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INVOLUNTARY EXPATRIATION AND *SCHNEIDER v. RUSK*

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May the government unilaterally provide for the termination of an individual's citizenship, irrespective of his intent or desire? Professor Agata analyzes recent Supreme Court cases in terms of opposing views among the Justices, all of which seem to at least restrict the government's prerogative in this area, and he explores related problems and contentions in some depth. His point of departure is the Court's latest pronouncement in SCHNEIDER V. RUSK, *and he presents a convincing argument that, as a result of that decision, involuntary expatriation is no longer permissible.*

I. INTRODUCTION AND BACKGROUND

PRIOR to 1940, with one possible exception,[1] expatriation, or loss of citizenship, always had been approached in terms of an individual's voluntary transfer of allegiance or abandonment of citizenship, taking into account all factors bearing on the determination of the intention of the citizen.[2] In 1940 Congress enacted legislation which provided for the loss of citizenship, regardless of the intention of the citizen to renounce or abandon it.[3] Expatriation was imposed as the result of certain kinds of conduct and was justified as being necessary and proper in support of Congress' power to regulate foreign relations and the conduct of war.[4] Some of the provisions of the act dealt with both naturalized and native-born citizens;[5] others covered only naturalized citizens.[6]

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1. See discussion of Mackenzie v. Hare, 239 U.S. 299 (1915), text at note 28 *infra*.

2. See, *e.g.*, rules promulgated by the Department of State to aid in the determination of whether a citizen had expatriated himself; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 310-13 (1942); Nelson v. Nelson, 113 Neb. 453, 458, 203 N.W. 640, 642 (1925).

3. Nationality Act of 1940, ch. 876, §§ 401, 402, 404, 54 Stat. 1168, 1169, 1170.

4. The legislative record indicates primary Congressional reliance on elements of allegiance, but the cases reflect that the government relied on the foreign relations power and the war power to support some of the 1940 provisions and the successor provisions in the 1952 act discussed later in the article. See, *e.g.*, Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949) (foreign relations power). For discussion of reliance on war powers, see Trop v. Dulles, 356 U.S. 86, 114 (1958) (dissenting opinion).

5. Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1168.

6. Nationality Act of 1940, ch. 876, § 404, 54 Stat. 1170.

The issues raised by these provisions involved both the existence of congressional power to expatriate and the proper exercise of that power. The major questions are whether Congress can prescribe expatriation as a consequence of a citizen's conduct, regardless of the citizen's intention or other justifying factors; whether such powers can be exercised merely incidentally to the exercise of other general powers; and whether any constitutionally valid distinction may be drawn between native-born and naturalized citizens.

These issues had received little judicial consideration prior to 1940 because the primary purpose of existing regulations was to determine whether an individual was entitled to protection abroad, *i.e.*, should he be treated as a citizen for that purpose? His right to re-enter the United States rarely was questioned, and the determination that he might not receive protection abroad did not affect his resuming the duties and rights of citizenship after his return.[7] A passport was not necessary for travel abroad at this time, so a determination of whether he was still a citizen of the United States did not need to be made for that purpose either.[8] Thus, little judicial precedent had developed to support or condemn the imposition of denationalization on an involuntary basis or on a basis that distinguished classes of citizens. In this respect, the 1940 act was on new ground.[9]

The "loss of nationality" provisions of the act, revised somewhat in 1952, recently have been the subject of several challenges on constitutional grounds.[10] In 1964, the Supreme Court, in *Schneider v. Rusk*,[11]

7. See, *e.g.*, 2 WHARTON, DIGEST OF INTERNATIONAL LAW 447, 452 (2d ed. 1887), quoting Department of State letters from 1855 and 1882; also see Attorney General Wickersham's 1910 opinion in the *Gossin* case, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 290 (1942); *cf.* Reynolds v. Haskins, 8 F.2d 473 (8th Cir. 1925). All of the matters in this note and those that precede it are considered in detail later in this article.

8. Nationality and citizenship are often used interchangeably in the cases and, for the purposes of this article, will usually be used in the same way. See, *e.g.*, Perez v. Brownell, 356 U.S. 44, 61 (1958); while the statute speaks of "loss of nationality," Justice Frankfurter speaks of "loss of citizenship." In the first footnote of his dissenting opinion in that case, the Chief Justice states that he will use the terms interchangeably. *Id.* at 62 n.1. Inasmuch as the main consequence of denationalization which is of concern here is the right to re-enter the United States, the difference between "citizenship" and "nationality" is not significant unless otherwise noted in the discussion.

9. Except for Mackenzie v. Hare, 239 U.S. 299 (1915), there appears to be no case that deals with this possibility. See text at note 28 *infra*. It has also been noted that "that it [involuntary denationalization] is not dictated by any vital national interest may be seen from the fact that, subject to insignificant exceptions, it finds no place in the laws of other States . . . ." 1 OPPENHEIM, INTERNATIONAL LAW 658 (8th ed. Lauterpacht 1955).

10. 66 Stat. 267, 269 (1952), 8 U.S.C.A. §§ 1481, 1482, 1484 (1953 & Supp. 1964). Schneider v. Rusk, 377 U.S. 163 (1964) (§ 1484(a)(1)); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (§ 1481(a)(10)); Trop v. Dulles, 356 U.S. 86 (1958) (§ 1481(a)(8)); Perez v. Brownell, 356 U.S. 44 (1958) (§ 1481(a)(5)).

11. 377 U.S. 163 (1964).

declared unconstitutional Section 352(a)(1) of the Immigration and Nationality Act of 1952.[12] The specific provision involved states:

> (a) A person who has become a national by naturalization shall lose his nationality by—
> (1) having a continuous residence for three years in the Territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . whether such residence commenced before or after the effective date of this chapter . . . .[13]

In declaring this provision unconstitutional, the Court may have brought closer to realization the thought expressed by Lewis Cass, Secretary of State under President Buchanan, when he stated: "The moment a foreigner becomes naturalized his allegiance to his native country is severed forever. He experiences a new political birth. . . . Should he return to his native country he returns as an American citizen, and in no other character."[14]

It is the purpose of this article to examine this decision and its implications in the following respects: (1) To attempt a definition of the principle announced by the decision and to describe the developing constitutional doctrine in this area; (2) To discuss the merits of the decision in terms of the alternative constitutional approaches now being considered by the Court; (3) To consider the scope of the decision and its relationship to some closely allied fact situations.

II. The Diverging Principles

Although *Schneider* dealt with only one narrow provision of the immigration and naturalization laws, it has broader implications relating to the concept of citizenship and the extent of congressional power to provide for involuntary expatriation. The case must be considered in the light of certain earlier cases[15] and changes in the personnel of the Court. As will become apparent in the following discussion, the Court is working out the constitutional limitations on congressional power in this area, by a process of give and take among the Justices. The Court's basis for decision is being developed against a backdrop of a fairly comprehensive, albeit confusing, statute, an administrative history that reveals some doubts as to the limits of congressional power and

12. 66 Stat. 267 (1952), 8 U.S.C.A. § 1484(a)(1) (1953).
13. *Ibid.*
14. Moore, *A Century of American Diplomacy*, in 2 Collected Papers 380 (1944).
15. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958); Perez v. Brownell, 356 U.S. 44 (1958).

the purpose of its exercise, and a divergence of views as to guiding principles.

Historically, many of the issues in this area had not been considered by American courts, and the views of the founding fathers and their progeny have provided only dim guidelines for the divergent expatriation opinions filed during the past seven years.[16]

Although *Schneider* is somewhat refreshing in that it produced only two relatively short opinions, in contrast to the multi-opinioned, multi-paged expatriation decisions that preceded it,[17] the complexity of the subject is emphasized by the fact that each of the *Schneider* opinions is multi-faceted and does not reveal a consensus as to the applicable basic principles.[18] This is not intended as an indictment of the competence or thought processes of the Justices individually or of the Court as a whole. The problem is not susceptible of simple disposition. Here, as in other cases, the Court is engaged in a great dialogue that involves the definition of some of the most basic values in the contest between an individual's right to do as he pleases and the claims of society asserted through the state. In a sense, the Court is following its classic pattern of deciding issues not heretofore significantly before it on as narrow grounds as will invite consensus.

The basic division on constitutional issues is between the view that expatriation is simply one of the means by which Congress can implement its other powers,[19] and the view which denies that Congress possesses any power to expatriate except when a citizen vountarily renounces or abandons his citizenship by his own words or conduct.[20]

16. All of the opinions rely on legislative history and construe the same opinions as supporting their respective positions. For example, in Perez v. Brownell, 356 U.S. 44, 57, 61 (1958), the Court relies on and explains Mackenzie v. Hare, 239 U.S. 299 (1915) and Savorgnan v. United States, 338 U.S. 491 (1950) and the dissents rely on the same cases; each also relies on the legislative history of the 1907, 1940 and 1952 legislation. It is not meant to suggest that this is uncommon practice, only that there is limited authority and the authority is susceptible of varying interpretations.

17. In addition to the opinion for the Court, Perez v. Brownell, 356 U.S. 44 (1958), prompted a dissent by Chief Justice Warren, joined by Justices Douglas and Black, a dissent by Justice Douglas joined by Justice Black, and a dissent by Justice Whittaker. Trop v. Dulles, 356 U.S. 86 (1958), produced an opinion by Chief Justice Warren, joined by Justices Black, Douglas and Whittaker, an opinion by Justice Black, joined by Justice Douglas, and a concurring opinion by Justice Brennan, while Justice Frankfurter dissented, joined by Justices Burton, Clark and Harlan. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), Justice Goldberg delivered the majority opinion, with Justices Black and Douglas concurring and reiterating Justice Douglas' dissent in *Perez*, Justice Brennan concurred, and Justices Harlan and Clark dissented, expressing agreement and joining in parts of a dissent by Justice Stewart, joined by Justice White.

18. See text at note 71 *infra*.

19. See, *e.g.*, the opinion of Justice Frankfurter in *Perez*: "[Is] the means—in this case, withdrawal of citizenship—. . . reasonably related to the end—here, regulation of foreign affairs . . . ?" 356 U.S. at 58.

20. See, *e.g.*, the opinion of Chief Justice Warren in *Trop*: "[C]itizenship is not subject to

The cases demonstrate that the adherents to these differing views do not necessarily reach contrary conclusions. Those that subscribe to the first view may differ over the extent to which the Court should review congressional decisions on due process grounds.[21] Those denying that Congress possesses any power of involuntary expatriation may find renunciation or abandonment in cases where the citizen did not subjectively intend to abandon or renounce his citizenship, but his acts nevertheless constituted such a dilution of allegiance that he can be deemed to have expatriated himself as a matter of law.[22]

The first view, which seeks only a "rational nexus" between a congressional declaration of expatriation and a legitimate congressional end, is nominally the doctrine which now commands the support of a majority of the Court. It was expressed in its classic form by Justice Frankfurter, writing for the five man majority in *Perez v. Brownell*,[23] but its application in *Schneider*, by a majority consisting mainly of those who adhere to the second view, is probably not one Justice Frankfurter would have approved.[24]

III. Pre-*Schneider* Cases

The decisions dealing with expatriation are sparse, and it is only within the last seven years that any pattern has begun to emerge from competing doctrines in this area. The Constitution itself does not expressly provide for expatriation. The fourteenth amendment provides that native-born and naturalized citizens are citizens of the United States and the states wherein they reside.[25] It has been held that a native-born child whose parents are not eligible for naturalization nevertheless is made a citizen by the Constitution, and that this citizenship cannot be denied by act of Congress.[26]

The first important judicial pronouncement on the issue of congres-

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the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship." 356 U.S. at 92.

21. Justices Stewart and Brennan subscribe to the rational nexus view; however, Justice Stewart joined with the majority in striking down legislation in Schneider v. Rusk, 377 U.S. 163 (1964) and Justice Brennan voted for unconstitutionality in Trop v. Dulles, 356 U.S. 86, 105 (1958) and Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1963).

22. See discussion of the views of Chief Justice Warren and Justices Douglas and Black in text at note 37 *infra*.

23. See note 19 *supra*.

24. Chief Justice Warren, Justices Douglas, Black, Stewart and Goldberg comprised the majority in *Schneider*. Warren, Douglas and Black had already announced opposition to the Frankfurter rational nexus view.

25. U.S. Const. amend. XIV, § 1.

26. United States v. Wong Kim Ark, 169 U.S. 649 (1898).

sional power over naturalization was Chief Justice Marshall's statement in *Osborn v. Bank of United States* that the naturalized citizen

> becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.[27]

A. Mackenzie v. Hare

The first Supreme Court case involving involuntary expatriation was *Mackenzie v. Hare*.[28] There the Court upheld the constitutionality of an act which provided for the loss of citizenship during coverture of a female native-born citizen who married an alien. The Court in that case described the conduct of the citizen as "voluntary" because she entered into the disabling status voluntarily and with notice of the effect of her actions. The Court rejected the argument that the statute was discriminatory because male citizens did not suffer the same disability.

Courts in later years differed on the basis for this decision.[29] Learned Hand suggested that it merely recognized the effect of the common law doctrine of the unity of spouses.[30] Others contended that the decision recognized congressional power to provide for involuntary expatriation.[31] Still others argued that it only authorized Congress to make conduct which is tantamount to abandonment or renunciation the basis for expatriation.[32] The statute involved is no longer in effect, and whether a majority of the present Court would uphold such a provision is open to question.[33] In any event, the case may be authority for the proposition that the Court has upheld the power of Congress to impose involuntary expatriation where it serves to reduce the embarrassment of the United States in its conduct of foreign affairs.

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27. 22 U.S. (9 Wheat.) 738, 827 (1824).

28. 239 U.S. 299 (1915).

