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A STUDY OF THE LAW OF EXPATRIATION

ABRAHAM SCHARF

In the fiscal year ending June 30, 1962, more than two million American citizens had traveled outside the United States, exclusive of Canada. Approximately one-half that number made trips to Europe, Asia and South America.\(^1\) Similar numbers have traveled abroad in previous years.\(^2\) As of March 31, 1963, the number of American citizens registered as residing abroad totaled approximately 330,000.\(^3\) In the past ten years, 49,133 American citizens have been reported by consular officers as having lost American nationality under our expatriation laws.\(^4\) It is not known how many more have been confronted with the possibility of loss of citizenship. Expatriation laws which affect so many of our citizens merit close analysis.

American citizenship has been characterized as a priceless possession\(^5\) and, perhaps today, the most precious right

\(^1\) 1962 ANN. REP. OF THE IMMIGRATION AND NATURALIZATION SERVICE Table 32.
\(^2\) 1958-61 ANN. REPS. OF THE IMMIGRATION AND NATURALIZATION SERVICE Table 32.
\(^3\) These statistics were furnished by the United States Department of State.
\(^4\) 1962 ANN. REP. OF THE IMMIGRATION AND NATURALIZATION SERVICE Table 51.
known to man. The deprivation of citizenship has drastic and grave practical consequences. An expatriate who has no other nationality becomes a truly stateless person—a person who not only has no rights as an American citizen, but no membership in any national entity. Such individuals enjoy, in general, no protection whatever, and if aggrieved by a state have no means of redress. The stateless person may find himself shunted from nation to nation since there is no state obligated or willing to receive him. In this country the expatriate would enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation.

The citizenship of one born a citizen of the United States or naturalized therein may be laid aside, and any such person may expatriate himself, subject to regulation by acts of Congress or treaty. Although the Constitution is silent with respect thereto, and despite objections that expatriation statutes are unconstitutional, it is now well settled that Congress has implied power to provide for expatriation upon the ground that withdrawal of citizenship is reasonably related to the power of Congress to regulate foreign affairs.

Expatriation itself has been defined as “the voluntary renunciation or abandonment of nationality and allegiance.”

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8 Kennedy v. Mendoza-Martinez, supra note 7.
10 There are only two sources of American citizenship—birth and naturalization. Elk v. Wilkins, 112 U.S. 94, 101 (1884). For a definition of naturalization and what constitutes naturalization, see note 187 and accompanying text infra.
11 Kennedy v. Mendoza-Martinez, supra note 7; United States ex rel. Scimeca v. Husband, 6 F.2d 957 (2d Cir. 1925).
It may result even if the person has not become naturalized in some other country according to its laws. Furthermore, loss of citizenship is automatic upon performance of the expatriating act. One becomes an alien at the time the act is committed, and not at the time alienage is administratively or judicially determined. These concepts have provided the guidelines for the preparation of this article.

**HISTORY OF EXPATRIATION**

At common law the general doctrine provided that no person could, by any act of his own without the consent of the government, cast off his allegiance and become an alien. As early as 1795, it was stated that a statute relative to expatriation was much wanted and that ascertaining by positive law the manner in which expatriation may be effected would obviate doubts. Efforts in Congress in 1808 and 1817 to enact legislation providing for expatriation were unsuccessful and the matter was not seriously considered until 1865. In that year Congress approved an act providing for loss of rights of citizenship upon desertion from the armed forces. In 1868, as a result of the refusal of a naturalized citizen's former country to recognize his right to shed his former allegiance to such country, Congress formally announced the traditional policy of this country that expatriation is the natural and inherent right of all people. Impairment of this right, Congress stated, is inconsistent with the fundamental principles of

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16 *Ex parte* Griffin, *supra* note 12, at 450.

17 Trop v. Dulles, *supra* note 9, at 106 (Brennan, J., concurring); United States *ex rel.* Marks v. Espedry, *supra* note 9, at 676.


19 Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 154 (1795).


21 13 Stat. 490-91 (1865).

It should be noted that in the case of Kurtz v. Moffitt, 215 U.S. 487, 501 (1885), it was stated that the provisions of the statute relating to forfeiture of citizenship could only take effect upon conviction by a court martial.

the United States.\textsuperscript{23} Although this statute was intended to apply to the right of immigrants to renounce their former allegiance, the language is broad enough to cover and does cover the corresponding right of American citizens to expatriate themselves.\textsuperscript{24}

However, Congress did not in this statute define what acts constituted expatriation.\textsuperscript{25} Recognizing that the executive branch had no specific legislative authority for nullifying citizenship, several presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves.\textsuperscript{26} On the basis of observations and recommendations made by a commission formed to investigate the subject of naturalization,\textsuperscript{27} Congress enacted the Act of March 2, 1907 [hereinafter referred to as the 1907 Act]. This Act provided for loss of citizenship during peacetime only (1) by naturalization in a foreign state, (2) by taking an oath of allegiance to a foreign state, (3) presumptive loss by naturalized citizens who had resided abroad under the conditions specified therein, and (4) by American women when they married foreigners.\textsuperscript{28}

By the early 1930's, the American law on nationality, including naturalization and denaturalization, was expressed in a large number of provisions scattered throughout the statute books. Some of the specific laws enacted at different times seemed inconsistent with others and Congress also had left unheeded some problems of growing importance. In 1933, at the request of the House Committee on Immigration and Naturalization, a committee composed of the Secretary of State, the Attorney General and the Secretary of Labor was established to review the nationality laws of the United States, to recommend revisions, and to codify the nationality laws into one comprehensive statute for

\begin{thebibliography}{99}
\item\textsuperscript{23} 15 Stat. 223-24 (1868).
\item\textsuperscript{25} Mandoli v. Acheson, 344 U.S. 133, 136 (1952); Schneider v. Rusk, \textit{supra} note 24.
\item\textsuperscript{26} Perez v. Brownell, \textit{supra} note 9, at 49.
\item\textsuperscript{27} Naturalization Comm'n Report, H.R. Doc. No. 326, 59th Cong., 1st Sess. 23-28 (1905).
\item\textsuperscript{28} 34 Stat. 1228 (1907).
\end{thebibliography}
submission to Congress. After five years of study by specialists representing the three departments, this committee formulated a draft code. It noted the special importance of the provisions concerning the loss of nationality and asserted that they were intended to deprive of citizenship those persons who had shown that their real attachment was to the foreign country and not to the United States.\footnote{29}

