriate to a controlled foreign corporation to evade the estate tax. Except for this special rule, the gross estate of an expatriate is determined under Code section 2103, which limits the gross estate of a nonresident alien to property situated in the United States.

The situs rules may be modified by the provisions of an applicable death tax treaty. The provisions of a convention apply in the case of a taxpayer dying on or after the effective date of the convention. To the extent that the rule governing inclusion of stock of foreign corporations in the gross estate of an expatriate is contrary to existing estate tax treaties it will not be effective.[241] For instance, some treaties give shares of corporate stock a situs in the place of incorporation with no provision for including shares of a foreign corporation owning assets situated in the United States in the gross estate.[242] Other estate tax treaties contain no general situs rules.[243] Even the Organization for Economic Cooperation and Development[244] draft estate tax convention gives personal property a situs in the country in which the decedent was domiciled with no specific exemption for stock owned by a nonresident alien. This vast variation among treaties will lessen the impact of the situs rules contained in sections 2104 and 2105 as well as the section 2107(b) special rules concerning expatriates'

---

238. Treas. Reg. § 20.2105-1, 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 8075.

239. I.R.C. § 2104(a).

240. S. REP. No. 1707, 89th Cong., 2d Sess. 54 (1966).

241. Ness, *supra* note 172, at 402.

242. Such treaty countries include: Canada, the United Kingdom, France, Finland, Greece, Ireland, Italy, Japan, Norway, and the Union of South Africa. Since the United States has entered only thirteen estate tax conventions this list comprises the majority of treaty nations.

243. Such treaty countries include Switzerland and Australia.

244. The Organization for Economic Cooperation and Development (OECD) Model Tax Treaty. *See* arts. 5-8, TAX TREATIES (CCH) ¶ 152.

interests in foreign corporations.

4. Gift Tax

The gift tax provisions[245] generally parallel the estate tax provisions of the Code. Nonresident aliens are exempt from tax on gifts of intangible property[246] regardless of the situs of the property, and may be taxed on gifts of real estate and tangible personal property only if it is located within the United States at the time the gift was made.[247] Section 2501(a)(3)(B), however, denies the intangible exemption to expatriates who renounce their United States citizenship for tax avoidance purposes. The gift tax expatriate rules extend the scope of the gift tax to include gifts of intangible personal property with United States situs made by a qualified expatriate. Thus, gift tax is imposed on transfers of shares of stock in domestic corporations[248] and debt obligations of United States persons[249] and the United States Government[250] because this property is considered to be situated in the United States.[251] The physical location of the bonds or stock certificates is not relevant for situs purposes.[252] Obligations of foreign obligors are not taxable even though physically located in the United States.

An unusual distinction exists between the gift and estate tax treatment of intangibles. The gift tax exemption for gifts of intangibles not having a United States situs is generally applicable. Theoretically, an expatriate can make a gift transfer of shares of a controlled foreign corporation whose assets consist of United States situs property without gift tax liability. Pragmatically, however, the interaction of other Code provisions makes this transfer virtually impossible.[253]

---

245. I.R.C. §§ 2501(a)(2), 2501(a)(3), 2511(a).

246. I.R.C. § 2501(a)(2).

247. I.R.C. § 2511(a).

248. I.R.C. § 2511(b)(1).

249. I.R.C. § 2511(b)(2)(A).

250. I.R.C. § 2511(b)(2)(B). This section includes the debt obligation of the United States, a state or any political subdivision, or the District of Columbia.

251. I.R.C. § 2511(b).

252. The statutory rule on debt obligations changes prior law with respect to bonds. Previously they were considered to have a situs where the bonds were situated. *See* Treas. Reg. § 25.2511-3(b)(1), T.D. 6334, 1958-2 C.B. 627, 649.

253. Palmer, *supra* note 184, at 303. See, for example, I.R.C. § 367 (transfers of property to foreign corporations) and § 1491 (imposition of an excise tax on

D. *Planning to Reduce Impact of the Expatriation Provisions*

1. In General

Before a taxpayer renounces his United States citizenship, he should choose an alternate allegiance[254] to avoid expatriating himself into statelessness. Because waiting time prior to expatriation does not count toward the tolling of the ten-year rule an expatriate may want to settle in a jurisdiction with a short waiting period to establish citizenship.