29. *Compare* United States v. Howe, 231 Fed. 546, 548 (S.D.N.Y. 1916), *with* Stein v. Fleischmann Co., 237 Fed. 679, 682 (S.D.N.Y. 1916).

30. Stein v. Fleischmann Co., *supra* note 29 at 682.

31. Perez v. Brownell, 356 U.S. 44, 61 (1958) (Frankfurter, J.).

32. *Id.* at 73 (dissenting opinion, Warren, C.J.).

33. See, *e.g.*, Nishikawa v. Dulles, 356 U.S. 129, 139 (1958) (concurring opinion, Black, J., with Douglas, J., joining). See also McGrath v. Zander, 177 F.2d 649 (D.C. Cir. 1949), wherein the court recognizes that, for the purposes of the Trading With The Enemy Act, the wife may establish a separate domicil from her alien husband even where both parties reside in the husband's native land.

B. Perez v. Brownell

Perez v. Brownell[34] represents the beginning of the Court's contemporary, and what apparently will be a definitive, encounter with the issue of involuntary expatriation.[35] In *Perez,* Justice Frankfurter wrote one of his strongest opinions advocating the doctrine of judicial self-restraint when reviewing the constitutionality of an act of Congress, and, in a 5-4 decision, the Court upheld a provision for automatic loss of nationality when a United States citizen voted in a foreign election. Justice Frankfurter viewed the question simply as an inquiry by the Court into whether or not withdrawal of a person's citizenship was a means reasonably calculated to achieve a concededly valid objective of Congress, *i.e.,* avoidance of embarrassment in foreign affairs. He denied that the power of Congress to terminate citizenship depends on the citizen's consent or that the conduct to which loss of citizenship attached had to be such that "amounts to an 'abandonment of citizenship' or a 'transfer of allegiance.' "[36]

Chief Justice Warren,[37] joined in dissent by Justices Black and Doug-

34. 356 U.S. 44 (1958).

35. Other cases have been decided. Perkins v. Elg, 307 U.S. 325 (1939), involving a question of retention of American citizenship by a native-born citizen taken abroad during her minority to her parents' native land, who by operation of law of that foreign nation was also its national. Chief Justice Hughes considered several questions including the problems of dual nationality and the concept of expatriation which will be considered *infra.* Several statements he made have been relied upon to support the thought that denationalization can be effective without regard to renunciation or abandonment equivalencies: "As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles." *Id.* at 329. "To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action .... Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." *Id.* at 334.

Savorgnan v. United States, 338 U.S. 491 (1949), involved loss of nationality by a native-born citizen who was naturalized in the United States as an Italian citizen, and who, after the naturalization ceremony, resided abroad with her Italian husband. Her claim that she had no intention to relinquish her American citizenship was deemed irrelevant under either the 1907 or 1940 statutes which provided for loss of citizenship upon naturalization by a foreign state. The case is significant because of its rejection of the relevance of the citizen's subjective intent as to her American citizenship and its exclusion of state of mind in the definition of the word residence. See note 138 *infra,* and accompanying text. Mandoli v. Acheson, 344 U.S. 133 (1952), involved the loss of nationality of a native-born citizen who took an oath to the Italian King and did not return to the United States upon attaining his majority. The government conceded that the oath taken upon entering the Italian army could not be deemed voluntary, and the Court decided that there was no statutory authority requiring a native-born dual national to make an election in order to preserve his American citizenship. Whether such an election could be required was not decided, but the affirmative is clearly implied. Justice Douglas dissented, relying on the taking of the oath, otherwise unexplained, as justifying denationalization because of the explicit terms of the applicable statute.

36. 356 U.S. at 61-62.

37. *Id.* at 62.

las, voiced sharp disagreement with Justice Frankfurter's approach and conclusions.

The Chief Justice categorically denied that citizenship could be terminated to implement the general powers of the government.[38] He relied on Chief Justice Marshall's statement in *Osborn*,[39] and explained prior decisions, including *Mackenzie*,[40] as involving conduct tantamount to a renunciation or abandonment of citizenship. He admitted that conduct which compromised a citizen's allegiance could qualify as a voluntary abandonment, but found the statute under consideration so widely drawn as to cover situations not limited "to those that may rationally be said to constitute an abandonment of citizenship."[41]

The issue drawn between the Warren, Douglas and Black group and the majority is simply this: The Warren group requires conduct on the part of the citizen which reasonably leads to the conclusion that citizenship has been abandoned before they will uphold a statutory declaration of denationalization. In effect, they deny that expatriation can be involuntary. The Frankfurter approach, on the other hand, seeks a "rational nexus" between expatriation and any legitimate end Congress might pursue. It may be that this statement of the Frankfurter position is too broad. It has been voiced only in the context of the foreign affairs and war powers. But Justice Frankfurter's own statement of his position does not reveal any inherent limitation on the use of involuntary expatriation to implement other powers.[42]

38. *Id.* at 68.

39. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 737, 827 (1824). See text at note 27 *supra*.

40. MacKenzie v. Hare, 239 U.S. 299 (1915). See text at note 28 *supra*.

41. Perez v. Brownell, 356 U.S. at 76 (dissenting opinion). The opinion stated:

> The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this priceless right is immune from the exercise of governmental powers. If the Government determines that certain conduct by United States citizens should be prohibited because of anticipated injurious consequences to the conduct of foreign affairs or to some other legitimate governmental interest, it may within the limits of the Constitution proscribe such conduct and assess appropriate punishment. But every exercise of governmental power must find its source in the Constitution. The power to denationalize is not within the letter or the spirit of the powers with which our government was endowed. The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country . . . . *Id.* at 77-78.

42. *E.g.*, Justice Frankfurter actually makes an analogy with congressional implementation of its other powers when he states the rational nexus test as the guide for determining constitutionality of imposing loss of nationality incidental to its powers to regulate foreign affairs. In fact, he states that the rational nexus between the power exercised and the action taken is *"the sole inquiry."* Perez v. Brownell, 356 U.S. at 58. (Emphasis added.) In addition, Justice Brennan's remarks in Kennedy v. Mendoza-Martinez, 372 U.S. at 187 (concurring opinion), reflect the need of those who had joined Justice Frankfurter in

Although joining in Chief Justice Warren's opinion, Justice Douglas (joined by Justice Black) wrote a separate dissent,[43] announcing what may be a subtle difference from the Chief Justice's views. Justice Douglas concluded that: (1) Citizenship has a preferred position under the Constitution; (2) The power of Congress to withhold, modify or cancel it does not exist; (3) A citizen may lose his citizenship only by relinquishing it voluntarily; (4) The majority "exalts the Due Process Clause of the Fifth Amendment above all others";[44] and (5) The due process clause is a limit on powers granted, not a means of watering down rights. In view of his reference in *Schneider* to his own opinion in *Perez* and not to the Chief Justice's, it may be that Justice Douglas perceives a difference between Warren's position and his own. The difference may be in terms of the extent to which Congress can classify any kind of conduct as being the basis for expatriation.[45] This point will be considered later.

Justice Whittaker also dissented in *Perez.*[46] His opinion is a bit confusing, but he seemed to agree with the majority opinion as to the scope of Congress' power, and with the dissent's view that voting in a foreign election legally open to aliens cannot be said to be tantamount to abandonment of citizenship. He believed the statute to be too broadly drawn to be upheld, even under the majority's approach.

C. Trop v. Dulles

In *Trop v. Dulles,*[47] decided the same day as *Perez,* a statute denationalizing any citizen who had been convicted of desertion by a court-martial was declared unconstitutional. Chief Justice Warren wrote an opinion in which Justices Black, Douglas and Whittaker joined. Justice Brennan[48] and Justice Black[49] each wrote concurring opinions, with Justice Douglas also joining in Justice Black's. Justice Frankfurter's dissenting opinion, in which the other dissenters joined,[50]

Perez to state that denationalization was an extraordinary remedy, requiring more than just a "not unreasonable" conclusion that it was necessary and proper.

43. 356 U.S. at 79.

44. *Id.* at 83.

45. Schneider v. Rusk, 377 U.S. at 166. In *Perez,* Chief Justice Warren's opinion considered the point that the record did not indicate any of the circumstances under which the petitioner had voted, and merely voting was not sufficient to show a voluntary abandonment of allegiance. 356 U.S. at 78. *Cf.* Justice Douglas' dissent in Mandoli v. Acheson, 344 U.S. 133, 139 (1952), discussed in note 35 *supra.*

46. 356 U.S. at 84.

47. 356 U.S. 86 (1958).

48. *Id.* at 105.

49. *Id.* at 104.

50. *Id.* at 114 (dissenting opinion by Justice Frankfurter, joined by Justices Burton, Clark and Harlan).

reiterated in strong language his belief in the limited exercise of judicial review and relied on the "rational nexus" theme of *Perez* to support the statute.

Chief Justice Warren stated two grounds of unconstitutionality. First, he repeated his "conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers. The right may be voluntarily abandoned either by express language or by language and conduct that show renunciation of citizenship."[51] Second, because a majority apparently did not support this view, the Chief Justice also analyzed the problem in terms of whether or not expatriation was an appropriate means of implementing another power of Congress, in this case the "war powers" instead of the foreign relations powers relied on in *Perez*. Justice Whittaker, who joined in Chief Justice Warren's opinion, did not expressly indicate that he disagreed with the first approach, but in *Perez*, decided the same day, he had expressed his support of Justice Frankfurter's "rational nexus" approach.

The provision in *Trop* was stricken on the ground that denationalization was in this case a cruel and unusual punishment prohibited by the eighth amendment. The nature and possible effects of denationalization were considered. Chief Justice Warren pointed out that loss of citizenship meant loss of the very right to have rights, and could subject one to banishment. If the expatriated individual was rendered stateless, the consequences would be even more abhorrent. The ends of the "war powers" could be accomplished better by less objectionable means.

Justice Frankfurter, for the minority, declared that expatriation was not punishment in the "constitutional sense." He further argued that even assuming expatriation did amount to punishment, it was not that type of punishment which is deemed "cruel and unusual" because it is contrary to concepts of "humane justice."[52] He could not see how expatriation was crueler than the death penalty or significantly worse than the loss of rights of citizenship as the result of conviction of a felony. The government likewise had not emphasized the punishment aspect,[53] but rather had argued that there was a rational nexus between expatriation and the war powers (in supporting morale in the armed forces); that expatriation was an appropriate measure—since the deserter did not act like an American, he should not be an American.

51. *Id.* at 91. Chief Justice Warren also concluded: "As long as a person does not voluntarily renounce or abandon his citizenship . . . I believe his fundamental right of citizenship is secure." *Id.* at 93.

52. *Id.* at 126 (dissenting opinion).

53. *Id.* at 112 (concurring opinion, Brennan, J.).

The minority agreed that a rational nexus existed between the refusal to perform one of the duties of citizenship and denationalization.

In addition to its holding and the arguments of Warren and Frankfurter, the *Trop* case is significant for Justice Brennan's concurring opinion.[54] Justice Brennan, who had been a member of the majority in *Perez,* distinguished this case on the grounds that *Perez* involved the foreign relations power and the necessity of avoiding embarrassment in that sphere, and further, that unlike *Trop,* the type of conduct involved in *Perez* "imports 'elements of an allegiance to another country in some measure inconsistent with American citizenship.' "[55] Justice Brennan's quote is from the *Perez* majority opinion,[56] but it reads very much like the standard proposed by Chief Justice Warren. Justice Brennan reiterated his support of *Perez,* but his singling out of this factor is of interest in view of his later expression of doubt as to the correctness of his position in *Perez*[57] and the references by Justice Brennan and others to this allegiance factor in later cases.[58]

D. *Summarizing* Perez *and* Trop

In both of the cases, the Warren group criticized the Frankfurter "rational nexus" view as a denial of the basic concept of the formation of our government—that the government derived its power from its citizens and therefore could not deny the existence of its source of power. The Warren group focused on the concept of "allegiance," and in addition noted the consequences of expatriation, particularly that of possible statelessness. Justice Frankfurter's followers, on the other hand, found no express limitation on the power to expatriate, questioned the wisdom of the Court in challenging a rational congressional determination, and denied that statelessness was as bad as one might think. Six Justices who are still members of the Court participated in *Perez* and *Trop*: Chief Justice Warren, Justices Douglas and Black denying that loss of nationality is a proper means of implementing the general powers of the government; Justices Harlan and Clark taking the contrary view; Justice Brennan proclaiming the latter, or "rational nexus" view, but in a sharply limited formulation.

54. 356 U.S. at 105.

55. *Id.* at 107.

56. Perez v. Brownell, 356 U.S. at 61.

57. Kennedy v. Mendoza-Martinez, 372 U.S. at 187.

58. Schneider v. Rusk, 377 U.S. at 175 (dissenting opinion); see also, discussion of Justice Stewart's opinion in Kennedy v. Mendoza-Martinez, 372 U.S. at 201, and its implications in *Schneider* to which reference is made throughout the remainder of this article.

E. Kennedy v. Mendoza-Martinez *and* Kennedy v. Cort

Kennedy v. Mendoza-Martinez and *Kennedy v. Cort* were decided together.[59] In each, a constitutional challenge was leveled against a provision for loss of nationality for "departing from or remaining outside of the jurisdiction of the United States in time of war or . . . national emergency for the purpose of evading or avoiding training and service"[60] in the nation's armed forces. Mendoza-Martinez was native-born of dual nationality. Cort was a native-born citizen without dual nationality.[61] Writing for the Court, Justice Goldberg, while avoiding the question of whether Congress could exercise the power of expatriation validly in this or any case, decided that here expatriation was an unconstitutionally imposed punishment because of the absence of procedural safeguards. Justices Douglas and Black, concurring, reiterated their *Perez* position,[62] and Justice Brennan, concurring,[63] noted some doubts about the correctness of *Perez*. Justice Stewart expressed the theory of the dissenters,[64] Justices Stewart, Clark, Harlan and White.