The Nationality Act of 1940 [hereinafter referred to as the 1940 Act] embodied the draft code and listed ten acts by which nationals, whether native-born or naturalized,\footnote{30}divested themselves of their nationality. It carefully reduced to specific statutory form a description of the various acts which of themselves amounted to a voluntary expatriation.\footnote{31}These provisions were a restatement of those contained in the 1907 Act and of the historic policy of the United States to limit duality of citizenship.\footnote{32}

In 1947, the Senate authorized a full and complete investigation of our entire immigration system since 1911. Early in the study it was concluded that the immigration laws were so closely entwined with the naturalization laws that it was essential for the two sets of laws to be considered jointly. Therefore, it was decided to draft one complete bill which would embody all such laws.\footnote{33}Study and investigation resulted in the Immigration and Naturalization Act of June 27, 1952 (McCarran-Walter Act)\footnote{34}[hereinafter referred to as the 1952 Act]. This Act continued with certain modifications, the provisions of the 1940 Act relative to loss of nationality.\footnote{35}

\footnote{29}Hearings on H.R. 6127, superseded by H.R. 9980, Before the House Committee on Immigration and Naturalization, 76th Cong., 1st Sess. 406, 512 (1940) [hereinafter cited as 1940 Hearings]. See also Perez v. Brownell, supra note 9, at 55-56.


\footnote{31}Miranda v. Clark, 180 F.2d 257, 259 (9th Cir. 1950).

\footnote{32}Savorgnan v. United States, supra note 24.

\footnote{33}S. REP. No. 1515, 81st Cong., 2d Sess. 1, 4 (1950).


Thus, there have been three expatriation statutes, each effective on different dates. The Supreme Court, however, has held that a person's status must be determined in accordance with the requirements of the laws in effect at the time the events occurred. Nationality already lost was not restored by repeal of a statute. For this reason such repealed statutes must, for practical purposes, be included in any consideration of the current grounds of expatriation.

RESTRICTIONS UPON EXPATRIATION

In the statutes providing for expatriation, Congress has imposed some restrictions so that the performance of acts which would otherwise cause forfeiture of nationality did not and does not produce that result where performed under the conditions specified. In addition, citizenship may only be lost by voluntary action in conformity with applicable legal principles. Therefore, it would be well to consider these limitations before turning to the specific acts causing expatriation.

At the outset it must be remembered that one who did not know he was a citizen at the time he performed an act which is designated as expatriating, does not lose his citizenship thereby.

38 Rogers v. Patokoski, 271 F.2d 858 (9th Cir. 1959); Matter of C., 9 I. & N. Dec. 670, 675-77 (Att'y Gen. 1962); Matter of C., 9 I. & N. Dec. 482 (BIA 1961). This is a recent development in the expatriation laws. Prior thereto the contrary view had been taken on the ground that one was charged with knowledge of the law. See Matter of F., 4 I. & N. Dec. 528 (BIA 1951); Matter of M., 3 I. & N. Dec. 558 (BIA 1949).

"Administrative Decisions Under the Immigration and Nationality Laws" will be referred to as I. & N. Dec. Except as they may be modified or overruled by the Board of Immigration Appeals or the Attorney General, decisions of the Board are binding on all officers or employees of the Immigration and Naturalization Service. Selected decisions serve as precedents in all proceedings involving the same issue or issues. 8 C.F.R. § 3.1(g) (1958). Pending publication in bound volumes, these precedents are issued as numbered interim decisions.
Acts Performed During Wartime

The 1907 Act contained a provision that expatriation could not occur while the United States was at war. This prohibition was considered declaratory of the generally accepted principles of law existing prior to 1907, viz., that it was the duty of a citizen who was abroad when war broke out to return without delay; that in time of war the government should be able to control the services of every citizen; and that the right of changing allegiance should not exist when the state is in peril. Its purpose was to protect the United States during a period of war against any citizen who might attempt to evade military service by acquiring the nationality of another country.

This bar was operative during the period in which the United States was engaged in World War I. During this period, naturalization in a foreign state could not cause expatriation. However, the foreign naturalization was recognized as expatriative after termination of the war. This construction was based upon the beliefs that no substantial interest of the United States would be served by refusing to recognize the expatriation, and that it would be clearly contrary to the interests of this country to permit one who had in fact abandoned his American citizenship to enter this country at will with all the rights of a citizen.

Oaths of allegiance taken in connection with enlistments in foreign armies during World War I also were not expatriating under the 1907 Act. Although a foreign oath of allegiance taken during this period did not expatriate, if subsequent to that period the person involved committed an affirmative, overt act which indicated a con-

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39 See note 28 supra.
40 H.R. Doc. No. 326, 59th Cong., 2d Sess. 28 (1906).
41 Petition of Prack, 60 F.2d 171, 172 (W.D. Pa. 1932).
43 See also Matter of M., 4 I. & N. Dec. 398, 399 (Central Office 1951), wherein the above stated rule was recognized but not applied due to the peculiar fact situation.
44 In re Bishop, 26 F.2d 148, 149 (W.D. Wash. 1927); In re Grant, 289 Fed. 814 (S.D. Cal. 1923).
continued allegiance to the foreign state, it was held that the oath of allegiance taken during wartime was effectively confirmed and resulted in loss of nationality.\textsuperscript{45}

The prohibition against expatriation during wartime also prevented an American woman from losing her citizenship by marriage to a foreigner. But, in this case too, nationality would be lost under certain conditions upon termination of the war.