If the income tax consequences are not onerous, a program of liquidation of United States situs assets should be started prior to expatriation and the funds should be used to acquire foreign substitutes. This method allows the taxpayer to take advantage of the situs rules of section 2105 without being penalized by the section 2107 inclusions.

2. Foreign Trusts

The new grantor trust rules of the Tax Reform Act of 1976[255] treat a United States person who created a foreign trust with United States beneficiaries as the owner of the transferred property.[256] The legal situs of the trust corpus is determined by "looking through" to the underlying property. In this way, United States citizens remain subject to tax on the income generated by transferred property.

Expatriation is often seen as a planning device for avoiding the foreign grantor trust rules. Although expatriation rules were intended to discourage United States citizens from renouncing their citizenship to avoid graduated rates of tax on their United States investment income, Congress addressed neither the relationship of expatriation rules to the grantor trust rules nor their impact on foreign source income generated by a foreign trust. Thus, planning devices that the taxpayer can use to benefit from the incon-

---

transfers to avoid income tax), which would prevent a tax free gift transfer of shares of a controlled foreign corporation.

254. This course of action is not necessary for dual nationals who will be returning to their homeland.

255. Pub. L. No. 94-455, § 1013, 90 Stat. 1520, 1614; Pub. L. No. 94-455, 159. Prior to the 1976 Act a United States person could benefit by transferring property to a foreign trust with United States beneficiares.

256. I.R.C. § 679(a).

sistencies in the expatriation rules may be developed[257] by examining the income, estate, and gift tax consequences on transfers made to foreign trusts.

a. Income Tax

(i) The grantor

If a United States citizen relinquishes his citizenship prior to creating a foreign trust in which his American children are beneficiaries, the transaction falls outside the scope of the grantor trust rules because the transferor is not a United States citizen at the time of the transfer.[258] The Service may contest the transferor's motive for expatriating and contend that he should be treated as the owner of the trust. As the deemed owner, the transferor would be subject to the alternative tax prescribed by section 877(b). The alternative tax is imposed only on United States source income earned during the ten-year expatriation period. The United States expatriate can successfully thwart the application of the foreign grantor rules by funding the trust with property producing foreign source income. Even if the Service treats the transferor as the owner of the income under the grantor trust rules, there would be no applicable property subject to the alternative tax.

(ii) The beneficiary

The Tax Reform Act of 1976 effected a number of major changes[259] in the treatment of accumulation distributions to ben-

---

257. *See* Gross, *Expatriation and Foreign Trust Rules,* 5 INT'L TAX J. 132 (1978).

258. Section 1491 of the Code governs the excise tax on the transfer by a United States citizen to a foreign trust. If the transferor, however, expatriates himself before creating the trust, the transfer of the property funding the trust is not subject to the excise tax since the transferor is not a United States citizen at the time of the transfer. Unlike I.R.C. § 877, the excise tax is inapplicable regardless of the presence of tax avoidance motives for making the transfer.

259. See, for example, I.R.C. § 668, which provides punitive rules governing accumulation distributions to United States beneficiaries of a foreign trust. Under these rules an interest charge, equal to six percent of the tax imposed on a beneficiary each year, is multiplied by the number of years during which tax was deferred because the income was accumulated rather than distributed; the sum of the interest plus the tax cannot exceed the amount of the distribution, but the trust is not allowed a deduction for payment of the interest and for throwback purposes, and the beneficiary must treat as ordinary income any cap-

eficiaries of foreign trusts. To avoid these punitive rules, a United States beneficiary can expatriate before receiving a distribution. Even if the expatriation rules apply, the alternative tax imposed by section 877 does not subject the distribution to United States tax because the distribution is foreign source income.[260]

b. Estate Tax

Estate tax section 2107, which governs expatriation, subjects the United States situs property of a qualified expatriate's gross estate[261] to the progressive rates applicable to United States citizens[262] rather than the generally lower rates applicable to nonresident aliens.[263] Once the foreign trust is created, however, the trust corpus loses its United States situs forever.[264] Even if the principal reverts to the expatriate transferor, it is not included in his gross estate because it does not have a United States situs. The trust remainder is includible in the beneficiary's gross estate if the trust remainder passes to someone other than the transferor. Therefore, a tax planner must remember that a beneficiary who expatriates to avoid United States income tax on distribution may also avoid estate tax if the trust principal is located outside the United States.