Not only does Justice Brennan's opinion indicate some backtracking from his "rational nexus" position in *Perez*, but Justice Stewart's opinion indicates that the broad test used by Frankfurter in *Perez* and *Trop* is being narrowed even as it is applied. Justice Brennan asserted that expatriation is not "found in Congress' arsenal of common sanctions, available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it."[65] He also said, "this Court has never granted the existence in Congress of the power to expatriate except where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality."[66] Justice Stewart concluded that all of the previous cases upholding involuntary expatriation involved "conduct inconsistent with undiluted allegiance to this country";[67] a clear indication that there are limits on Congress' power to provide for expatriation, other

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

60. The Nationality Act of 1940, ch. 876, § 401(j), 54 Stat. 1170 (1940), was challenged in *Mendoza-Martinez*, while *Cort* involved an attack on 66 Stat. 267 (1952), 8 U.S.C.A. § 1481(a)(10) (1953).

61. Chief Justice Warren's statement in *Perez* denying the right to denationalize naturalized citizens, as well as native-born citizens is also of significance. See note 41 *supra*. It might be noted that *Perez* and *Trop* had also involved native-born citizens.

62. Kennedy v. Mendoza-Martinez, 372 U.S. at 186.

63. *Id.* at 187.

64. *Id.* at 201.

65. *Id.* at 187-88.

66. *Id.* at 187.

67. *Id.* at 214.

than a substantive due process concept of a rational nexus between means and end. The language of both Justice Brennan and Justice Stewart comes very close to Chief Justice Warren's expressions in *Perez*, where he said that citizenship may be renounced voluntarily not only by exercising the right of expatriation, "but also by other actions in derogation of undivided allegiance to this country."[68]

"Undivided allegiance," however, was not the issue which Justice Frankfurter posed in *Perez*. He was concerned with the exercise of the power of expatriation as a means reasonably calculated to avoid embarrassment in foreign affairs. By terminating citizenship, the problem of United States' involvement would also be terminated and hence, the exercise of the power was constitutionally justified. He also stated in an almost parenthetical manner:

> Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.[69]

This language was seized upon in *Schneider* by both the majority and the dissent, as a means of narrowing Justice Frankfurter's original "rational nexus" test.[70] In *Trop*, Justice Frankfurter reiterated the "rational nexus" theme in connection with the war power, noting that it was appropriate to withdraw citizenship where the obligation of serving in the armed forces was avoided. In *Trop* he did not speak in terms of any dilution of allegiance. The significance of the shift of emphasis by some members of the *Perez* majority will become apparent in the discussion of the *Schneider* case.

IV. *Schneider v. Rusk*

Schneider[71] involved a United States citizen born in Germany, who had obtained derivative American citizenship when she was sixteen years old as a consequence of the naturalization of her mother in 1950. She had lived in the United States from 1939 to 1954, attended school abroad for two years, returned to the United States for a short period, married a German national in Germany, and had lived there since 1956. She surrendered her naturalization certificate under protest, and was declared to have lost her citizenship by virtue of Section

68. Perez v. Brownell, 356 U.S. at 68 (dissenting opinion).
69. *Id.* at 60-61.
70. Schneider v. Rusk, 377 U.S. at 168, 175.
71. 377 U.S. 163 (1964).

352(a)(1) of the Nationality and Immigration Act of 1952.[72] The ground for this declaration was that she, a naturalized citizen, had resided in the land of her birth for a period of three years. She had no definite intention to return to the United States.[73]

Justice Douglas, speaking for the Court, stated that because the view that Congress had no power to impose involuntary expatriation[74] had failed to muster a majority, the question before the Court was whether section 352(a)(1) violated due process. He used Justice Frankfurter's language in *Perez* to frame the issue: "Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . . ?"[75] Justice Douglas concluded that: (1) The power of expatriation may not be used in every area where Congress has power to act; (2) A greater necessity than "administrative convenience" was needed to justify the use of this power; (3) The assumption that "naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born"[76] is not permissible and under the Constitution is a discrimination so unjustifiable as to be violative of due process; and (4) "[L]iving abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance."[77]

Justice Douglas' opinion appears to be unresponsive to the question as he had posed it (*i.e.*, in terms of Justice Frankfurter's "rational nexus" theory), but actually seems to fall more in accord with either (1) the Warren test that had not commanded the support of a majority of the Court or (2) the Frankfurter test, as modified by the requirement that there must be some degree of derogation from or a dilution of allegiance to justify the use of expatriation. In fact, Justice Douglas quoted from Justice Stewart's dissent in *Mendoza-Martinez,* to the effect that prior cases permitting expatriation all involved elements of a dilution of allegiance.[78]

The explanation for this approach seems to be that the Court has

72. 66 Stat. 267 (1952), 8 U.S.C.A. § 1484(a)(1) (1953).

73. This fact appears in Justice Clark's dissent and in the opinion below. Schneider v. Rusk, 218 F. Supp. 302 (D.D.C. 1963). Its significance, if any, is considered later in this article.

74. In support of this proposition, Justice Douglas cited his dissent in *Perez,* 356 U.S. at 79, and Chief Justice Warren's opinion in *Trop,* 356 U.S. at 87. He failed to cite Chief Justice Warren in *Perez,* 356 U.S. at 62.

75. Perez v. Brownell, 356 U.S. at 60.

76. Schneider v. Rusk, 377 U.S. at 168.

77. *Id.* at 169.

78. *Id.* at 168. And see text accompanying note 67 *supra.*

departed substantially from a pure "rational nexus" analysis. If Justice Douglas really were posing the question in traditional *Perez* terms, then the propriety of making expatriation the consequence of conduct would not be dependent upon whether such conduct indicated a dilution of allegiance. In *Perez,* Justice Frankfurter specifically had rejected the position that a finding of dilution of allegiance was necessary to the decision and had refused to argue that the conduct there was tantamount to abandonment of citizenship.[79] In *Perez,* the issue was considered to be whether or not "Congress acted without warrant" when it provided for the expatriation of a citizen who voted in an election of another country.[80] In *Schneider* as in *Perez* the "rational nexus" test would seem to require some detailed consideration of the actual and potential embarrassment of foreign affairs before the Court could say Congress acted without warrant.

Justice Douglas' opinion not only does not examine the problem which prompted Congress to act; it precludes an inquiry into these facts. He states that even if the facts did show that naturalized citizens as a class are less reliable and bear less allegiance to this country than native-born citizens, no statute could proceed on that assumption because the assumption is "impermissible" and "impossible for us to make."[81] Establishing a classification on this basis would be unconstitutionally discriminatory.

If the facts which prompted Congress to pass the statute involved in *Schneider* would reasonably warrant a conclusion by Congress that expatriation would meet its problem, then some of Justice Douglas' conclusions can only be explained on the basis that he is taking a broader view than did Justice Frankfurter of the Court's function of judicial review in determining what is a reasonable means to a legitimate end; or, as is more likely, that he is imposing some absolute limitations on the use of involuntary expatriation. This is said not to record disagreement with Justice Douglas' conclusion, but rather to suggest that the Court's acceptance of any form of involuntary expatriation as a means of implementing congressional policy may be approaching its end and *Perez* may be an anomaly.

As if to further stress the shift of emphasis from Justice Frankfurter's original formulation, Justice Clark, joined in his *Schneider* dissent by Justices Harlan and White, said that the Court in *Perez* described "the central issue in expatriation cases 'as importing not only

79. 356 U.S. at 61.
80. *Id.* at 62.
81. 377 U.S. at 168.

something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.' "[82]

It should be noted that although *Schneider* involved a naturalized citizen and a statute applicable only to naturalized citizens, Justice Douglas' opinion had a broader sweep when he stated that "living abroad [by *any* citizen] . . . is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance."[83] This statement indicates that discriminatory treatment alone was not the basis for the decision. Viewed narrowly, Douglas' opinion did not decide whether a statute which did not discriminate between native-born and naturalized citizens would be upheld on the basis of the Frankfurter "rational nexus" approach posed in *Perez* and repeated in *Schneider, i.e.,* expatriation justified as a means to avoid embarrassment in the conduct of foreign affairs. But it is difficult to avoid the conclusion that when Justice Douglas dwelled so on the problems of allegiance and renunciation, the very considerations deemed decisive under tests that had not "yet commanded a majority of the entire Court,"[84] the ground for decision is shifting further.

A. *The* Schneider *Dissent*

Justice Clark's dissent in *Schneider*[85] may be summarized as follows. Congress did not place a badge of lack of allegiance on Mrs. Schneider, but (1) Congress authorized expatriation as "the only adequate remedy" to meet a problem of "the highest national importance"; (2) Mrs. Schneider "with her eyes open to the result" chose by her action to renounce her derivative citizenship; and (3) If she is a "second class citizen," it is by virtue of her own conduct and not congressional action.[86] As applied to her, the statute is not discriminatory and thus a violation of due process because her situation raises an implication of something less than complete allegiance.[87] The provision bears a rational relationship to achieving a legitimate congressional end.[88] History supports "the practice of expatriating naturalized citizens who voluntarily return to their native lands to reside."[89]

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82. *Id.* at 175-76.
83. *Id.* at 169.
84. *Id.* at 166.
85. *Id.* at 169.
86. *Id.* at 169, 170.
87. *Id.* at 170.
88. *Ibid.*
89. *Ibid.*

Sometimes the arguments against a position reveal more of its strength than those made in its behalf. As a basis for exploring in greater depth some of the issues covered and raised by the case, a seriatim consideration of some of the major points made by Justice Clark in support of his contentions will follow.

1. *As Applied to Mrs. Schneider, There is No Denial of Due Process*

Justice Clark emphasized that Mrs. Schneider was a "permanent resident" of a foreign country and that she actually had no intention of returning. Of course, if the statutory standards take intent into account, then the Court would be compelled to consider these factors. But they are not necessary to the Court's determination under the present statute, for it applies without regard to the intended permanency of the residence abroad. Merely living abroad for the requisite period of time is sufficient to allow expatriation, regardless of intent.[90] The very vice of this statute is that it condemns certain kinds of conduct by a group of persons without regard to circumstances. Indeed, that was the purpose of the statute.[91] The constitutionality of a statute limiting expatriation to those who take up permanent residence abroad without the intention to return would present the Court with different issues, which will be considered later in this article. Suffice it to say that the present statute did not make the fact of intent to abandon citizenship, found to exist by Justice Clark, relevant to loss of nationality.

In view of Justice Clark's definition of the central issue in expatriation cases as involving some inquiry into allegiance, it may be that even the dissenters would not approve the application of this statute to a naturalized citizen residing abroad for three years, in the absence

90. The term "residence" as defined in section 101(a)(33) [66 Stat. 166 (1952), 8 U.S.C.A. § 1101(a)(33) (1953)] means the place of general abode, and the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. This definition is a codification of judicial constructions of the term "residence" as expressed by the Supreme Court of the United States in Savorgnan v. United States, 338 U.S. 491, 505–06 (1950), where the Court stated:

> Under the act of 1940, the issue is not what her intent was on leaving the United States, nor whether, at any later time, it was her intent to have a permanent residence abroad or to have a residence in the United States. The issue is only whether she did, at any time between July 1941 and November 1945, in fact "reside" abroad. The test of such "residence" is whether, at any time during that period, she did, in fact, have a "principal dwelling place" or "place of general abode" abroad . . . . Her intent as to her "domicile" or as to her "permanent residence," as distinguished from her actual "residence," "principal dwelling place," and "place of abode," is not material . . . .

See also H.R. Rep. No. 1365, 82d Cong., 2d Sess., 2 *United States Code Congressional and Administrative News* 1653, 1684-85 (1952).

91. The Court recently rejected an analogous argument in connection with a statute which limited the right to obtain a passport. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

of some showing of other factors indicating dilution of allegiance. It is difficult to answer this question, because the majority speaks in terms of the statutory standards without regard to the facts of the particular case and the dissent emphasizes the facts without noting that the statute has much broader application.

2. *If There is Second Class Citizenship Here, Mrs. Schneider and Not Congress Created It*

The defect with this proposition is obvious. The point is that Mrs. Schneider and all naturalized citizens are placed in a different class, not as a consequence of their actions, but because they cannot do certain acts without suffering consequences different than those visited upon a native-born citizen. Whether we call her "second class," or a member of a class that enjoys rights more limited than one who is native-born, is of no moment on this issue. What is clear is that she is treated differently than other citizens by virtue of congressionally imposed restrictions. While this does not answer the question of whether such a classification is constitutionally maintainable, it is impossible to argue that this is a classification which has not been imposed on her without her assent. Certainly giving different privileges to different citizens constitutes the creation of classes of citizenship.

3. *History Supports Expatriating Naturalized Citizens Returning to Their Native Lands to Reside*

Some historical background will put *Schneider* in perspective. It was a matter of dispute as to whether the English common law doctrine of perpetual allegiance, denying the effect of naturalization without the consent of the sovereign who had the original claim to allegiance, was part of the American common law.[92]

a. Talbot v. Jansen

As early as 1795, in *Talbot v. Jansen*,[93] the Supreme Court concerned itself with the question of whether a citizen could unilaterally expatriate himself. Although the Court decided that there had been no

92. Many assume that the English doctrine was part of the American common law. See, *e.g.*, MOORE, *The Doctrine of Expatriation*, in 4 COLLECTED PAPERS 388, 389-91 (1944). *But cf.* Alsberry v. Hawkins, 39 Ky. (IX Dana) 177, 178 (1839). See also Letter from Lord Grenville to Mr. King, March 27, 1797, in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 309 (2d ed. 1887), asserting the doctrine of perpertual allegiance as a basis for impressing native Britons on foreign ships. "The doctrine of perpetual allegiance was one of the settled principles of the English common law, and was maintained in the United States by high authorities during the earlier periods of our Federal history." Citing 2 KENT, COMMENTARIES 49 (12th ed. 1873) and 3 STORY, CONSTITUTION 3 (1858).