The prohibition against expatriation during wartime was repealed by the 1940 Act and was not continued in that Act or the 1952 Act. Although representations were made to Congress that this ban be retained,\textsuperscript{46} the drafters of the code apparently agreed that it should not.\textsuperscript{47} Since repeal of the 1907 Act, the existence of a state of war has generally had no effect upon the performance of an expatriative act.

\textit{Acts Performed in the United States}

Ordinarily, departure from the country of which a person had been a national was regarded as an essential element of expatriation.\textsuperscript{48} But, whether this was an essential element under the 1907 Act was not decided by the Supreme Court.\textsuperscript{49} The 1940 Act, however, recognizing the undesirability of American nationals being able to cast off their American allegiance while continuing to reside

\textsuperscript{45} Matter of S., 8 I. & N. Dec. 604 (Regional Comm'r 1960).

\textsuperscript{46} 1940 \textit{Hearings} 289, 388, 398.

\textsuperscript{47} Id. at 44.

\textsuperscript{48} The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822); Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795). However, since there was no limitation of place therein, this general rule was not applicable to \textsection{3} of the 1907 Act and an American woman lost nationality by marriage to a foreigner, during the effective period thereof, even though she had remained in this country. MacKenzie v. Hare, \textit{supra} note 13.

\textsuperscript{49} Savorgnan v. United States, \textit{supra} note 24, at 503. In the \textit{Savorgnan} case the government contended that an American woman who had obtained Italian naturalization in 1940 at an Italian consulate in the United States, had then and there expatriated herself under the 1907 Act. The Court stated that while residence abroad may have been required before the 1907 Act and was expressly required by the 1940 Act, the 1907 Act did not so require. However, it was conceded that since at least 1933, the State Department had considered residence abroad to be a necessary element of expatriation.
in this country,\textsuperscript{50} made this principle statutory. This Act, as amended, declared that, except for desertion from the armed forces of the United States in time of war, treason, and formal renunciations of allegiance in the United States, no national could expatriate himself while in the United States or its outlying possessions. But if any other expatriating acts were performed in this country, or an outlying possession, expatriation would result upon subsequent residence abroad.\textsuperscript{51} This restriction was continued in the current act without change.\textsuperscript{52} It should be noted that a mere absence from the United States after performance of an otherwise expatriating act therein without the establishment of a foreign residence, as defined by statute, does not result in loss of nationality.\textsuperscript{53}

The 1940 Act defined the term “United States” as including continental United States, Alaska, Hawaii, Puerto Rico, and the Virgin Islands.\textsuperscript{54} The term “outlying possessions” included all territory, other than as specified in the term “United States,” over which the United States exercised rights of sovereignty, with the exception of the Canal Zone.\textsuperscript{55} The 1952 Act added Guam\textsuperscript{56} in the definition of the United States and named American Samoa and Swains Island as outlying possessions.\textsuperscript{57}

\textsuperscript{50} 1940 Hearings 492.
\textsuperscript{52} 66 Stat. 269 (1952), 8 U.S.C. §1483(a) (1958): “Except as provided in paragraphs (7), (8), and (9) of section 349 of this title, no national of the United States can expatriate himself, or be expatriated, under this Act while within the United States or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this chapter if and when the national thereafter takes up residence outside the United States and its outlying possessions.”
\textsuperscript{53} Matter of W., 1 I. & N. Dec. 558, 560 (BIA 1943). In this case one took an oath of allegiance to the King of England in 1943 in connection with his induction into the Canadian Armed Forces at Boston, Massachusetts. Thereafter, he was absent from April 12, 1943, to May 10, 1943, in Canada as a member of the armed forces. This was held not to constitute taking up residence abroad. However, since he also possessed Canadian nationality and was serving in the Canadian Armed Forces while in Canada, he was held expatriated as the result of such service.
\textsuperscript{54} 54 Stat. 1137 (1940).
\textsuperscript{55} Ibid.
The term "residence" was also defined in the 1940 Act as "the place of general abode." The definition was intended to cover the principal dwelling place of a person, omitting the element of intent. This definition cleared up uncertainties as to the type and amount of residence abroad required to establish expatriation. The term "residence" was used in the 1940 Act as plainly as possible to denote an objective fact. Although definitions of residence frequently include the element of intent as to the future place of abode, no mention of intent was made in the 1940 Act, and the actual "place of general abode" was the sole test for determining residence.

The 1952 Act was more explicit in that the statute itself specified that the place of general abode meant a person's principal or actual dwelling place in fact, without regard to one's intent. The courts have generally followed these definitions and, consequently, have ruled out the factor of intent in determining residence under the expatriation statutes. However, disregarding intent does not mean that a person's permanent place of abode must always be determined by his external conduct, regardless of the purposes of his stay, and it has been held that when a person has established that he lives in more than

58 54 Stat. 1138 (1940). Although this definition is not expressly applicable to § 401, 54 Stat. 1168 (1940), which relates to loss of nationality, the Court in the Savorgnan case nevertheless utilized it. Savorgnan v. United States, supra note 24.

59 1940 Hearings 417.

60 Savorgnan v. United States, supra note 24, at 505-06. The Court found that the principal dwelling place of a woman who lived abroad with her husband and his family was, in fact, with her husband, despite her contentions that she did not intend to establish a permanent residence abroad, or abandon her residence in the United States. See also Matter of A., 7 I. & N. Dec. 619 (BIA 1957), in which it was concluded that one was "residing" abroad with her daughter, despite the fact that she maintained a room in the United States in which personal possessions were stored, where the evidence indicated that such room had not been used as an apartment for some time before the citizen had gone to the foreign country to live with her daughter.


one country, the fact that he considers one place his permanent home in preference to the other place is of importance.\textsuperscript{63}

\textit{Age at Which Expatriating Acts May be Performed}

Prior to January 1941, the statutes did not specify at what age an expatriative act could effectively be performed. Since voluntariness is an essential ingredient of an expatriating act and since the act of a minor was not regarded as voluntary in that sense,\textsuperscript{64} it was repeatedly held under the 1907 Act that one could not lose American citizenship during minority.\textsuperscript{65} Thus, citizens who had not attained the age of twenty-one years were not expatriated prior to 1941 by taking an oath of allegiance to a foreign country,\textsuperscript{66} by becoming naturalized therein in their own right \textsuperscript{67} or under the provisions of a treaty.\textsuperscript{68} It is to be noted, however, that where one performed an expatriating act while a minor he could by clear and unequivocal acts after reaching his majority indicate a desire to confirm the acts taken during minority, and thereby complete his loss of nationality under that Act.\textsuperscript{69}