c. Gift Tax

Transfers of United States situs intangible personal property to a foreign trust by a qualified expatriate trigger the gift tax. A transferor who intends to fund the trust with intangible property should transfer foreign situs intangibles to avoid imposition of gift tax expatriation rules on the transfer.

---

ital gains accrued in 1976 or thereafter.

260. If the trust is funded with foreign situs property, the same fact pattern results and the alternative tax imposed by the expatriation rules is not assessed.

261. I.R.C. §§ 2107(b), 2103.

262. I.R.C. § 2001(c).

263. I.R.C. § 2104(d).

264. Treas. Reg. § 20.2103-1, 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 8045 (property deemed situated outside the United States).

IV. The Relationship Between the Constitution and the Internal Revenue Code with Respect to Matters of Expatriation

A. *United States v. Matheson*

1. The Case

United States v. Matheson[265] illustrates the conflict between the constitutional safeguards that protect a taxpayer's citizenship[266] and the taxpayer's right to claim expatriation when substantial tax savings can be obtained. The *Matheson* case involved the income, estate, and gift tax consequences of the Dorothy Gould Burns (granddaughter of the railroad magnate Jay Gould) estate. In the opening remarks of his opinion Judge Mansfield noted:

> [s]ince United States citizenship is considered by most to be a prized status, it is usually the government which claims that the citizen has lost it, over the vigorous opposition of the person facing the loss. In this rare case the roles are reversed. Here the estate of a wealthy deceased United States citizen seeks to establish over the government's opposition that she expatriated herself. As might be suspected, the reason is several million dollars in tax liability,[267] which the estate might escape if it could sustain the burden of showing that the deceased lost her United States citizenship.[268]

The basic issue in *Matheson* was whether the decedent had ever knowingly relinquished her United States citizenship. Decedent was born in the United States in 1904, but lived in Europe after 1919. Decedent always traveled on a United States passport.[269] Between 1925 and 1936, she was married to a Swiss na-

---

265. 532 F.2d 809 (2d Cir. 1976).

266. Constitutional safeguards require proof of subjective intent to relinquish citizenship before a certificate of loss of nationality can be issued. *See* notes 53-125 *supra* and accompanying text.

267. Although this appeal involved claims of gift and income tax liabilities amounting to only about $24,000, there exists in the Tax Court a pending estate tax dispute involving approximately $3.25 million that turns on the resolution of the legal issues raised here.

268. 532 F.2d at 811.

269. Between 1945 and her death in 1969, the decedent traveled extensively in Europe using a United States passport and stating in all passport applications that she was a United States citizen. She paid income taxes to the United States and obtained exemptions from French income taxes because of her American nationality. Her yacht was registered as American to avoid duty on entry into

tional. In 1944 she married a Mexican national. Since an alien woman who married a Mexican man became a naturalized citizen under Mexican law, decedent applied for a certificate of Mexican nationality[270] in which, *inter alia,* she declared her allegiance to Mexico and renounced any rights arising from her previous nationality.[271]

The executor contended that decedent's execution of the Mexican nationality certificate in 1944 conformed to the expatriation provision of section 349(a)(2) of the INA.[272] The district court rejected this argument and held that the decedent had always been a United States citizen and that the estate was barred by laches from asserting that she had been expatriated in 1944.[273]

Affirming, the court of appeals relied upon *Afroyim v. Rusk*:[274] "*Afroyim*'s requirement of a subjective intent reflects the growing trend in our constitutional jurisprudence toward the principle that conduct will be construed as a waiver or forfeiture of a constitutional right only if it is knowingly and intelligently intended as such."[275] The court examined the conduct of the deceased to determine whether she had satisfied the requisite intent necessary to relinquish citizenship.[276] The court found that the evidence

---

France. Her death in France was reported to United States officials as that of an American national.