93. 3 U.S. (3 Dall.) 133 (1795).

expatriation in that case, several opinions were filed which concerned the right of voluntary expatriation. The Justices recognized that, if permitted at all, expatriation was accomplished by the will of the person, and the problem they faced was to determine when that will had been exercised. They expressed a need for some criteria to determine what amounted to such an exercise of will, and thought that Congress might supply these criteria. The element of transfer of allegiance was of course involved, but most acts were ambiguous and it was difficult to know when a claimed transfer had been effected. There was no indication that the Court believed that the intention to renounce citizenship was not a necessary element of abandoning citizenship, or that the finding of such intention would not have to be at least a rational conclusion. The reference to a need for statutory criteria was not a suggestion that acts unrelated to intent could or should result in expatriation. In fact, there was an admonition not to fear legislative limits over voluntary expatriation, but to be more concerned with a need "to restrain acts of banishment (if such could be at all permitted) . . . ."[94] This statement in *Talbot* is an early warning against attempts to legislate involuntary expatriation.[95]

b. *The Doctrine of Perpetual Allegiance*

As to whether there really was a right of voluntary expatriation, both Kent and Story recognized the English doctrine of perpetual allegiance.[96] Others vehemently denounced that doctrine, or denied its applicability to the United States.[97] Nevertheless, there never was

94. *Id.* at 163.

95. See also Burkett v. McCarty, 73 Ky. (IX Bush) 758 (1874): "While a citizen may with consent of his state, express or presumed, expatriate himself, no mere act of state legislation can *per se* denationalize him against his will or without his concurrence." *Id.* at 759. "We do not doubt that the legislature had the constitutional power to prescribe the conditions on which a citizen should, against his will, forfeit or lose his citizenship." *Id.* at 762.

96. See note 92 *supra*.

97. See, *e.g.*, Lessee of Jackson v. Burns, 3 Binn. 75, 84 (Pa. 1810) (the doctrine is "not compatible with the constitution of Pennsylvania, or her sister states"); Letter from Jefferson, Secretary of State, to G. Morris, August 16, 1793 in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 360 (2d ed. 1887): "Our citizens are certainly free to divest themselves of that character by emigration and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do." It should also be noted that even after announcing the right of the individual to expatriate himself without the consent of his sovereign, the United States placed a restriction on the right by prohibiting its exercise in time of war. The right was so limited by § 2 of the Act of March 2, 1907, 34 Stat. 1228 (1907). In Talbot v. Jansen, 3 U.S. (3 Dall.) 132, 161-63 (1795), Iredell, J., considered the right of expatriation and suggested that if it was "a natural, inalienable right," the citizen should be able to exercise it in war or peace. But the fact that some writers find an exception in time of war suggests that it is a right whose exercise is subject in some degree to the consideration of the public safety.

any doubt that under its municipal law the United States had the power to naturalize aliens without the consent of their foreign sovereigns, even though the status of these naturalized citizens under international law was much in dispute.[98] Often their native countries still claimed their allegiance, and if they returned to their native lands, the United States government might well be called upon to intervene and to extend them protection.

Except for the reference in *Talbot*, grounds for involuntary expatriation appear not to have been considered again. There is some evidence that naturalized citizens returning to their native lands may have been considered expatriated, but this type of "expatriation" seems to have occurred in the context of merely denying a demand for United States protection abroad and not with respect to denying the right to return to the United States, or the enjoyment of citizenship status here. The problem of the naturalized citizen who went back to his native land, having no intention of returning to the United States, often raised questions as to his original good faith in obtaining his United States citizenship, rather than of losing that citizenship once properly obtained. Whether one had voluntarily expatriated himself by changing his domicile also was considered.[99] Mere residence, how-

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98. "The Government of the United States 'cannot admit of qualified naturalization, subject to the consent of the country of origin, neither could our courts, in which the judicial power of naturalization is vest by law, take cognizance of the consent of a foreign state as a precedent to naturalization.' " Letter from Mr. Frelinghuysen, Secretary of State, to Mr. Cramer, Oct. 19, 1882 in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 341 (2d ed. 1887). See also *id.* at § 172. For difficulties with Russia and Italy, see Letters, Evarts to Cronstine, March 17, 1880, Blaine to Randall, June 8, 1881, in *id.* at 326, 327.

99. *E.g.*, Letter from Fish to Moran, Feb. 16, 1877, in *id.* at 354:

> While the decisions concerning the binding force of a record of naturalization make it difficult to go behind the record; at the same time, whenever the Government is called upon for its interposition in a foreign state on behalf of any person claiming to be a naturalized citizen, the question whether, under all the facts presented by him, intervention should be accorded is always open for consideration.

"A citizen of the United States may forfeit the protection of its Government abroad by making his permanent residence abroad and evading performance of the duties of citizenship." Letter from Fish to Beardsley, April 28, 1873, in *id.* at 449. "When a naturalized citizen resumes his residence with his family in the land of his origin, and goes into business there, and becomes an office-holder . . . the laws and interests of the United States do not require us to do more than insist that he shall have a right to return to the country of his adoption . . . ." Letter, Frelinghuysen to Lowell, April 25, 1882, in *id.* at 454. *Compare* Letter from Marcy to Kinney, Feb. 4, 1855 in *id.* at 447 ("Persons voluntarily emigrating from the United States to take up a permanent abode in a foreign land, 'cease to be citizens of the United States, and can have after such a change of allegiance no claims to protections as such citizens from our Government.' ") *with* Letter from Marcy to Clay, May 24, 1855 in *id.* at 447 ("Though there is no law forbidding a citizen of this country who goes abroad with an intention to settle, to resume his rights as a citizen on his return . . . ."). In 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 287 (1942), an excerpt from H.R. Doc. 326, 59th Cong., 2d Sess., p. 23 (1907), explains the provisions of the 1907 act dealing with expatriation by residence abroad, see note 110 *infra*, as designed to avoid such evils: a "foreigner who does not intend to cast his lot permanently with us should endeavor

ever, without the actual intent not to return, did not cause a change of allegiance or loss of citizenship.[100]

As part of its policy to encourage immigration to the United States and to protect its naturalized citizens abroad, the United States sought international acceptance of the right of voluntary expatriation without the consent of the sovereign. James Buchanan, first as Secretary of State and later as President, officially fostered as part of United States foreign policy the rejection of the perpetual allegiance concept.[101] In 1868, before there had been a definitive ruling by the Court on the constitutionality of restraining a citizen from voluntarily expatriating himself, Congress enacted legislation putting this nation on record as rejecting the doctrine of perpetual allegiance and asserting the international validity of the naturalization process and the right of all persons to voluntarily expatriate themselves.[102] This unilateral action did not and still has not caused foreign sovereigns to accept that view unanimously. Having stated the principle and having earnestly sought the support of the international community in permitting a person, voluntarily and without his sovereign's consent, to change his allegiance, the United States entered into treaties with several nations providing for recognition of the effectiveness of each nation's naturalization of the other's citizens, and in some instances providing for means of renouncing or abandoning the acquired citizenship.[103]

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to avail himself of the flag as a fraudulent protection. . . . They have not become citizens in good faith, but they seek to avail themselves of the protection of our citizenship in avoiding responsibility to which they may be subjected in other parts of the world."

100. "A naturalized citizen of the United States cannot be regarded as renouncing his United States citizenship merely because he returns to his native land. To sustain such renunciation, there must be either an express declaration of renunciation, or acts from which it may be logically inferred." Letter from Frelinghuysen to Osborne, June 19, 1882 in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 368 (2d ed. 1887).

101. MOORE, *The Doctrine of Expatriation*, in 4 COLLECTED PAPERS 395 (1944).

102. The preamble to the 1868 legislation reads:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of the principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendents, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore,
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That 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 principles of this government. Act of July 27, 1868, 15 Stat. 223 (1869).

103. See, *e.g.*, Treaty With North German Union, Feb. 22, 1868, 15 Stat. 615 (1869); Treaty With Belgium, Nov. 16, 1868, 16 Stat. 747 (1871); Treaty With Denmark, July 20, 1872, 17 Stat. 941 (1873); Treaty With Great Britain, May 13, 1870, 16 Stat. 775 (1871); Treaty With Sweden and Norway, May 26, 1869, 17 Stat. 809 (1873).

c. *Treaty Provision Presumptions and Later Legislation*

Provisions of these treaties, providing for renunciation or abandonment of naturalization upon the return of the naturalized citizen to the territory of his former national state, are relevant to this discussion. Provisions differed, but generally provided that residence by the naturalized citizen in his original nation "without the intent to return to America" shall be deemed a renunciation of his acquired citizenship, and further that the intent not to return "may be held to exist" when the naturalized person resides in the other country for more than two years.[104] Justice Clark in his dissent asserts that the rights under these treaties are stricken by *Schneider*.[105] This contention raises several problems that will be considered later. At this point, it should be noted that these treaties always involved a residence abroad coupled with the absence of an intent to return to America.[106] The statutory provision in *Schneider*, however, does not involve "an intention not to return" but relies on mere residence abroad.

The treaties were just a beginning. They may have solved some problems concerning the obligations which native states claimed to be due from naturalized citizens, but not all nations entered into such treaties with the United States. Furthermore, the departure of a naturalized citizen to foreign lands raised a nagging doubt about the good faith of the naturalized citizen in obtaining his American citizenship. This question arose most frequently in the context of a claim by the naturalized citizen for United States protection and intervention in his behalf while he was abroad. Whether native-born citizens residing permanently abroad retained their United States citizenship raised similar problems when they sought United States protection.[107]

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104. See, *e.g.*, Treaty With North German Union, Feb. 22, 1868, art. IV, 15 Stat. 615, 616, 617 (1869):

> If a German naturalized in America renews his residence in North Germany, without the intent to return to America, he shall be held to have renounced his naturalization in the United States. Reciprocally: if an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.

105. 377 U.S. at 163, 172.

106. Whether or not this resulted in loss of citizenship in the sense used by Justice Clark is doubtful. See text at note 154 *infra*.

107. See, *e.g.*, 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 288 (1942):

> [T]his Department has ruled time and time again, the rulings dating back to the very beginning of the Government, that any man native or naturalized, who leaves the United States and establishes himself in a foreign country, is not entitled to protection as a citizen of the United States . . . . Instruction issued to the Consul General at Large in Mexico, circa 1907.

See also Letter from Fish to Washburne, June 28, 1873 in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 362, 366-67 (2d ed. 1887). As discussed later in the text, these questions were

After several Secretaries of State and Presidents had called for solutions, a citizens board in 1906 recommended that residence abroad for a prescribed period should result in expatriation.[108] The recommendation was applicable to both native-born and naturalized citizens;[109] but when Congress enacted the legislation in 1907, it dealt only with naturalized citizens.[110]

(1) *Early Legislative Expatriation Presumptions.* One provision[111] made residence in a foreign country within five years after naturalization prima facie evidence of an intent at the time citizenship was acquired not to reside permanently in the United States. This enabled an attack on the validity of the original naturalization proceedings, in which there was a requirement that an applicant for citizenship must have the intention to permanently reside in the United States at the time citizenship is acquired.[112] This requirement is part of the present law[113] and raises some questions in connection with *Schneider* that may be disposed of conveniently at this point.

If *Schneider v. Rusk* stands for the proposition that citizenship cannot be held to have been abandoned merely because the citizen established permanent residence in a foreign country, can a condition of naturalization that requires an intention, at the time that citizenship is obtained, to permanently reside in the United States be valid? If such a requirement is validly and reasonably related to the acquisition of citizenship, can it be said that this cannot be made a condition of its retention as well? *Schneider* does not answer these questions and

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usually raised in the context of a request for protection. However, there appears to be at least one reference to an actual loss of citizenship by voluntary expatriation. The point, however, is that *voluntary expatriation* is the test, so that the Fish to Washburne communication, *supra* at 366, states: "Expatriation is a fact to be established, like any other fact, by external evidence, and such continuous residence, even for a lifetime, is capable of being explained on other theories than that of a voluntary denationalization." In that case, the reference was to native-born citizens who had resided in Paris for forty years and raised their family there. In an instruction of 1910, see text accompanying note 125 *infra*, the State Department called attention to an 1899 instruction that considered permanent residence abroad with no intention to return as possibly resulting in expatriation, and in the 1910 instruction some special considerations were given to the native-born citizen. This demonstrates that the 1899 instruction contemplated native-born, as well as naturalized citizens, and the problems of determining acts of expatriation existed with respect to each.

108. See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 287 (1942).

109. See also 41 CONG. REC. 1464-66 (1907) (remarks of Congressman Bennett), wherein in the debate with respect to the 1907 act it is noted that a draft provision amended in committee provided for inclusion of native-born citizens and the issue is raised as to whether any distinction could be made between native-born and naturalized citizens.