This age limitation as to the performance of expatriative acts was generally reduced to eighteen years by the 1940 Act,\textsuperscript{70} in the belief that a person who had reached that age should be able to appreciate fully the seriousness of

\begin{itemize}
\item\textsuperscript{63} United States v. Karahalias, 205 F.2d 331 (2d Cir. 1953); Matter of C., 7 I. & N. Dec. 599 (BIA 1957).
\item\textsuperscript{64} Perri v. Dulles, 206 F.2d 586, 588-89 (3d Cir. 1953); Haaland v. Attorney General of the United States, \textit{supra} note 37, at 20.
\item\textsuperscript{65} Soccodato v. Dulles, 226 F.2d 243, 244 (D.C. Cir. 1955); Mazza v. Acheson, 104 F. Supp. 157, 158 (N.D. Cal. 1952).
\item\textsuperscript{67} Matter of G., 1 I. & N. Dec. 329 (1942). \textit{Contra}, \textit{In re Wittus}, 47 F.2d 652 (E.D. Mich. 1931), where it was held that a woman nineteen years of age lost her citizenship by marrying an alien prior to September 22, 1922.
\item\textsuperscript{68} Perkins v. Elg, 307 U.S. 325, 338 (1939).
\item\textsuperscript{70} 54 Stat. 1170 (1940).
\end{itemize}
such an act.\textsuperscript{71} Hence, voting in a foreign election \textsuperscript{72} or employment by a foreign government \textsuperscript{73} at age twenty amounted to expatriation under the 1940 Act, whereas these same acts performed by one under eighteen years of age did not.

However, even under the 1940 Act there were certain expatriative acts which were not effective unless a person had attained the age of twenty-one years, viz., formal renunciation of his allegiance to the United States,\textsuperscript{74} his own application for naturalization in a foreign state\textsuperscript{75} or loss of citizenship by residence abroad.\textsuperscript{76} The eighteen-year age limitation was apparently continued in the current Act with the modification that certain expatriative acts committed while under eighteen years of age could be disaffirmed within six months after attaining that age.\textsuperscript{77}

**Expatriation Must be by Voluntary Action**

Since the essence of expatriation is that it be voluntary,\textsuperscript{78} the right of citizenship can only be waived as the result of free and intelligent choice.\textsuperscript{79} Duress which inhibits such

\textsuperscript{71} 1940 Hearings 492, 493. See also Miranda v. Clark, 180 F.2d 257 (9th Cir. 1950).
\textsuperscript{72} Miranda v. Clark, \textit{supra} note 71. In that case the constitutionality of this provision of the statute was sustained.
\textsuperscript{73} Matter of G., 4 I. & N. Dec. 521 (BIA 1951).
\textsuperscript{74} McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951).
\textsuperscript{75} Matter of R., 3 I. & N. Dec. 470 (Central Office 1949). In view of the exclusion of this ground from the 1940 Act, the common-law rule was applied.
\textsuperscript{76} \textit{Ibid}.
\textsuperscript{77} 66 Stat. 269 (1952), 8 U.S.C. §1483(b) (1958): “A national who within six months after attaining the age of eighteen years asserts his claim to United States nationality, in such manner as the Secretary of State shall by regulation prescribe, shall not be deemed to have expatriated himself by the commission, prior to his eighteenth birthday, of any of the acts specified. . .”

Although this statute is not as affirmative as §403(b) of the 1940 Act, the legislative intent is clear. It was intended to continue in effect the provisions of the 1940 Act, but to modify the conditions under which a person who commits certain expatriating acts while under eighteen years of age may repudiate those acts and thus preserve his United States citizenship. S. Res. No. 1137, 82d Cong., 2d Sess. 46 (1952). For the State Department regulations as to the procedure for assertion of the claim to citizenship, see 22 C.F.R. §§ 50.9-10 (1958).

\textsuperscript{78} Doreau v. Marshall, 170 F.2d 721 (3d Cir. 1948); Inouye v. Clark, 73 F. Supp. 1000 (S.D. Cal. 1947), \textit{rev’d on other grounds}, 175 F.2d 740 (9th Cir. 1949).
a choice is, therefore, a defense to expatriation.\textsuperscript{80} Threats of loss of civil rights,\textsuperscript{81} jail,\textsuperscript{82} concentration camp,\textsuperscript{83} or fear of reprisals or physical injury\textsuperscript{84} to oneself or one's family\textsuperscript{85} have all been held to avoid loss of nationality. The means of exercising duress is not limited to weapons, or physical threats,\textsuperscript{86} and economic duress has been similarly regarded.\textsuperscript{87}

Where military service in a foreign country is compulsory, the taking of the oath of allegiance in connection therewith is, in the absence of evidence to the contrary, presumed to be involuntary.\textsuperscript{88} Failure to protest or to ask for American consular protection upon entry into the foreign army are irrelevant to the issue of voluntariness.\textsuperscript{89} Also irrelevant is the fact that one should have known that when he voluntarily entered the foreign state he would be drafted at some future date.\textsuperscript{90}

Mere statements, however, indicating duress do not avoid expatriation where the evidence is overwhelming that

\textsuperscript{80}Nishikawa v. Dulles, \textit{supra} note 79.
\textsuperscript{81}Soccodato v. Dulles, \textit{supra} note 65.
\textsuperscript{82}Kamada v. Dulles, 145 F. Supp. 457 (N.D. Cal. 1956).
\textsuperscript{83}Dos Reis \textit{ex rel.} Camara v. Nichols, 161 F.2d 850 (1st Cir. 1947).
\textsuperscript{85}Scholer v. Secretary of State, 175 F.2d 402 (7th Cir. 1949); Doreau v. Marshall, \textit{supra} note 78. An unfounded, but genuine fear of harm or reprisal will avoid loss of nationality. Matter of G., 8 I. & N. Dec. 317, 322 (BIA 1959).
\textsuperscript{86}Nakashima v. Acheson, 98 F. Supp. 11, 13 (S.D. Cal. 1951).
\textsuperscript{87}Stipa v. Dulles, 233 F.2d 551 (3d Cir. 1956).