270. There was an underlying consideration that the Mexican certificate had been sought to enable the decedent and her family to move in and out of Mexico easily and not a result of a desire to relinquish United States citizenship. Mexican citizenship allowed Mrs. Burns' eldest daughter by her previous marriage to gain expedited entry into Mexico as a preferred immigrant.

271. The language of the renunciation provided in relevant part:

> I herewith formally declare my allegiance, obedience, and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin.

532 F.2d at 811.

272. Title 8 U.S.C. § 1481(a)(2) (1976) provides that nationality will be lost by naturalization in a foreign state or by execution of an oath of allegiance to a foreign state.

273. 532 F.2d at 813.

274. 387 U.S. 253 (1967). The executor attempted to minimize the significance of *Afroyim* by reading Rogers v. Bellei, 401 U.S. 815 (1971), broadly. *See* notes 94-98 *supra* and accompanying text.

275. 532 F.2d at 814.

276. *Id.* at 815.

showed decedent's intent to establish dual nationality, but not decedent's intent to expatriate herself.[277] The court characterized Mrs. Burns' 1944 declaration as a mere "subscription to a basic principle of international law governing dual nationality: that a national of one country may not look to it for protection while she is in another country of which she is also a national."[278] In the court's view, the declaration was a limited surrender which did not preclude her from claiming rights as a United States citizen outside of Mexico.[279] The fact that she did not expatriate herself by unequivocally renouncing her United States citizenship when she could have done so was determinative. The court observed that the United States had furnished many benefits to Mrs. Burns[280] and, therefore, was entitled to payment of taxes by her estate.[281] Finally, relying upon *Rexach v. United States*,[282] the court noted that one gaining governmental benefits on the basis of a representation or asserted position is thereafter estopped from taking a contrary position in an effort to escape taxes.[283]

2. Analysis

The *Afroyim* decision was viewed as the high-water mark of constitutional protections of citizenship. The *Afroyim* Court considered citizenship a fundamental right.[284] Although the *Matheson* decision was announced eight years after *Afroyim* and there were indications that the wide sweep of *Afroyim* would gradually be narrowed,[285] the court transformed the *Afroyim* language intended as a blanket protection of a citizen's rights and turned it into a presumption against voluntarily renunciations of

277. *Id.* at 816.

278. *Id.*

279. *Id.* In 1949 the Mexican naturalization law was substantially modified to require explicitly a renunciation of other citizenship in applying for a certificate of Mexican nationality. *Id.* at 817.

280. *Id.* at 819. The benefits received by Mrs. Burns attributable to her United States citizenship included: issuance of United States passports, issuance by the United States Coast Guard of a license for her yacht, and registering as a United States citizen with the United States Mission, entitled her to assistance by United States officials overseas. *Id.*

281. *Id.*

282. 390 F.2d 631, 632 (1st Cir.), *cert. denied*, 393 U.S. 833 (1968).

283. *Id.*

284. Afroyim v. Rusk, 387 U.S. at 262.

285. *See* notes 94-98 *supra* and accompanying text.

citizenship.

The language of *Afroyim,* which indicated that Congress had no power to prescribe any objective conduct that would automatically result in expatriation (absent an individual's voluntary relinquishment of citizenship), was incongruously used to avoid finding that a decedent's application for a certificate of Mexican nationality was prompted by a specific intent to relinquish her United States citizenship.