110. Act of March 2, 1907, ch. 2534 § 2, 34 Stat. 1228; Act of June 29, 1906, ch. 3592 § 15, 34 Stat. 601 (1907).

111. Act of June 29, 1906, ch. 3592 § 15, 34 Stat. 601 (1907).

112. Act of June 29, 1906, ch. 3592 § 4, 34 Stat. 596 (1907).

113. 66 Stat. 260 (1952), 8 U.S.C.A. § 1451(d) (1953).

its rationale may not deny the power to denationalize where there is no intention to return to the United States. If *Schneider* does not deny the power to expatriate some or all citizens in such cases, it would not be inconsistent with its holding to allow Congress the power to impose such a condition concerning the applicant's intention at the time he obtains citizenship. *Schneider* then would be limited to requiring that after citizenship is obtained with the requisite intent to comply with the condition, a naturalized citizen should have no less of a right to maintain permanent residence abroad than a native-born citizen. Of course, if *Schneider* is taken to mean that no citizen can be expatriated merely because of permanent residence abroad, this will raise some problems with the prima facie presumption of bad faith and perhaps also with the validity of the condition for naturalization. These possibly could be disposed of by the usual view that the granting of citizenship is a privilege and not a right, or by recognizing a distinction between the motives of an individual in obtaining citizenship and the limitations on losing it once it has been lawfully acquired.

(2) *1907 Legislation.* In 1907 Congress enacted the predecessor[114] of section 404 of the act of 1940[115] and section 352 of the act of 1952,[116] the last named containing the provision involved in *Schneider.*

The 1907 provision said in part that

> when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe . . . .[117]

The effect of the 1907 provision on loss of citizenship was the subject of diverse views; its effect was never decided by the Supreme Court.[118] The State Department began and ended its administration of the provision by viewing it only as a presumption, which continued only so long as the naturalized citizen was abroad and was no longer applicable after the citizen returned from a stay abroad exceeding

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114. Act of March 2, 1907, ch. 2534 § 2, 34 Stat. 1228.
115. Nationality Act of 1940, ch. 876, § 404, 54 Stat. 1170.
116. 66 Stat. 269 (1952), 8 U.S.C.A. § 1484 (1953).
117. See note 114 *supra.*
118. *Compare* United States *ex rel.* Anderson v. Howe, 231 Fed. 546 (S.D.N.Y. 1916), *with* Stein v. Fleischmann Co., 237 Fed. 679 (S.D.N.Y. 1916).

two years.[119] The State Department assumed that the presumption was rebutted by the return itself, and even by a showing that the naturalized citizen, while abroad, intended to return and had made definite arrangements to do so.[120] Despite one court opinion to the contrary,[121] and a short period during which the State Department viewed the unrebutted presumption as constituting automatic loss of citizenship,[122] the provision was viewed as not having "any other or further application than to fix the length of time beyond which this government will not extend protection to its naturalized citizens residing abroad, as the preamble of the act declared."[123] In fact, Judge Learned Hand suggested that a contrary conclusion, *i.e.*, loss of citizenship, would be in conflict with some of the very treaties which Justice Clark believed were invalidated by *Schneider*.[124]

The 1907 act applied only to naturalized citizens, but the problem with which it dealt, *i.e.*, loss of protection, also existed with respect to native-born citizens. Very instructive on this point is a 1910 State Department instruction to its officers:

> After a careful consideration of the principles underlying this whole question of the protection of American citizens abroad, the department has come to the conclusion that *in the case of a native American residing in a foreign land,* whether civilized or semi-barbarous, a *definite intention to resume residence in this country should not be made an absolute prerequisite to the privilege* of *receiving a passport* or certificate of registration, *or, if necessary, protection by this Government.*
>
> In modern times there has been a vast improvement in facilities for communication and transportation between the various nations of the earth, and a corresponding increase in international travel

119. Until 1924, except for a short period following *Howe, supra* note 118, and a year or so after passage of the 1907 Act, the State Department followed a 1910 decision of Attorney General Wickersham to the effect that the 1907 act provided a presumption in connection with the right to protection abroad and did not provide for cessation of citizenship. A return to the United States for permanent residence rebutted the presumption. From 1924 to 1926, the State Department operated on the assumption that citizenship had been lost. See 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 290, 294 (1942). In 1926, the State Department reversed itself and taking cognizance of a diversity of views and the absence of ruling by the Supreme Court, provided that passports should issue to persons who had failed to overcome the presumption while residing abroad, but who had established good faith permanent residence in the United States. *Id.* at 294-96.

120. *Id.* at 296.

121. United States *ex rel.* Anderson v. Howe, 231 Fed. 546 (S.D.N.Y. 1916).

122. See note 119 *supra.*

123. Camardo v. Tillinghurst, 29 F.2d 527, 530 (1st Cir. 1928). It was also noted that this view was in accord with prior State Department practice. See 41 CONG. REC. 1464, 1466 (1907).

124. Stein v. Fleischmann Co., 237 Fed. 679, 682 (S.D.N.Y. 1916); Schneider v. Rusk, 377 U.S. at 169 (dissenting opinion).

and trade, and it has become a not unusual practice for citizens of one country to establish themselves in another country for purposes of business without any intention of renouncing their original allegiance. Therefore *it is the department's opinion that the acquisition of permanent foreign residence by a native citizen has not the same significance which it had in former years.* It is considered that an American citizen may now have a permanent foreign residence and yet contribute, indirectly if not directly, to the wealth and strength, the prestige, and general welfare of his country, so that, *as long as he maintains a true allegiance to this Government and is ready, if need be, to come to its defence, he may be entitled to its protection.*

In each case of an American permanently residing abroad, it will be necessary, before deciding as to his right to protection, to determine among other things whether he maintains an actual connection with the United States, and a true allegiance thereto, or whether he has practically abandoned this country and identified himself with the political community of the land in which he resides; and while, as to questions arising in regard to registration and the issuance of passports, a lack of intention to resume residence in this country may, upon matters relating to protection as American citizens, still raise a presumption of expatriation, such presumption shall not be considered as conclusive, but the person concerned shall be given an opportunity to show that he is still a true citizen of the United States. In this connection are to be considered the cause of the foreign residence, participation in the politics of the country of residence or abstention therefrom, ties of family, business, or property maintained with this country, and, in the case of a married man, the original nationality of the wife and the mode of raising the children, and finally the general conduct of the person in question. *It is impossible to lay down a general rule which will be applicable to every case which arises, and each case must be decided upon its peculiar merits.* You will, therefore, not finally refuse a passport or registration certificate to any person belonging to the class under consideration until you shall have been authorized to do so by the department after a full presentation of the pertinent facts.[125]

This instruction and the surrounding circumstances lead to several conclusions: (1) Until 1907, the problem insofar as embarrassment in foreign relations was concerned, involved the granting or withholding of protection to citizens abroad, not a determination of the status of citizens who wished to return to the United States; (2) The problem related to both native-born and naturalized citizens; (3) The acquisition

125. Quoted in 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 280-81 (1942). (Emphasis added.)

of permanent foreign residence by a native citizen was deemed not necessarily inconsistent with continued allegiance to the United States, but, in fact, might serve the United States; (4) The State Department recognized in its instruction that in the case of native-born citizens, it "is impossible to lay down a general rule which will be applicable in every case which arises, and each case must be decided upon its peculiar merits";[126] and (5) Whether or not any valid distinction could be made between native-born and naturalized citizens residing abroad, the only distinction actually made was a statutory presumption applicable only to naturalized citizens, and this only for purposes of protection, not loss of nationality.

(3) *1940 Revisions.* In 1940, legislation covering this subject was sharply altered. In lieu of raising a presumption, the new legislation provided for automatic loss of nationality for a naturalized citizen as a result of his:

> (a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or
>
> (b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 [setting forth certain exceptions] hereof.
>
> (c) Residing continuously for five years in any other foreign state, except as provided in section 406 hereof.[127]

It is difficult to believe that in 1940 the incidence of nationals returning to their native land had increased, or that there had been an increase in the problem of fraudulent acquisition of naturalization, particularly in view of the sharp reduction in immigration during the prior two decades.[128] The presidential committee studying the problem had reported displeasure by the State Department because it had to make some difficult decisions about who was and who was not entitled to protection abroad.[129] However, no particular reason was offered why naturalized citizens should be treated differently than native-born citizens, other than that they had received special treatment under the

126. *Id.* at 281.

127. Nationality Act of 1940, ch. 876, § 404, 54 Stat. 1170.

128. See S. Rep. No. 1515, 81st Cong., 2d Sess. 73, 814-16 (1950), wherein the Committee on the Judiciary, investigating the immigration system, reports that from 1901-10, there were close to 9 million immigrants coming into the United States; from 1910-20, almost 6 million; from 1920-30, slightly over 4 million, with a drop after 1922 because of the first quota act; from 1920-30, slightly over ½ million; from 1941-47, less than ½ million.

129. See Schneider v. Rusk, 218 F. Supp. 302, 309 (D.D.C. 1963).

1907 act and it was believed that more naturalization conventions could be concluded if the 1940 legislation were enacted.[130] In retrospect, it appears that not one new treaty dealing with this subject has been concluded since the enactment of the 1940 legislation.[131]

Other than pique[132] and a desire to avoid some difficult administrative decisions relating to protection abroad, the committee report does not indicate why loss of citizenship was warranted for one group of citizens (naturalized) and not for another group (native-born), or why it was any more difficult to make the determination described in the 1910 instruction in the case of naturalized citizens than in the case of native-born citizens. Residence alone without regard to intent was made the test for loss of nationality, however, so that a naturalized citizen, even if he intended to return, could not live abroad for the prescribed period if his residence was of the type defined in the act.[133] In the only reported case considering the constitutionality of the 1940 provisions,[134] a federal court of appeals rejected the challenge to the section, but a dissent[135] was registered by one judge on the ground that the statute unconstitutionally discriminated by singling out naturalized citizens for special treatment.

(4) *1952 Revisions.* In 1952 there was a general revision of the immigration and naturalization laws, and the loss of nationality provisions were amended in several respects, including the deletion of subdivision (a) of section 404 of the 1940 act,[136] dealing with expatriation after two years residence when a new nationality is obtained by operation of law. The three year and five year residence provisions were retained.[137] It was expressly declared that "residence" was to be determined "without regard to intent."[138]

No new reasons are given in the statute for treating naturalized

130. *Id.* at 310.

131. No such treaty has been found by the writer, and no such treaty is listed as operative in Treaties in Force (Jan. 1, 1964) State Department Publication 7645.

132. The Congressional debates are replete with statements that indicate annoyance at those who go abroad, stay there, but claim some right of protection or a right to be considered a citizen when they return.

133. See note 90 *supra.*

134. Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949).

135. *Id.* at 622 (dissenting opinion, Edgerton, J.).

136. See note 126 *supra* and accompanying text.

137. 66 Stat. 269 (1953), 8 U.S.C.A. § 1484 (1953):

(a) A person who has become a national by naturalization shall lose his nationality by—

(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . .

(2) having a continuous residence for five years in any other foreign state or states . . . .

138. Quoted words are additions to the 1940 definition. 66 Stat. 166 (1953), 8 U.S.C.A. § 1101(a)(33) (1953).

citizens differently from native-born citizens. However, some of the comments in the Senate Judiciary Committee's report are significant.[139] The report, submitted by Senator McCarren, stated that with respect to a native-born citizen, there are instances when he might reside and be educated abroad and,

> to all intents and purposes he is an alien, but his native American citizenship cannot be taken from him, and years later he can, and often does, demand and receive the protection and rights of an American citizen abroad. While it is recognized that situations such as this can create difficulties, it must also be kept in mind that citizenship at birth is as near a vested right as the individual citizen has, and that it is one which is to be protected and preserved.[140]

This statement implies either that the quality of the citizenship of a native-born citizen is higher than that of a legally naturalized citizen or that some peculiar problems are raised by naturalized citizens which are not raised by native-born citizens. Apparently problems of whether to extend protection are not unique to naturalized citizens residing abroad, so this could not be the basis for the distinction; nor was there a desire to enter into new treaties that would protect our naturalized citizens abroad. This was not even mentioned. What does appear, however, is a belief of the drafters that citizenship of the two types is of a different quality, in that post-naturalization regulations may be imposed on the naturalized citizen. The Senate report states: "The law is well settled that certain restrictions placed on naturalized citizens, both before and after their naturalization, do not apply to native-born persons."[141]

There even appears to be some belief that certain naturalized citizens may be treated differently than others.[142] There are exceptions to the loss of nationality provisions which further indicate a view that naturalized citizens are pretty much the "King's subjects" by grant. One such exception is that all who are naturalized by act of Congress or treaty are exempt from the restrictive residence aspects of the "loss of nationality" provisions,[143] thereby placing these naturalized citizens "on a par with native-born citizens with respect to freedom to live abroad indefinitely without losing United States nationality."[144] Other

139. S. REP. No. 1515, 81st Cong., 2d Sess. 73 (1950).
140. *Id.* at 685.
141. *Ibid.*
142. See notes 143, 144 *infra*, and accompanying text.
143. 66 Stat. 270 (1953), 8 U.S.C.A. § 1485(10) (1953).
144. H.R. REP. No. 1365, 82d Cong., 2d Sess., 2 *United States Code Congressional & Administrative News* 1653, 1744 (1952).

exceptions deal with the purpose of residence abroad.[145] The fault with these provisions is that, as exceptions, they bear only slightly, if at all, on any demonstrated evil which peculiarly involves naturalized citizens when residing abroad.