The following were considered duress: (1) where one took what might have been a government position in order to subsist, Insogna v. Dulles, 116 F. Supp. 473 (D.D.C. 1953); (2) where one voted after being informed that unless she did so, her food rations would be discontinued, Takehara v. Dulles, 205 F.2d 560 (9th Cir. 1953); (3) marital coercion where one remained abroad due to the severe illness of his wife, Mendelsohn v. Dulles, 207 F.2d 37 (D.C. Cir. 1953); (4) where there was coercion by one's husband, Inouye v. Clark, \textit{supra} note 78; (5) where there was parental coercion, Takehara v. Dulles, \textit{supra}; (6) where there was fear of loss of access to one's country, Nakashima v. Acheson, \textit{supra} note 86; and (7) where there was formal renunciation of American citizenship and conditions at a relocation center, where Americans, born of Japanese descent, were detained, created an atmosphere of mental fear and intimidation, Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949).

\textsuperscript{89}Lehmann v. Acheson, 205 F.2d 592 (3d Cir. 1953). See Nishikawa v. Dulles, \textit{supra} note 79.
\textsuperscript{90}Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953).
such military service was voluntarily performed.\textsuperscript{91} Military service may be performed willingly, freely and even voluntarily, although technically there is no enlistment but conscription under a compulsory service law.\textsuperscript{92} The inference of duress which flows from conscription is subject to rebuttal through evidence that foreign law permitted invocation of American citizenship as a ground for immunity from service and that such immunity was not invoked, or through evidence that the American volunteered for service more onerous than that mandatorily imposed upon a conscript.\textsuperscript{93} Thus, despite claims of involuntary action, one who had participated in public demonstrations honoring Adolph Hitler and had acted as a spy for the German Army,\textsuperscript{94} one who had accepted a commission as a first lieutenant in a foreign army and took an oath of allegiance at that time,\textsuperscript{95} or one who had personally seen the American consul on frequent occasions but had not at any time requested personal assistance or asylum\textsuperscript{96} were all deemed to have served voluntarily in foreign armed forces and to have lost American nationality.

Erroneous advice by American government officials may also have a bearing upon the existence or nonexistence of a free choice.\textsuperscript{97} Where performance of expatriating acts was required as the result of such advice,\textsuperscript{98} or entry as an alien was sought after such erroneous advice had been given,\textsuperscript{99} American citizenship was held retained.\textsuperscript{100} In

\textsuperscript{92} Acheson v. Maenza, \textit{supra} note 90, at 458.
\textsuperscript{93} Augello v. Dulles, 220 F.2d 344, 347 (2d Cir. 1955) (dictum).
\textsuperscript{94} Bauer v. Clark, 161 F.2d 397 (7th Cir.), \textit{cert. denied}, 332 U.S. 839 (1947).
\textsuperscript{96} United States ex rel. Marks v. Esperdy, \textit{supra} note 91. See also Vaccaro v. Bernsen, 267 F.2d 265 (5th Cir. 1959), in which it was found that voting was voluntary despite claims of coercion. See also Kiyama v. Rusk, 291 F.2d 10 (9th Cir. 1961).
\textsuperscript{97} Acheson v. Maenza, \textit{supra} note 90; Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950).
\textsuperscript{98} Podea v. Acheson, \textit{supra} note 97; see also Matter of S., 8 I. & N. Dec. 226 (BIA 1958).
\textsuperscript{100} However, voting in political elections in Japan and Germany subsequent to World War II at the urging of the occupying American forces did not,
accordance with applicable legal principles, it has been held that mental incompetency prevents voluntariness of action.\textsuperscript{101} Intoxication\textsuperscript{102} and entrapment\textsuperscript{103} appear to be similarly regarded.

In short, each case must be judged by its own facts and circumstances. There must be consideration of the circumstances attending the expatriative act and the reasonable inferences to be drawn therefrom,\textsuperscript{104} and the trier of the facts must consider all evidence relating to the mental condition of the actor to determine whether his act was the result of another's influence.\textsuperscript{105}

However, voluntariness of action is not to be confused with intent to renounce citizenship. An intent to renounce American citizenship is not a prerequisite for expatriation.\textsuperscript{106} Even though one does not intend to give up American citizenship or is in ignorance of the fact that an act would deprive him of citizenship,\textsuperscript{107} if the specified acts are voluntarily performed,\textsuperscript{108} American nationality is lost.

\textit{Burden of Proving Expatriation}

When the Supreme Court declared that rights of citizenship were not to be destroyed by an ambiguity, it was referring to a treaty.\textsuperscript{109} Because the consequences of

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\textsuperscript{101}McCann v. McCann, 13 F. Supp. 847 (W.D. Ky. 1936).
\textsuperscript{102}See also McGrath v. Abo, supra note 74, at 772, where the government admitted "that eight plaintiffs lacked sufficient mental capacity to accomplish legally binding acts and made no defense to their cases on the merits."
\textsuperscript{103}See Acheson v. Wohlmuth, supra note 100.
\textsuperscript{104}Acheson v. Murata, 342 U.S. 900 (1952) (per curiam); Acheson v. Okimura, 342 U.S. 899 (1952) (per curiam).
\textsuperscript{107}Savorgnan v. United States, supra note 106; Scavone v. Acheson, supra note 106, at 61.
\textsuperscript{108}Acheson v. Wohlmuth, supra note 100.
\textsuperscript{109}Perkins v. Elg, supra note 68.
denationalization are so drastic, this principle has been applied to evidentiary ambiguities,\textsuperscript{110} and, prior to September 1961, once citizenship was established the burden was upon the government to prove the performance of an expatriative act by clear, convincing and unequivocal evidence.\textsuperscript{111} If the issue of voluntariness were injected, the same degree of proof was required to establish that the act had been voluntarily performed.\textsuperscript{112} This burden of proof was so heavy that it had been held that previous extrajudicial admissions of voting in a foreign election, later repudiated, were insufficient to establish expatriation in the absence of satisfactory corroboration.\textsuperscript{113} Even uncorroborated testimony of duress sustained a finding that expatriating acts were involuntary,\textsuperscript{114} and disbelief of one's motives and fears did not fill the evidentiary gap.\textsuperscript{115} Not only were factual doubts to be resolved in favor of citizenship,\textsuperscript{116} but the facts and the law were to be construed as far as reasonably possible in favor of the citizen.\textsuperscript{117}