The *Matheson* decision illustrates the potential interplay between the INA and the Internal Revenue Code. In order to appropriately analyze the tax consequences of an expatriation case, the courts should utilize a three-step analysis. First, the INA should be consulted to determine whether the taxpayer has engaged in conduct which is deemed to be expatriatory. In the instant case, the taxpayer claimed to have satisfied section 1481(a)(1) of the INA, which provides that United States citizenship will be lost upon taking an oath to a foreign country. Satisfying the requirements of the immigration law pertaining to expatriation is, however, only prima facie evidence that expatriation will actually occur. Once an expatriating act (*e.g.,* an oath to a foreign country) has been proven, the expatriation provisions of the INA should be read in light of the Supreme Court decisions interpreting that legislation. Only after the necessary elements of voluntariness and intent have been satisfied will the litigant meet the threshold tests allowing him to turn to the third step in the analysis — an examination of the impact of the Internal Revenue Code upon the expatriation. By adopting this proposed three-step analysis, the courts apply the same criteria regardless of whether the government or the taxpayer is advocating expatriation. Only the first two steps of the analysis are required when the government asserts expatriation. The taxpayer claiming expatriation allegedly for tax avoidance reasons should be entitled to the same analysis. Only when he has satisfied the first two steps in the process and has been guaranteed that his citizenship right has been afforded the constitutional protections enunciated by the Supreme Court should the courts examine the third step.

In a case such as *Kronenberg,* where the taxpayer clearly engaged in expatriatory conduct (renunciation of United States citizenship) and performed the renunciation voluntarily and with the intent to lose his citizenship, the Court will quickly gloss over the first two steps and focus attention on the principal issue — the impact of the Internal Revenue Code upon the expatriation. In

Matheson, the estate proved the expatriatory conduct (the oath) and no evidence was presented to refute the voluntary nature of Mrs. Burns' conduct (*i.e.,* neither party contended that the oath was made against her will), but that conduct was held not to satisfy the intent requirement. Although Mrs. Burns had voluntarily sworn allegiance to Mexico, she did not establish by the totality of the circumstances that she subjectively intended to relinquish her United States citizenship by her Mexican oath. Her oath merely established her dual nationality.

By relying upon the oath that the decedent had taken years before her death to remove her estate from the reach of the United States taxing authorities, and despite the abundant evidence against expatriation, the attorneys involved in *Matheson* made a valiant though unsuccessful effort at innovative post-mortem planning. The stakes were high. Several million dollars in taxes rested upon the legal characterization of Mrs. Burns' actions. In brief, the attorneys dealt primarily with the first step of the analysis. They contended that the INA specifies conduct that automatically results in expatriation, but they failed to confront the Supreme Court decision in *Afroyim*[286] which undermines this argument. The *Afroyim* Court explicitly rejected earlier cases applying an objective test in favor of the argument that Congress cannot strip an individual of his citizenship in the absence of a voluntary relinquishment embodying a specific intent to lose nationality.[287]

Although the resolution of the expatriation issue controlled more than three million dollars in potential tax revenues, neither party cited or relied upon the Internal Revenue Code expatriation provisions.[288] Since the Internal Revenue Code was not cited as a theory for relief, the *Matheson* court, while invalidating the expatriation in the second step, never addressed the impact of the expatriation Code provisions. Given that there have been few decisions involving tax related expatriations, that the courts have not adopted a well-defined method of analysis, and that the satisfac-

---

286. The appellants in *Matheson* offered several unpersuasive grounds for distinguishing *Afroyim* including: (1) *Rogers v. Bellei* implicitly overruled *Afroyim,* and (2) the *Afroyim* decision should be limited to cases dealing with voting in foreign elections. 532 F.2d at 814.

287. 387 U.S. at 266.

288. Ignorance of the provisions is probably not the reason for the omission since the alternative tax established by §§ 877, 2107, and 2501 was in existence ten years prior to *Matheson.*

tion of the intent requirement was the major hurdle in the *Matheson* case, the attorneys may have been in a better tactical position had they started with the third step in the proposed analysis. By focusing on the applicable Internal Revenue Code provisions, the attorneys could have diverted the court's attention away from the potential constitutional weakness in their argument. Rather than adopting the proposed three-step analysis set forth above, the courts historically have characterized such controversies as either constitutional or tax cases. This has resulted in few cases exemplifying an interplay between the relevant tax and constitutional analysis. This means that the appellants could have used the court's failure to combine tax and constitutional analysis to the court's advantage.