(5) *The Concept of Inherent Sovereignty.* The exemptions which relate to the elderly[146] and the ill,[147] while commendable for their humanitarian motives, appear too much like the benevolent grant of a sovereign, rather than the dignity of right that is accorded to the native-born citizen residing abroad. In fact, this concept of sufferance is referred to in Justice Clark's dissent in *Schneider,* when he speaks of the rights of the naturalized citizen being conditioned in the grant,[148] citing *Calvin's Case.*[149] Coke's dictum[150] in that case may well have been appropriate to a grant from a Stuart King, or perhaps even a sovereign parliament; but absent reliance on some concept of inherent sovereignty, it has little to commend it in a Constitution established by "We, the people," and which more and more has been adapted to the recognition of a need to prohibit absolutely classifications based on race, religion or similar factors. In fact, this concept of inherent sovereignty was argued by the government in *Mendoza-Martinez.*[151] The inconsistency between speaking at the same time both of a government of limited powers over both citizens and aliens, and of a government, solely by virtue of its existence, having the power to cancel citizenship, should disturb those who urge it. The concept of grant subject to conditions, and the manner in which this concept is treated in the 1952 Immigration and Nationality Act, is little more than the basing of loss of nationality on place of birth classifications, with no provision for separate consideration of the individual case in the light of the end to be accomplished. It is of no small significance that, in

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145. 66 Stat. 270 (1953), 8 U.S.C.A. § 1485 (1953), makes exceptions for: government employment abroad; residence abroad because of government service incurred disability; persons over 60 who have resided 25 years in the United States since naturalization; educational purposes; certain relatives of native-born citizens. Exceptions to the five year provision are found in 66 Stat. 271, 8 U.S.C.A. § 1486 (1953), as amended, 73 Stat. 274 (1959), 75 Stat. 656 (1961), and apply to certain veterans, commercial purposes and aged.

146. 66 Stat. 270 (1953), 8 U.S.C.A. §§ 1485(3), 1486(3), (4) (1953).

147. 66 Stat. 270 (1953), 8 U.S.C.A. §§ 1485(2), (5)(A) (1953).

148. Schneider v. Rusk, 377 U.S. at 170 (dissenting opinion).

149. Calvin's Case, 6 Jac. 1, 77 Eng. Rep. 377 (K.B. 1608). Justice Clark's reference is probably to *Id.* at ——, 77 Eng. Rep. 383-84.

150. *Id.* at ——, 77 Eng. Rep. at 384. Coke refers to types of citizenship and lists a grant "upon condition." For a comment on the authority of this case, see Jackson v. Burns, 3 Binn. 75, 85 (Pa. 1810).

151. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 195 (1963) (concurring opinion, Brennan J.). See also reference to this power in Perez v. Brownell, 356 U.S. 44, 52 (1958).

addition to some cases involving aliens,[152] the only case cited by Justice Clark in support of this kind of classification is one of the World War II cases dealing with Japanese-Americans, *Hirabayshi v. United States*.[153]

Even assuming that such a "grant" of citizenship may be conditioned, this leaves the further consideration of just what conditions may be imposed. There must be some limits on the number and type of restrictions which may be placed on citizenship, unless we are ready to admit that surrender of such fundamental rights as trial by jury may be a condition of the grant. If there are such limitations, then may restrictions which do not exceed them be imposed solely because a naturalized citizen is involved? If the answer to this is "yes," then we seem truly to have created a second class citizen. If it is concluded that being a naturalized citizen cannot be the sole basis for imposing restrictions which would otherwise be within permissible limits, then a further question is reached: Assuming the existence of a problem properly within the concern of Congress and assuming also that the problem is raised by both naturalized citizens and native-born citizens, may Congress choose to regulate only the naturalized citizen, because it either judges such to be more convenient or assumes that it cannot so restrict native-born citizens because to do so would be unconstitutional? If such regulations are upheld in reliance on the first ground, then the only basis for differentiating between the two groups is place of birth, and one can understand why Justice Clark could find only *Hirabayshi* reliable authority for such a dichotomy. If the second ground for so legislating is relied on, then it is admitted that there are in law and fact "second class" citizens. Either view is abhorrent.

It can be concluded that with respect to the historical and factual bases for distinguishing between naturalized and native-born citizens residing abroad, any differences in statutory treatment after citizenship was properly acquired by naturalization were not related to any significant difference in the problems raised by each as a class, and the difference in treatment in large measure was based on the belief that constitutionally there was a difference between native-born and naturalized citizens. Furthermore, the major problem Congress was trying to solve was the difficulty of deciding who should receive American protection abroad. The statute was intended to avoid the necessity for making this decision, and it both (1) exceeded the need in the case of natural-

152. Schneider v. Rusk, 377 U.S. at 176.

153. 320 U.S. 81 (1943). It is unfortunate that the rules of this case and of Korematsu v. United States, 323 U.S. 214 (1944), cited by Justice Brennan in his concurring opinion in Trop v. Dulles, 356 U.S. 86, 107 (1958), still have possible viability.

ized citizens and (2) failed to deal with the equally troublesome and identical problem raised by native-born citizens.

4. *Treaties and Settling Abroad Without an Intention to Return*

The final major assertion that Justice Clark makes in his dissent and which will be considered here is that *Schneider* strikes down rights under naturalization conventions and treaties.[154] This suggests several questions: (1) Can there be a loss of nationality solely by virtue of a treaty, *i.e.*, are the treaties self-executing on the individual, or is congressional implementation required? (2) Is a treaty provision, that equates "no intention to return" with renunciation of citizenship a violation of due process? (3) Does the existence of such a provision in a treaty justify implementing legislation that would not otherwise be constitutional? (4) Is the time when the treaty becomes effective relevant, *i.e.*, if it is entered into before or after a given citizen is naturalized? (5) If legislation relies on the existence of the treaty for its validity, to what extent, if any, can it deviate from the treaty provisions? (6) Is the creation of a "stateless" status for the naturalized citizen a relevant consideration in determining constitutionality? (7) Does *Schneider* deal with the validity of the provisions referred to by Justice Clark? Here consideration will be given to *Schneider's* significance with respect to treaty provisions for renunciation and abandonment.

The applicable treaty provisions provide for renunciation of citizenship based on a naturalized citizen's return to his native land with no intention to return to the United States, such lack of intent to return to be presumed after two years of residence in his native land;[155] they do not contain exceptions for legitimate reasons. The present statutory provisions do provide for exceptions not expressly stated in the treaties.[156] The statute also provides, however, that it shall not be deemed inconsistent with any treaty provisions.[157] If this last provision means that the exceptions to the loss of nationality laws are not applicable in the case of naturalized citizens who were formerly nationals of countries with whom we have such treaties, then still another class of citizens is created, with further restrictions on their movements. If the exceptions are applicable equally to naturalized citizens from the states with whom we have these treaties, then Justice Clark's concern about the effect the *Schneider* decision might have on the treaties must be seen in the con-

154. Schneider v. Rusk, 377 U.S. 163, 172 (dissenting opinion).

155. See, *e.g.*, the provision of the Treaty With North German Union, set forth in note 104 *supra*.

156. See note 145 *supra*.

157. 66 Stat. 272, 8 U.S.C.A. § 1489 (1953).

text of a statutory scheme that presently may be in derogation of those treaties.

a. Schneider *Does Not Invalidate the Treaties*

It is more likely that the *Schneider* decision is not inconsistent with the treaties as they are applied. The United States has not considered the treaties to provide for automatic loss of citizenship by residence in a foreign country with no intention to return.[158] The treaties appear to be merely a shorthand means of providing a standard for recognition of a status voluntarily entered into by the naturalized citizen, *i.e.*, abandonment of American citizenship or repatriation in his native land. The emphasis is on an intention to settle abroad permanently, with an affirmative intention not to return as distinguished from the negative condition of "no intention to return." Even where there is such an "abandonment of citizenship," the United States is not obligated by treaty to recognize it, except as an incident of its policy of recognizing the right of voluntary expatriation by all persons, including naturalized United States citizens. In 1885, the Secretary of State wrote:

> The treaties we have made simply recognize and define an existing status under the laws of the two parties; they do not assume legislative or judicial power of making and unmaking citizens. They leave the laws of the land of return free to operate, after two years, to restore the former allegiance. The treaty does not restore the original status any more than it can forfeit the acquired one, and perhaps leave the party without any national status whatever. Moreover, forfeiture of status is essentially a penalty. . . . There is no statutory warrant for the exercise of such a power, and for the Executive to assume it would be repugnant to the principles of our government, according to which no man can be punished without due process of law . . . . the difference between imposing forfeiture of citizenship and recognizing its renunciation is not inconsequential—it is vital.[159]

These treaties dealt with the question of whether or not the United States could properly assert the rights of the naturalized citizens abroad as citizens of the United States. The particular concern was protection. It did not involve the issue of the effectiveness of the municipal law of the United States within its own borders. The treaties involved the relationship of the nations who were parties to it, on the issue of the

158. See note 159 *infra* and accompanying text.

159. Letter from Bayard to Cox, Nov. 28, 1885, in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 323 (2d ed. 1887).

treatment of the naturalized citizen. He was assured the right to expatriate and repatriate himself and some standards were set that provided a *modus operandi* for the nations concerned, vis-à-vis one another, to determine when the citizen had exercised that right.

It is concluded that the *Schneider* decision does not necessarily affect these treaty provisions because: (1) The treaty provisions do not provide for automatic loss of nationality; (2) The loss of citizenship from residence abroad was not an automatic consequence of treaty provisions, but if a loss occurred at all, it was a consequence of a voluntary abandonment; (3) The treaty provisions with respect to two years of residence were viewed as presumptions of intention only; (4) Insofar as the United States municipal law was concerned, it was free to permit re-entry and reassertion of the rights of citizenship; and (5) The treaty provisions were intended only to assure protection of naturalized citizens abroad, to provide some guide as to when the United States might assert the right to protection, and to assure the right of a naturalized citizen to renounce his American citizenship. As with the presumption raised by the 1907 act concerning expatriation, the treaties did not involve a loss of citizenship, but provided a guide for determining when citizenship had been abandoned voluntarily, and when the United States no longer was obligated to provide protection abroad. In any event *Schneider* does not deal directly with the issue, because the statute involved in *Schneider* made the element of intent to return irrelevant, which is not the case with the treaty provisions.

The foregoing does not resolve whether a treaty constitutionally could provide for loss of citizenship insofar as the relationship between the United States and the naturalized citizen is concerned or whether, as a class, all citizens can be expatriated involuntarily as a consequence of settling abroad. Insofar as a treaty alone is concerned, the statement by Secretary of State Bayard denied the power to "make or unmake" citizens by treaty.[160] Furthermore, the opinion in *Reid v. Covert*[161] indicates that the Court will not yield to executive or legislative judgment when personal rights and liberties are at issue merely because the magic phrase "foreign relations" power is used. In addition, the United States has consistently denied a treaty the power to affect its rights to natural-

160. *Id.* at 322. *But see* Chief Justice Hughes in Perkins v. Elg, 307 U.S. 325, 338 (1939), wherein there may be an implication that a treaty could have this effect:

> Thus, on the facts of the present case, the treaty does not purport to deny to the United States the right to treat respondent as a citizen of the United States, and it necessarily follows that, in the absence of such a denial, the treaty cannot be set up as a ground for refusing to accord to respondent the rights of citizenship in accordance with our Constitution and laws by virtue of her birth in the United States.

161. 354 U.S. 1 (1954).

ize an immigrant under municipal law, with the result that even a treaty that requires a five year residence period before a foreign state is compelled to recognize our naturalization of its national does not prevent the United States from effectively providing for naturalization after only one year's residence.[162] It would be a perversion of the purpose of these naturalization treaties to turn them into a basis for involuntary expatriation when their original purposes were to assure the effectiveness of our naturalization procedures and the right of voluntary repatriation for the naturalized citizen.

b. *Validity of Statute Based on "No Intention to Return"*

(1) *The* Schneider *Provision.* Assuming that no existing naturalization convention or treaty expatriates a naturalized citizen against his will, and assuming further that such a treaty alone could not have this effect, the next question to be considered is whether or not a statute might provide for loss of nationality of a citizen residing abroad without the intention of returning to the United States. Section 352 of the 1952 act contains provisions expatriating naturalized citizens residing three years in their native land or five years in any other foreign country.[163] *Schneider* struck down the first provision and there is no reason why the second provision still should be considered viable. Neither provision was directed at a person who did not intend to return to the United States. Mrs. Schneider did not intend to return and the opinion does not indicate clearly whether a statute narrowly drawn and limited to a person with such intent would be considered constitutional.

Justice Douglas stated in *Schneider* that

> this statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." . . . A native born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and al-

162. See Letters from Fish to Bancroft, Sept. 20, 1870, and from Frelinghuysen to Cramer, Oct. 19, 1882 in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 339, 340 (2d ed. 1887).

163. See note 137 *supra.*

legiance. It may indeed be compelled by family, business, or other legitimate reasons.[164]

This language seems to indicate the following: (1) Any classification which attaches different significance to the actions of native-born citizens and naturalized citizens, as classes, is unconstitutional, at least insofar as that classification involves implications as to loyalty; (2) Mere residence abroad, without more, raises no indication of lack of allegiance on the part of either native-born or naturalized citizens; (3) Statutory denationalization, even in cases where there is no intent to return to the United States, still might be unconstitutional, if no exception is made for the citizen residing abroad for legitimate reasons; (4) The possibility that an affirmative intention not to return to the—United States may create an abandonment of citizenship is left open—the reference to the existence of "legitimate reasons" supporting living abroad suggests the possibility that a statute providing for denationalization in the absence of "legitimate reasons" might be upheld.

The rationale of the *Schneider* decision would seem to deny the constitutionality of an expatriation statute even though it was limited to persons with no intent to return to the United States, if it were applicable only to naturalized citizens. The Court states that it is impermissible to assume greater likelihood of lack of allegiance on the part of naturalized citizens as a class than is assumed with respect to native-born citizens.

(2) *The Narrowly Drawn Statute.* Let us now, however, look at expatriation legislation which is devoid of this particular constitutional objection. To avoid the charge of unconstitutional discrimination and to turn to consideration of the factor that has caused some of the greatest concern in this area, the constitutionality of a statute which would provide for loss of nationality for any citizen, native-born or naturalized, who resided abroad without any intention of returning to the United States will be considered. Such a statute would raise squarely the issue of whether Congress possesses the power to prescribe certain acts which will result in loss of nationality, regardless of the subjective desires of the citizen. *Perez v. Brownell,* as has been seen, clearly supports the existence of such a power in one situation, and *Schneider* does not necessarily deny Congress such a power. But *Perez,* as it is now construed by Justices Stewart and Clark and presumably White and Harlan, nevertheless required some element of dilution of allegiance in order to justify the use of the expatriation power. If the *Perez* holding

164. 377 U.S. at 168-69. (Citation omitted.)

has been so modified, the remaining inquiry should be whether the absence of an affirmative intention to return involves such a dilution of allegiance.