\textsuperscript{110} Nishikawa v. Dulles, \textit{supra} note 79, at 133.

\textsuperscript{111} See note 119 and accompanying text \textit{infra}. See Perez v. Brownell, 356 U.S. 44 (1958). This rule applied to all subsections of the 1940 Act, Nishikawa v. Dulles, \textit{supra} note 79, at 133, and to the 1907 Act, Matter of P., 9 I. & N. Dec. 369 (BIA 1961). It should be noted that the pattern of expatriation cases is that a claim generally is made that American citizenship has been retained and it is contested by the government.

\textsuperscript{112} Nishikawa v. Dulles, \textit{supra} note 79. Previously, the burden had been upon the citizenship claimant to prove that his action was not voluntary. See McGrath v. Abo, \textit{supra} note 74, at 773-74. In Nishikawa the Court held that common experience dictates that one ordinarily acts voluntarily. Unless voluntariness is put in issue the government makes its case simply by proving the objective expatriating act.


\textsuperscript{114} Pandolfo v. Acheson, 202 F.2d 38 (2d Cir. 1953).

\textsuperscript{115} Nishikawa v. Dulles, \textit{supra} note 79, at 137. Although the burden was upon the defendant to show that citizenship was lost, where the plaintiff assumed the burden, i.e., before the defendant offered any proof, the plaintiff took the witness stand and testified, and the record clearly and unmistakably showed that the plaintiff by his acts and conduct had forfeited citizenship, a decree of loss of nationality was affirmed despite an assumption that the case was tried upon an erroneous burden of proof. Bauer v. Clark, \textit{supra} note 94, at 401.

\textsuperscript{116} Stipa v. Dulles, \textit{supra} note 87; Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955); Alata v. Dulles, 221 F.2d 52 (D.C. Cir. 1955).

Following the decision of the Supreme Court requiring that expatriation be proved by clear, convincing and un-equivocal evidence,\textsuperscript{118} Congress statutorily revised the burden of proof by providing that when loss of United States nationality is put in issue, such loss may be established by a preponderance of the evidence, and placing the burden of proving that expatriative acts were involuntary upon the person who committed them.\textsuperscript{119} By its own terms, this statute is limited to proceedings commenced on or after its enactment on September 26, 1961,\textsuperscript{120} and it has no application to a proceeding which was instituted prior to that date.\textsuperscript{121}

\textbf{Presumptions}

In addition to the causes whereby American nationality could be lost, the 1940 Act created a presumption of expatriation by service in a foreign military force or through acceptance or performance of the duties of a post under a foreign state, where a citizen other than an officer or employee of the United States or a member of his family had resided for six months or longer in certain foreign states.\textsuperscript{122} This presumption was rebutted by the presenta-

\textsuperscript{118} Nishikawa v. Dulles, \textit{supra} note 79, at 133.
\textsuperscript{119} 75 Stat. 656 (1961), 8 U.S.C. § 1481(c) (Supp. IV, 1962): "Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after the enactment of this subsection under, or by virtue of, the provisions of this or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b), any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence that the act or acts committed or performed were not done voluntarily."
\textsuperscript{121} Matter of Picone, Interim Decision No. 1259 n.6 (Att'y Gen. 1963).
\textsuperscript{122} 54 Stat. 1169 (1940): "A national of the United States who was born in the United States, or who was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsections (c) or (d) of Section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist
tion of satisfactory evidence to a United States diplomatic, consular, or immigration officer. This provision was not retroactive and it could not be applied against anyone before January 13, 1941, nor could the six months’ residence have begun prior to that date.\textsuperscript{123} However, this presumption did not destroy the basic requirement of voluntariness,\textsuperscript{124} and was easily rebutted.\textsuperscript{125} Evidence of conscription dispelled the presumption,\textsuperscript{126} and once it was shown that the citizen did no act which brought him under these sections the force of this statute was spent.\textsuperscript{127}

The current Act introduced a new concept in the field of expatriation law by providing for a conclusive presumption that expatriating acts were voluntarily done if the person was a dual national who had been physically present in the foreign state for more than ten years prior thereto.\textsuperscript{128} However, this conclusive presumption is addressed only to the issue of voluntariness. It has no application in cases in which the acts were performed voluntarily but without knowledge that one was a citizen,\textsuperscript{129} or where the citizen relied upon the advice of a U. S. until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee nor to any accompanying member of his family.”

It should be noted that this section was adopted upon the special recommendation of the War Department with a view to checking the activities of persons regarded as prospective fifth columnists. See Kawakita v. United States, 343 U.S. 717, 730 n.5 (1952).

\textsuperscript{123} S. Rsp. No. 1515, 81st Cong., 2d Sess. 752, 753 (1950).

\textsuperscript{124} Acheson v. Maenza, \textit{supra} note 90, at 457.

\textsuperscript{125} Nishikawa v. Dulles, \textit{supra} note 79.

\textsuperscript{126} \textit{Ibid.}

\textsuperscript{127} Kawakita v. United States, \textit{supra} note 122; Dos Reis \textit{ex rel. Camara} v. Nicolls, \textit{supra} note 83.