The argument presented by Matheson's attorneys should have focused upon section 2107. Section 2107 provides that if one of the principal purposes of the loss of citizenship is avoidance of United States taxes, the United States property owned by expatriates will be taxed at regular estate tax rates applicable to United States citizens, so long as the expatriate's death occurs within ten years after surrender of United States citizenship. Implicit in the alternative tax provisions governing expatriates is the assumption that citizenship actually has been relinquished. The plausibility of this option is evidenced by the fact that the attorneys contended that Mrs. Burns' declaration of allegiance resulted in automatic expatriation pursuant to the INA; under this theory she was potentially subject to section 2107 treatment.

The attorneys should have first offensively introduced section 2107, and then framed the question of whether the elements of section 2107 had been satisfied. The bulk of the argument should have established why their client did not satisfy the requisites of the punitive Code provision. If an individual expatriates and lives more than ten years, the taint associated with his original renunciation disappears. Because Mrs. Burns signed her oath twenty-five years before her death, the ten-year period of section 2107 was not met. In addition, the record reflects that Mrs. Burns' principal motives for declaring allegiance to Mexico were ease of travel within her new husband's domicile and the establishment of preferred immigrant treatment for her daughter from her first marriage; the tax avoidance motivation required for the application of section 2107 thus was not met. Arguably, tax avoidance did not enter into her decision to pledge loyalty to Mexico.

Even if the court had found that one of Mrs. Burns' purposes

for expatriation was the avoidance of United States taxes, she had not satisfied the required ten-year rule. More importantly, since she was a United States expatriate, only her United States assets and not her worldwide wealth would be subject to estate taxation. By adopting the suggested strategy, the *Matheson* attorneys could have saved their client some tax money. The tax liability associated with the expatriate alternative tax provisions generally is lower than the tax generated by the estate of a citizen. If the court's focus had been upon the expatriation provisions of the Code, the estate would have been subject to only the alternative tax due to the failure to satisfy section 2107. Concentrating instead on the "intent" requirement and Mrs. Burns' failure to satisfy it, the court announced that Mrs. Burns was still a citizen and that her entire estate therefore was subject to United States taxation.

3. The Matheson Decision in Light of *Vance v. Terrazas*

In *Vance v. Terrazas,*[289] the most recent Supreme Court interpretation of the expatriation provisions of the INA,[290] the Court had an opportunity to address the application of section 1481(a)(2) — specifically whether the oath Mr. Terrazas made to the Mexican government constituted expatriatory conduct. In certain respects the *Matheson* and *Terrazas* decisions are similar. Both involve section 1481(a)(2) of the INA, which declares that one who takes an oath to a foreign country engages in expatriatory conduct, and both involve formal declarations of allegiance to Mexico. In *Matheson,* the court held that the oath made to the Mexican government did not constitute expatriatory conduct despite the claim of the citizen's estate that she intended to relinquish her citizenship. In contrast, the *Terrazas* Court held that the oath made to the Mexican government resulted in expatriation over protests by the citizen that he did not intend to lose his nationality. Besides observing that the government's position was upheld by the Court in both instances, how can these deci-

289. 444 U.S. 252 (1980).

290. But compare Fedorenko v. United States, 101 S. Ct. 737 (1981), in which the Court interpreted § 340(a) of the INA, *as amended by* 8 U.S.C. § 1451 (1976), entitled Revocation of Naturalization— Concealment of Material Evidence. The Court held that a Nazi prison guard who materially misrepresented himself upon entry into the United States was denaturalized. The Court revoked his citizenship because he had procured it illegally.

sions be reconciled?

There is a technical difference between the two cases. The Mexican Nationality and Naturalization Act of 1934, was in force in 1944 when Mrs. Burns acquired Mexican nationality. This Act treated women who were allowed to acquire Mexican citizenship because of their marriage to Mexican husbands as dual nationals. In 1949 the Mexican naturalization law was modified to require a renunciation of other citizenship when applying for a certificate of nationality.[291] A comparison of the oaths taken in *Matheson* and *Terrazas,* however, reveals that both documents contain language of renunciation.[292] The more important issue is whether the crucial question of intent to relinquish citizenship, which is the threshold element necessary to satisfy constitutional protection for United States citizenship, should be determined by minor changes in foreign nationality law.