Justices Douglas and Black, on the other hand, do not deny the power of Congress to declare the consequence of certain acts to be expatriation.[165] They do insist, however, that the acts so designated must be acts that would constitute expatriation in and of themselves absent Congressional guidelines. To them, expatriation still is the voluntary act of renouncing or abandoning citizenship, or shifting allegiance.[166] If the conduct is in fact not tantamount to express renunciation, Congress cannot make it an act of expatriation merely by saying so. The only area in which Justices Black and Douglas acknowledge a power in Congress to prescribe certain acts as acts of expatriation is in the power to prescribe conditions precedent to accomplishing voluntary expatriation; but Congress "cannot turn white to black and make any act an act of expatriation."[167]

If a statute like the one presently under consideration is intended to cover only those cases where allegiance actually appears to have been renounced in view of all the facts, and "absence of an intention to return" is a shorthand way of describing the existence of this condition, then such a statute would merely recognize the right of voluntary expatriation. Justices Black and Douglas presumably would support such a statute. However, if the statute's only criterion is the absence of an existing intention to return, it could run afoul of *Schneider*, and certainly of Justices Black and Douglas, because it clothes an otherwise ambiguous act with a meaning which it may not have in the particular case. Of course, if the "rationale nexus" approach of *Perez* still has vitality, it might support such a statute. It may be significant that the majority opinion in *Schneider* did not deal with or even refer to the

165. They joined in Chief Justice Warren's opinion in Perez v. Brownell, 356 U.S. 44, 62 (1958) (dissenting opinion).

166. In taking this position, they place some reliance on Chief Justice Hughes' definition of expatriation as "the voluntary renunciation or abandonment of nationality and allegiance." Perkins v. Elg, 307 U.S. 325, 334 (1939) quoted by Justice Douglas in *Perez*, 356 U.S. at 80 (dissenting opinion).

167. Perez v. Brownell, 356 U.S. at 84 (dissenting opinion). *But see* Justice Douglas' dissent in Mandoli v. Acheson, 344 U.S. 133, 139 (1952), where he objected to a refusal to consider an oath of allegiance to the King of Italy as an abandonment of citizenship, in spite of a government concession (in another case) that such an oath was not voluntary. He relies on (1) the clear words of the statute, and (2) the absence of evidence in the record of surrounding circumstances. It is not clear if he would permit a showing of surrounding circumstances consistent with a desire not to abandon allegiance to be decisive. In any event, some definite inference can be drawn that at the time Justice Douglas did not see the issue as "whether the conduct [the act] . . . describes invariably involves a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship." Perez v. Brownell, 344 U.S. at 75 (dissenting opinion).

alleged lack of intention to return by Mrs. Schneider, thereby leaving this question open.

Perhaps a distinction should be made between the absence of an affirmative intent to return to the United States and the presence of an affirmative intention not to return. The latter may involve the element of emigration. While it is true that short of express renunciation it would be difficult to support a finding of fact that the citizen actually intended not to return, only administrative convenience would dictate avoiding the issue, and to let such considerations control would be to cut off a valuable right in some cases.

Another technique which would satisfy *Schneider* would be to set forth exceptions to any expatriation provision based upon legitimate reasons for residence abroad. It does not seem possible to set forth in sufficient detail all the various situations where residence abroad would be for a legitimate reason. It may be necessary and perhaps preferable therefore, merely to articulate the statutory standard in general terms of residence abroad under such circumstances as are inconsistent with undiluted allegiance to this country. If this is what is required by the Court's opinion in *Schneider*, then it appears that the view announced by Chief Justice Warren in *Perez* is now the prevailing view.

(3) *Problems of Interpretation.* The problem of the interpretation of such a statute suggests another issue raised by Chief Justice Warren, and Justices Douglas and Black. What constitutes undiluted allegiance to this country? Or when can allegiance be said to have become diluted? Justices Black and Douglas refer to "expatriation" as a means of renouncing citizenship. Expatriation is usually defined as leaving a country with the intention "to settle in another."[168] If this is all that is required, then the ordinary meaning of these words would seem to include the mere departure from the United States without any intention to return. But Justices Black and Douglas sometimes add the qualification of transfer of allegiance. In fact, they also speak in terms of the voluntary acquisition of another citizenship or of a transfer of loyalty.[169]

It is conceivable that a citizen might leave the United States with no intention of returning, settle in another country with the intention of acquiring new citizenship and never obtain that citizenship. Would this amount to expatriation? Justices Douglas and Black appear to rely on one of two bases for loss of citizenship: (1) an act that has a "sufficient relationship to the relinquishment of citizenship," or (2) an act that

168. This is the definition adopted by Justice Douglas in *Perez*, 356 U.S. at 80 (dissenting opinion) from Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 153 (1795).

169. Perez v. Brownell, 356 U.S. at 80 (dissenting opinion).

has a "sufficient quality of adhering to a foreign power."[170] One of the questions that this analysis raises is whether there can be a loss of citizenship where there is not at the same time loyalty to another power. It seems that Justices Black and Douglas might not view the above conduct as expatriation until the new citizenship actually is acquired.[171] The purpose of this approach is to avoid the problem of statelessness.[172] Presumably, a citizen's express declaration of his intention to be stateless could be honored by these Justices, but the desire to achieve this status would not be inferred. It must be confessed that it is difficult to be certain what either Justices Douglas and Black or Chief Justice Warren would require on this point. They make interchangeable references to the acquisition of new citizenship, transfer of loyalty, adhering to a foreign power, transfers of allegiance and acquisition of a new nationality. These terms are not synonymous, and it is possible that one may acquire a foreign nationality without citizenship, or adhere to a foreign power or be loyal to it without becoming a citizen or national of that country.

c. *Statelessness, Dual Nationality and Foreign Law*

In *Schneider v. Rusk,* Justice Clark states that the United Nations Convention on the Reduction of Statelessness provides "that naturalized citizens who reside abroad may be expatriated when they reside abroad for seven years unless they declare their intent to retain citizenship."[173] In this provision Justice Clark finds support for according different treatment to native-born citizens and naturalized citizens. However, the more significant aspect of the provision is that it reflects inter-

170. *Id.* at 83 (dissenting opinion). It is not clear if only one of these conditions or both must exist—a possible explanation could be that without an express renunciation, renunciation cannot be implied from an act involving no new loyalty, because of the unlikelihood of a person making himself stateless. Nevertheless, the question remains whether adherence to a foreign power can be implied only where there is an acquisition of a new nationality.

171. See, *e.g.,* the considerations in the *Koszta* case, involving an Austrian subject who came to this country, declared his intention to become an American citizen and went abroad. We granted him protection abroad on the theory that he had severed his relationship with Austria and had become an American "national" entitled to protection. Letter from Marcy to Marsh, Aug. 26, 1853, in 2 WHARTON, DIGEST OF INTERNATIONAL LAW 357 (1886); First annual message of President Pierce, *Id.* at 358. This suggests the distinction between citizenship and nationality—he was not a citizen, but was a national of the United States for this purpose. *Quaere:* What if he failed to become a citizen? *Cf.* MOORE, *The Doctrine of Expatriation,* in 4 COLLECTED PAPERS 388, 403 (1944), wherein another view of this case is given. Regardless of which view is correct, the point is that the concepts of transfer of allegiance, adherence to a foreign power and other such verbiage do not have definite enough meaning to enable a decision to be made as to the precise point when nationality is gained or lost.

172. See Perez v. Brownell, 356 U.S. at 80 (dissenting opinion).

173. 377 U.S. at 174 (dissenting opinion).

national recognition that the intention to retain or give up citizenship is the focal point of inquiry, and recognition that the act of merely residing abroad is essentially an ambiguous one. It has further significance in that its very purpose is to eliminate the consequence of involuntary statelessness. Statelessness, it should be remembered, would have been the consequence in *Schneider*.

If statelessness is a concern, it is apparent that that concern does not exist when another nationality is acquired or retained. The present law deals with the acquisition or existence of another nationality and its effect on the retention of American nationality.[174] These provisions are posited on a voluntary abandonment of American nationality.[175] Interestingly enough, the 1952 act repealed the one provision in the 1940 act which had established involuntary loss of nationality as the result of the acquisition of another nationality.[176] This result followed when the naturalized citizen acquired a foreign nationality by operation of law of a foreign nation as a consequence of his residence there. Sections of the 1952 act provide for loss of United States nationality consequent upon foreign naturalization or taking an oath of formal allegiance to a foreign country.[177] This provision would apparently be upheld by Chief Justice Warren, and probably would be considered the equivalent of renunciation by Justices Black and Douglas if indeed they do differ with the Chief Justice on the applicable principle.[178]

Expatriation is not a necessary conclusion from such an event, and in the early case of *Talbot v. Jansen*[179] the Court concluded that acquisition of foreign citizenship did not necessarily result in loss of United States citizenship. The Court in that case implied that acquisition of another nationality could be a basis for a congressional declaration that a loss of nationality had occurred. The context in that case, however, was the expression of a need for a congressional declaration

174. See notes 177, 180 *infra* and accompanying text.

175. Referring to the provisions set forth in text accompanying note 180 *infra*, the Conference Report on the Managers on the part of the House states:

> In composing the differences between the Senate and House bills as they appeared in the section relating to termination of dual nationality, the conferees have modified the language so as to remove any doubt that loss of United States citizenship could occur by any other than affirmative action taken by the dual national. H. Rep. No. 1365, 82d Cong. 2d Sess., 1952 *United States Code Congressional and Administrative News* 1653, 1756.

176. See § 404(a) set forth in text accompanying note 126 *supra*. Also see text accompanying note 186 *infra*.

177. 66 Stat. 267 (1952), 8 U.S.C.A. §§ 1481(a)(1), (2) (1953).

178. Chief Justice Warren and Justice Douglas in Perez v. Brownell, 356 U.S. at 68, 73, 76, 80, explain a case of this nature as voluntary abandonment by an act inconsistent with retention of citizenship and the acquisition of another nationality. See also Justice Douglas' opinion in Mandoli v. Acheson, 344 U.S. 133, 139, discussed in note 167 *supra*.

179. 3 U.S. (3 Dall.) 133 (1795).

as guidance to the citizen so that he might know how the effectiveness of his desire to abandon nationality could be assured; not to provide a basis for loss of nationality in the absence of the citizen's desire.

d. *Dual Nationality*

Another provision in the present law, added in 1952, deals with dual nationality acquired at birth. It requires some affirmative act by the citizen with dual nationality before he can be divested of his United States citizenship, even if he should reside abroad indefinitely. It provides:

> A person who acquired at birth the nationality of the United States and of a foreign state and who has voluntarily sought or claimed benefits of the nationality of any foreign state shall lose his United States nationality by hereafter having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall—
>
> (1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States diplomatic [*sic*] or consular officer in a manner prescribed by the Secretary of State; and
>
> (2) have his residence outside of the United States solely for [a legitimate reason]. . .: *Provided, however,* that nothing contained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years.[180]

(1) *Problems Raised.* This provision presents several problems. It preserves American citizenship for a person who may never have been in the United States and whose ties with the United States may well be less than those of the naturalized citizen who suffered loss of nationality under the *Schneider* provision. This is further evidence of the irrational classification attacked in that case. In view of *Schneider,* however, the limitations on residence in this section that apply when the citizen has become subject to and complies with subdivision (1) may no longer be constitutional. If they are not valid, then a problem remains until clarified by statute. Has he lost his citizenship in the United States as a consequence of "accepting benefits" from a foreign nation and residing in the other country in which he has nationality by birth, or does he retain his nationality in both nations? It would seem that in the absence of some evidence of abandonment or renunciation of his

180. 66 Stat. 269 (1952), 8 U.S.C.A. § 1482 (1953).

United States citizenship it would be difficult without some statutory authority to declare his American nationality forfeited, particularly in view of the legislative recognition of the possibility of having two nationalities at the same time. Had he not been born in the United States, there would appear to be no constitutional restriction on denying him nationality at birth. Contrariwise, had he been born in the United States, his nationality could not be so denied.[181] If he had been born in the United States, the question would be whether the acceptance of benefits and residence abroad in the manner described in the statute can be the basis for expatriation. If he had not been born in the United States and assuming that Congress does not alter the present view that he acquires American nationality at birth, then it would appear that no restrictions with respect to his residence could be placed upon him which are not placed on other nationals.[182] However, this raises the possibility that a person who never has been in the United States and has no constitutional source of citizenship might never have to affirmatively declare his citizenship. It would seem possible that if the Congress so desired, it might require some affirmative act—a declaration or even a return to this country for a period of time—for his citizenship to mature. This could be viewed as a condition of acquiring citizenship for a person born abroad who is not a citizen solely by virtue of the fourteenth amendment.[183]

(2) *Applicable Constitutional Principles.* Despite the fact that he does not become stateless upon losing his American nationality, a dual national should not be treated differently than any other American national with respect to the conditions for loss of American nationality. Dual nationality might be acquired two ways: (1) By birth (hence a status not voluntarily sought); or (2) By being naturalized and yet retaining his old nationality under the laws of his native land. In the case of a naturalized citizen, it would be inconsistent with our espousal of the right of voluntary expatriation for the United States to give effect to the old nationality. In addition, the oath of naturalization provides that he possess undivided allegiance to this country at the time he takes the oath,[184] and if we continue to give any effect to his old nationality

181. See United States v. Wong Kim Ark, 169 U.S. 649 (1898).

182. This would appear to be one of the teachings of *Schneider.*

183. For the history of the statutory basis of such citizenship see Weedin v. Chin Bow, 274 U.S. 657, 661-64 (1927).

184. 66 Stat. 658 (1952), 8 U.S.C.A. § 1448(a) (1953):

(a) A person who has petitioned for naturalization shall, in order to be and before being admitted to citizenship, take in open court an oath . . . (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen . . . .

other than to impugn the effectiveness of the original naturalization proceeding[185] we would be making some assumptions about the loyalty of naturalized citizens that are declared "impermissible" by *Schneider.*

The existence of another nationality should not even be evidentiary on the issue of whether certain acts constitute such a dilution of allegiance that loss of citizenship is authorized, under either Justice Stewart's modified Frankfurter view or the view of Chief Justice Warren. To give any effect to this dual status is objectionable on two grounds: (1) We would be permitting foreign law over which we have no control to affect the status of our nationals; and (2) We would be inferring something from the actions of a dual national that we would not attribute to other nationals, *i.e.,* a diluted allegiance, thereby limiting a dual national's actions solely because of the operation of foreign law.