\textsuperscript{128} 66 Stat. 267 (1952), 8 U.S.C. § 1481(b) (1958): “Any person who commits or performs any act specified in subsection (a) shall be conclusively presumed to have done so voluntarily and without having been subjected to duress of any kind, if such person at the time of the act was a national of the state in which the act was performed and had been physically present at such state for a period or periods totaling ten years or more immediately prior to such act.”

\textsuperscript{129} Matter of C., \textit{supra} note 117.
government official and would not have jeopardized his citizenship had he not been informed that it was already lost to him.\textsuperscript{130} Also, if the physical presence in the foreign state was involuntary, i.e., where continued efforts to depart were unavailing and the prolonged physical presence in the foreign state resulted from official prevention of departure,\textsuperscript{131} duress would be available as a defense.\textsuperscript{132}

**Grounds of Expatriation**

**Under the Provisions of Treaties**

Beginning with the so-called “Bancroft conventions” concluded with certain of the German states in 1868, the United States has from time to time entered into agreements relating to naturalization with various other states. These agreements have been designed principally to remove conflicting claims to the allegiance of naturalized persons, and to prevent the imposition of obligations of military service and other obligations of nationality by one party to the agreement on persons having dual nationality who are more closely connected with the other party.\textsuperscript{133} These instruments typically provide that each of the signatory nations would regard as a citizen of the other such of its citizens as became naturalized by the other. Most of them contain further provisions under which a naturalized citizen

\textsuperscript{130} Matter of S., \textit{supra} note 98.
\textsuperscript{131} Ibid.
\textsuperscript{132} Ibid. This conclusive presumption has been noted by the Supreme Court, but its validity was not considered because it was not an issue in the case. Nishikawa v. Dulles, 356 U.S. 129 (1958).
\textsuperscript{133} HACKWORTH, \textit{INTERNATIONAL LAW} 377 (1942). These treaties fall into six categories: (1) early conventions with European states, patterned largely upon, and including the German conventions: Austria-Hungary, Belgium, Denmark, Germany (North German Confederation, Baden, Bavaria, Hesse, Wurttemberg), Great Britain, Portugal, Sweden and Norway; (2) agreements with Latin American states; Brazil, Costa Rica, Haiti, Honduras, Nicaragua, Peru, El Salvador and Uruguay; (3) the peace treaties of the World War of 1914-18: Austria, Germany and Hungary; (4) post-war naturalization treaties: Albania, Bulgaria and Czechoslovakia; (5) dual nationality and military service agreements: Finland, Lithuania, Norway, Sweden and Switzerland; (6) multi-partite agreements: Pan American conventions on the status of naturalized citizens and on nationality of women, and the protocol relating to military obligations in certain cases of dual nationality. \textit{Ibid.} See also Perkins v. Elg, 307 U.S. 325 (1939).
of the United States may be held to have renounced such naturalization if he established a permanent residence in the foreign state from which he came, with an intent not to return to this country. The foreign residence may be presumed to be permanent when the citizen shall have resided for two years in such foreign state.\textsuperscript{134}

This series of treaties initiated this country’s policy of automatic divestment of citizenship for specified conduct affecting our foreign relations. Upon the basis of the Act of 1868 and such treaties as were in force, it became the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of American citizenship by individuals who performed various acts abroad.\textsuperscript{135}

American nationality could be lost under such a treaty where one returned to his former country intending to remain there permanently, or where one was employed there for many years by one company and made no manifestation of an intention to return to this country.\textsuperscript{136} However, if the residence abroad was of a temporary nature and the intent to return to this country always existed, the presumption would be rebutted,\textsuperscript{137} and citizenship retained. Further, the residence abroad must be voluntary.\textsuperscript{138}

The applicability of treaties was continued by express statutory declaration in the 1940\textsuperscript{139} and 1952\textsuperscript{140} Acts.

\textsuperscript{134}1940 \textit{Hearings} 505, 506.
\textsuperscript{136}Matter of L., 3 I. & N. Dec. 98 (Central Office 1947).
\textsuperscript{138}Perkins v. Elg, \textit{supra} note 133.
\textsuperscript{139}54 Stat. 1171 (1940): “Nothing in this Act shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party upon the date of the approval of the Act.”
\textsuperscript{140}66 Stat. 272 (1952), 8 U.S.C. §1489 (1958): “Nothing in this title shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party and which has been ratified by the Senate upon the effective date of this title: \textit{Provided, however,} That no woman who was a national of the United States shall be deemed to have lost her nationality solely by reason of her marriage to an alien on or after September 22, 1922, or to an alien racially ineligible to citizenship on or after March 3, 1931, or, in the case of a woman who was a United States citizen at birth, through residence abroad following such marriage, notwithstanding the provisions of any existing treaty or convention.”
By Dual Nationals

A person who is claimed as a citizen or subject of two states is said to possess dual nationality. This concept, well recognized in international law, recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not, without more, mean that he is renouncing the other. However, dual nationality cannot exist if the assertion of rights or the assumption of liabilities of one are inconsistent with the maintenance of the other. The United States has long recognized the general undesirability of dual nationality, and it has been an issue of concern to Congress for many years. It was, and still is, the intention that dual nationality be eliminated to every degree possible.