The *Terrazas* decision is not intended to overrule *Matheson. Terrazas* cites *Matheson* as an example of application of the *Afroyim* analysis.[293] In *Terrazas,* the Court, referring to *Matheson,* states that "expatriation depends on the will of a citizen as ascertained from his words and conduct . . . ."[294] *Terrazas* has not eliminated the intent requirement announced in *Afroyim,* but rather has decreased its effectiveness by mitigating the burden of proof standard.

Extending the *Terrazas* analysis to the *Matheson* facts, this lesser burden of proof can aid the taxpayer. For example, the *Terrazas* Court held "that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act."[295] Accordingly, the *Matheson* oath of allegiance would be presumed voluntary. If voluntariness is presumed, the only remaining question under *Terrazas* is "whether on all the evidence the government has satisfied its [minimal] burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship."[296] One could assume from the *Terrazas* language that if the citizen and not the government was claiming expatriation, the citizen need establish only the requisite

---

291. 532 F.2d at 817.
292. *See* notes 100 & 271 *supra.*
293. 444 U.S. at 263.
294. *Id.*
295. *Id.* at 270.
296. *Id.*

intent to renounce nationality by a mere preponderance of the evidence.

The language of the *Terrazas* decision, however, seems to focus on facts similar to those in *Afroyim* in which the citizen is vehemently struggling to retain his nationality. The Second Circuit in *Matheson* is the only court of appeals to date to consider the "flip-side," in which the citizen is vehemently struggling to relinquish his citizenship for tax-based reasons. *Matheson* was denied certiorari[297] and it is unlikely that the Court will examine such facts until several other circuits have considered the issue.

In *Matheson* strong evidence of Mrs. Burns' continued relationship with the United States tended to refute her expatriation claim.[298] If a future case presents evidence clearly indicating a taxpayer's intent to renounce citizenship, the application of the *Terrazas* analysis could produce a holding in favor of the taxpayer. If the Court develops a separate analysis for tax-induced expatriation rather than adopting one congruous method for analyzing expatriation such as the three-step analysis proposed above, the Court will effectively force the retention of citizenship in order to take property. There is no rational basis upon which one could develop a test producing the incongruous results in the present line of cases. Currently, if a person wishes to remain a United States citizen, his citizenship right is entitled to lesser protections than that of a person who wishes to cast aside his citizenship. Whether or not the Court treats citizenship as a fundamental right entitled to the utmost protection, it must ensure uniformity of treatment. The value attributed to the right of citizenship should be the same for the citizen qua citizen as the citizen qua taxpayer.

V. CONCLUSION

This Note first specifically addressed those cases in which United States nationals bitterly fought to retain their citizenship and the standards that have evolved from those cases to prevent the unjust rescission of citizenship. The second part of this analy-

297. 429 U.S. 823 (1976). In opposition to the petition for certiorari, the Solicitor General argued that "*Afroyim* broadly held that Congress has no power to prescribe any objective conduct that will automatically result in expatriation, absent the individual's voluntary relinquishment of citizenship . . . ." Vance v. Terrazas, 444 U.S. at 263 n.7.

298. *See* notes 269 & 280 *supra*.

sis dealt with what Judge Mansfield termed the "rare case"[299] in which the citizen seeks to renounce his United States citizenship for tax reasons. As Judge Mansfield commented, the case law in this area is scarce,[300] but the problem is extensive enough for Congress to have made substantial amendments in the Internal Revenue Code to countermand attempts by United States citizens to seek expatriate status for tax avoidance purposes. As tax advisors continue to search for planning devices that will satisfy the new provisions of the law, increased case law concerning the tax consequences of expatriation undoubtedly will evolve. Such devices will be developed with the knowledge that the citizen's inherent right to relinquish his citizenship, which was firmly established by Thomas Jefferson nearly two hundred years ago, is subject to severe limitations when taxes are involved.

Terri R. Reicher

299. United States v. Matheson, 532 F.2d 809, 811 (2d Cir. 1976).
300. *Id.*