With respect to the operation of foreign law, the deletion of section 404(a) of the 1940 act from the 1952 act was based upon a decision to reduce the operation of foreign law on what is essentially a municipal law problem.[186] The problem of relying on foreign law as a touchstone for the determination of loss of American nationality is also relevant to the consideration of loss of nationality by repatriation under the naturalization conventions. The treaties were negotiated on the assumption that if American nationality were lost as a consequence of return to the naturalized citizen's native land, there would be an automatic resumption of the former nationality.[187] In *Schneider,* since the signing of the original treaty with the North German Confederation, German law had changed and Mrs. Schneider would not automatically have obtained German nationality merely because she lost her American nationality or because she had married a German national.[188]

Another problem with basing any decisions on the existence of dual nationality by operation of foreign law is that dual nationality may

185. See text at note 113 *supra.*

186. S. REP. No. 1515, 81st Cong., 2d Sess. 767 (1950).

187. Referring to a dispute concerning the treaty with the North German Confederation, Wharton, law officer of the Department of State in 1885, said:

> A final objection to this construction to which I now turn has already been taken by the American minister at Berlin. If at the expiration of two years' residence in Germany, a German naturalized in the United States loses his American nationality, he becomes without any nationality whatsoever, so far as the treaty is concerned, since by the treaty there is no provision made for the resumption of his German nationality. He would, therefore, be in the extraordinary condition of a person without any national ties or allegiance. That he should be allowed to resume his old nationality when he desires is not strange but it would be very strange, if, without such desire on his part or any action justifying it, he should thus, by the mere expiration of time, be absolutely deprived of any political status whatsoever. 2 WHARTON, DIGEST OF INTERNATIONAL LAW 382 (2d ed. 1887).

188. Schneider v. Rusk, 218 F. Supp. 302, 304 (D.D.C. 1963).

exist with respect to a person born in the United States and having no relationship with another nation except for the fact that his parents or ancestors, who may have been American citizens, may have a dual nationality. To attribute any significance to this involuntarily acquired status would be to permit foreign law to operate on our citizens in a wholly uncontrolled situation.

(3) *Determining Loyalty.* Dual nationality does raise the problem, of course, of determining whether the dual national adheres to his American nationality or to his other nationality. One approach might be to assume that if there is no reason to believe otherwise, he adheres to his American nationality. As a matter of constitutional principle, a person born in the United States, who becomes a citizen by virtue of the fourteenth amendment, should be subject to no assumptions derogative of his American nationality nor should he be subjected to any condition requiring him to declare his intention to retain American citizenship.[189] When a citizen becomes such by naturalization this issue is not presented, because his act of applying for naturalization is the affirmative declaration required. However, the dual national born abroad, who derives his citizenship only from statutory provisions, does present a problem. Inasmuch as Congress need not have granted such persons citizenship in the first place, it could in the future require as a condition precedent to perfecting their citizenship that they declare their allegiance by word or deed. However, after they have done so, they should be under no additional disability because of their dual nationality.

(4) *Further Problems.* Consideration of the effect of dual nationality as evidence or as creating a presumption suggests other problems in this area. Previous discussion traced the statutory provision in *Schneider* from some presumptions contained in treaties, some working presumptions of the State Department, and the statutory presumptions contained in the 1907 legislation. How does *Schneider* effect the use of presumptions which are based on residence abroad? It will be remembered that Justice Douglas said in *Schneider* that, "living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance."[190]

It would appear from this that Justice Douglas would not permit an unexplained residence abroad to lead to any conclusion with re-

189. *But see* discussions of the dual national problem and the implication that statutory burdens may be imposed. Mandoli v. Acheson, 344 U.S. 133 (1952); Perkins v. Elg, 307 U.S. 325 (1939).

190. 377 U.S. at 169.

spect to nationality.[191] In the next sentence he explains that such residence may be compelled by legitimate reasons. If residence abroad with expressed intent to settle there can be a basis for concluding that a citizen has voluntarily expatriated himself, then it is difficult to understand why foreign residence alone could not permit some presumption, albeit a weak one, that he has expatriated himself, with some burden then placed on the citizen to explain why, by this conduct, he has not expatriated himself. Even Justice Douglas suggests that some explanations might not be legitimate. If Justice Douglas would not permit any presumption in such cases, it is further evidence that he is requiring express renunciation, and is precluding reliance on conduct alone. Justice Stewart, on the other hand, might be willing to consider unexplained foreign residence as some evidence of dilution of allegiance, and uphold something in the nature of the 1907 presumptions.

V. Conclusions

Although there are undoubtedly many problems raised by *Schneider* that have not been considered in the foregoing discussion, some conclusions with respect to the power of Congress to impose expatriation as a consequence of an individual's conduct are warranted. The area is still in a state of development, but *Perez,* the first case in the most recent series, appears to have been significantly limited. Both opinions in *Schneider* treat the central issue in that case as dealing with dilution of allegiance, and presumably even the dissenters would not treat the power of expatriation as an appropriate legislative weapon which could be used incidentally to the exercise of all general powers.

The present emphasis on dilution of allegiance brings *Schneider* closer to the dissenters in *Perez,* but there is still a distinction between those dissenters and Justice Stewart. Justice Stewart would be willing to accept a classification which characterizes some acts generally as indicative of a dilution of allegiance; Justices Douglas and Black would focus the inquiry on the specific conduct involved under the facts of the case to determine if it was, in fact, tantamount to express renunciation. They and Chief Justice Warren recognize no incidental power to

191. The assumption throughout this article has been that in view of Justice Douglas' statement (text accompanying note 190 *supra*) the provision would not have been upheld even if applicable to both native-born and naturalized citizens. In this connection, the dissent in Lapides v. Clark, 176 F.2d 619, 622 (D.C. Cir. 1949), arguing that the five-year residence abroad provision was unconstitutional because of its discriminatory character, stated: "Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad. But it does not follow that Congress may expatriate some citizens and not others on this ground." *Id.* at 623.

declare a person denationalized, in the absence of some conduct equivalent to recognizing that the person has voluntarily expatriated himself. There may be some difference between Chief Justice Warren and Justices Black and Douglas on the issue of whether any conduct can be so classified without inquiry into the facts of the particular case. This is suggested because Justice Douglas cites only one of Chief Justice Warren's prior opinions as supporting the views Justice Douglas stated in *Perez*.[192] This does not necessarily mean that Chief Justice Warren's *Perez*[193] opinion differs from that of Justice Douglas, but the subtle difference previously alluded to may have compelled Justice Douglas to write a separate dissent in *Perez* in addition to concurring with Chief Justice Warren. Chief Justice Warren's opinion in *Trop*,[194] however, is cited by Justice Douglas and they therefore actually may be in agreement.

Justice Brennan did not participate in *Schneider*, but his views in *Mendoza-Martinez* seem to be in accord with those of Justice Stewart, at least, and his expression of doubts about the validity of *Perez* may even involve disagreement with its principle that expatriation may be used incidentally to other general powers of Congress.[195] If Justices Brennan and Goldberg† were to join the Chief Justice and Justices Douglas and Black, the Court might now have a majority for the Douglas-Black view. This may have significant consequences, both for the vitality of *Perez* on the specific issue in that case, and for the validity of all the loss of nationality provisions which characterize a general class of conduct as expatriation, without regard to the specific facts of the case.[196] Even if such a principle of decision does not clearly emerge, it is apparent that the power of Congress to decree expatriation is being sharply limited and may well be non-existent.

Insofar as the other aspect of *Schneider*, classification of citizens, is concerned, the only question which properly may be raised in the case of a naturalized citizen which may not exist in the case of a native-born

192. There is one view that the power of Congress to take away citizenship for activities done by the citizen is non-existent absent expatriation by the voluntary renunciation of nationality and allegiance. See Perez v. Brownell, 356 U.S. 44, 79 (dissenting opinion by Douglas, J.); Trop v. Dulles, 356 U.S. 86 (opinion by Warren, C.J.); Schneider v. Rusk, 377 U.S. at 166 (opinion by Douglas, J.).

193. 356 U.S. at 62.

194. Trop v. Dulles, 356 U.S. 86 (1958).

195. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 187 (1958) (concurring opinion by Brennan, J.).

† This article went to press prior to the resignation of Justice Goldberg and the appointment of Justice Fortas—Ed.

196. This may not only reopen the voting issue involved in *Perez*, but may cast doubt on the validity of the dual nationality provisions (note 180 *supra*) and some of the provisions applying to both native-born and naturalized citizens in 8 U.S.C.A. § 1481.

citizen is whether the former acquired his citizenship in good faith. This problem is covered by section 340(d) of the 1952 act[197] and involves the issue of whether he ever actually obtained American nationality, not whether he shall lose it once acquired.

Although it may be argued that as a matter of policy the imposition of loss of nationality is undesirable and unnecessary, this does not necessarily answer the question of whether such a Congressional policy is constitutional. Any attempt to define with a degree of accuracy the views of the members of the Court runs into difficulty. Difficulties exist because: (1) The views are not clearly expressed in the opinions, because words normally considered "words of art" are not used as such; (2) Words with different meanings in some contexts, but essentially synonomous in other contexts, are used interchangeably; (3) What appears to be an unqualified assertion is often qualified expressly or by implication at a later point in the same opinion or in a later opinion;[198] (4) The issuance of separate opinions by Justices even though they reach the same decision suggests that they may be applying different principles;[199] (5) The last-named difficulty is increased when some of the Justices, while joining in one opinion, also write separate opinions which sometimes suggest differences not visible to the naked eye.[200]

It is with reservations that one should describe, much less predict, the views of the Court. Nevertheless, an attempt to do so is justified by necessity. The possible views expressed by the Court, as the writer sees them, are: (1) The "rational nexus" view of Justice Frankfurter in *Perez* and *Trop*, which would permit Congress to impose loss of nationality incident to the exercise of its general powers; (2) The qualified "rational nexus" view of Justice Stewart, first announced in *Mendoza-Martinez*, applied in *Schneider* by the Court, and possibly adopted by the *Schneider* dissent, which would permit the imposition of loss of nationality incident to general powers of Congress only where the conduct specified imports some dilution of allegiance; (3) The denial of any power of involuntary expatriation or denationalization incident to the exercise of general congressional powers, a view which is supported by Chief Justice Warren, Justices Douglas and Black, and which may include one Warren view friendlier to a power to imply voluntary ex-

197. 66 Stat. 260 (1952), 8 U.S.C.A. § 1451(d) (1953).

198. The earlier references to Justice Brennan's doubts about *Perez;* Justice Frankfurter's words in *Perez*, later seized upon by Justices Stewart and Clark and used by Justice Douglas in *Schneider;* the variety of ways in which Justice Douglas and Chief Justice Warren express their views in *Perez* and *Trop*—all contribute to a feeling of inadequacy of precise description of the principle they rely on.

199. See note 17 *supra.*

200. *Ibid.*

patriation from ambiguous acts where there is some "rational nexus" to a dilution of allegiance, and another Warren view, in which Justices Douglas and Black join, limiting any such implications almost to a point of non-existence.

It may be difficult to see much of a distinction between the "rational nexus" views of Justice Stewart and Chief Justice Warren, but the Stewart view would still permit the imposition of loss of nationality incident to the exercise of general powers, and the import of the dilution of allegiance need not be to the point where it is tantamount to abandonment or renunciation of allegiance. The Warren "rational nexus" inquiry does not necessarily require the facts of each case to amount to actual abandonment of citizenship, but seeks to determine if it is rational to conclude that the act is tantamount to abandonment or renunciation of allegiance. Presumably, a whole class of such acts, if properly defined, could have this consequence under the Warren version of the "rational nexus" view. The Douglas-Black view at times sounds close to the Warren "rational nexus" view, but its emphasis appears to be on the denial of power to classify any conduct generally as renunciation or abandonment of citizenship, and a requirement of inquiry into the specific situation to determine if there has been an abandonment or renunciation.

Except when considered as punishment, the imposition of loss of nationality invariably seems to be broader than is necessary for its stated purpose. As punishment, of course, it has been limited by *Trop*, and is probably not available at all. If the congressional objective is to limit actions of our citizens abroad, Congress may punish them for violations when they return. The very fact that they return indicates that they have not abandoned their allegiance. If the objective is to avoid providing protection, this is discretionary anyway. Any other use of the power of expatriation cannot be distinguished from banishment. The potential of this power which would permit the state to cast persons outside the pale because they are considered undesirables justifies the Court in imposing limitations approaching denial of any such power. In fact, outright denial of a power to banish should be the Court's ultimate conclusion.