Under the 1907 Act, it had been held that a citizen of the United States who acquired a foreign nationality during minority, either in his own right or derivatively, must elect to retain American citizenship after reaching majority in order to retain such citizenship. An election did not require a formal prescribed procedure, but was possible of determination from the circumstances of a person’s conduct and behavior. Return to the United States upon attaining majority constituted an election to retain American nationality. Elections to retain American nationality were also deemed made upon reaching majority: where one

141 Tomasicchio v. Acheson, 98 F. Supp. 166, 168 (D.D.C. 1951): “By reason of differences between nationality laws of various countries, there are many persons whose allegiance is claimed by two or more states, or conversely, upon whom the benefits of nationality are conferred by two or more countries. These conflicts arise principally by reason of the fact that in some countries nationality is governed by jus soli, i.e., it originates by birth within the country; in others, it is based on jus sanguinis, i.e., the child inherits the nationality of its parents irrespective of his place of birth; and in still others, like the United States, it may be predicated on either jus soli or jus sanguinis.”
142 Kawakita v. United States, supra note 122, at 724.
143 Savorgnan v. United States, supra note 106.
145 Matter of G., 1 I. & N. Dec. 329 (BIA 1942). See also Segreti v. Acheson, 195 F.2d 205 (D.C. Cir. 1952). This right of election was recognized by the Supreme Court in Perkins v. Elg, supra note 133.
146 Perkins v. Elg, supra note 133.
registered with an American Consul and entered the United States for permanent residence when twenty-three years of age, although he remained for only two months and had entered as a United States citizen on an average of five times a year for twenty years; \(^{147}\) where one had claimed American nationality upon entry for a temporary period during minority by presentation of his birth certificate, and after majority maintained a course of conduct consistent only with that of American citizenship; \(^{148}\) where a dual national attempted to return to the United States at the age of nineteen, but was thwarted by governmental action; \(^{149}\) and where one was consistently admitted to the United States for visits upon a claim of American citizenship. \(^{150}\)

Conversely, elections to give up American nationality, which required a voluntary act connoting more than mere residence abroad, \(^{161}\) were established by voting in a foreign election, \(^{152}\) use of a passport of the foreign state, \(^{153}\) and failure to disaffirm acquisition of a homestead in Canada upon attaining majority. \(^{154}\) However, registering in a foreign draft as a foreign national and an unsuccessful effort to enlist in the foreign army during World War II, or an attempted enlistment in a foreign militia during minority, were held not to indicate an abandonment of American citizenship and not to constitute an election of the foreign nationality. \(^{155}\)

It is to be noted that the doctrine of election had no application to a person who was vested with dual nationality

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\(^{147}\) Matter of G., 1 I. & N. Dec. 496 (BIA 1943).


\(^{150}\) Matter of F., 2 I. & N. Dec. 427, 428 (BIA 1946). It is interesting to note that once an election to retain citizenship of the United States had been made, one's status was determined, and he could only divest himself thereof by performing acts that would under existing law, result in expatriation. Matter of M., 1 I. & N. Dec. 536, 538 (BIA 1943).


\(^{152}\) Matter of W., 1 I. & N. Dec. 24 (BIA 1941).


\(^{154}\) Matter of G., \textit{supra} note 145.

at birth, and such a dual national was not required to make an election to retain American citizenship. Solution of the dual nationality problem was attempted by the 1940 Act which contained an implicit congressional design to discourage dual nationality. It was designed to clarify the law by specifying a definite method of terminating dual citizenship and electing American nationality. The purpose of its provisions was to relieve the United States from the embarrassment ensuing when American citizens exposed themselves to conflicting demands for allegiance, and to force such dual nationals to elect whether to return to the United States or to forfeit their American citizenship.

Section 401(a) of that Act recognized the theory of election and definitely limited the manner of evidencing election to a taking up of residence in this country within the time limit specified.

Still faced with the problem of dual nationals during its consideration of the 1952 Act, and desiring to terminate such status, Congress enacted a new section divesting dual nationals at birth of American citizenship where they had voluntarily sought or claimed benefits of a foreign nationality and had resided in the country of that nationality for three years after age twenty-two.

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159 Miranda v. Clark, 180 F.2d 257 (9th Cir. 1950).
160 In the Matter of Bernasconi, supra note 156.
161 Matter of G., supra note 147.
163 66 Stat. 269 (1952), 8 U.S.C. § 1482 (1958): "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 or consular officer in a manner prescribed by the Secretary of State; and
This section affects all persons who are dual nationals at birth, whether born in or out of the United States.\textsuperscript{164} The three years' residence must follow the seeking or claiming of the benefits.\textsuperscript{165} This statute is prospective,\textsuperscript{166} and nationality is not lost unless the individual has sought or claimed the benefits of foreign nationality after December 24, 1952 and thereafter, and after his twenty-second birthday, acquires a period of three years residence in the foreign state of his nationality. Although reliance may not be had upon acts performed prior to December 24, 1952, where the benefits of the foreign nationality were sought or claimed before December 24, 1952 but the continued exercise of the claim or enjoyment of the benefits continued thereafter, one comes within the statute and loss of citizenship will result when coupled with a three years' residence after that date.\textsuperscript{167}

The benefit voluntarily sought or claimed by the dual national must be substantial and indicative of an intention to express some elements of preference to another country in a measure inconsistent with American citizenship. Hence a dual national who claimed to be a Mexican citizen in order to gain admission to the United States as an agricultural worker, did not seek or claim a benefit within the contemplation of the 1952 Act.\textsuperscript{168} However, applying for a foreign passport or identity card and presenting it at the time of admission to the United States constitutes seeking

\textsuperscript{165} Matter of J., 8 I. & N. Dec. 112 (BIA 1958).
\textsuperscript{166} Ibid.
or claiming the benefits of a foreign nationality, as does holding land in Mexico, which aliens were not permitted to acquire without special permission.

Loss by Marriage

Prior to 1907, the marriage of a woman citizen to a foreigner did not change her allegiance so long as she remained in this country. To cause loss of citizenship it was necessary for her to leave the United States or take some equally patent step to show an election to relinquish citizenship. Such an election was established where a woman citizen married a national of a country with which this country had a naturalization treaty, thereby acquiring his nationality, and emigrated to that country.

Between 1907 and 1922, an American woman who married a foreigner lost her citizenship thereby. This provision of the 1907 Act was based upon the principle of identity of husband and wife. Under this Act marriage to an alien was expatriative whether or not the woman acquired a foreign nationality thereby and even though she resided in the United States. However, it was admin-

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160 See Matter of J., supra note 165, at 115-16. In Jalbuen v. Dulles, 254 F.2d 379 (3d Cir. 1958), the court held that a dual national of this country and the Philippine Islands who took an oath of allegiance to obtain a Philippine passport was not expatriated under the 1940 Act upon the ground that his conduct was merely declaratory of what he was as a dual national entitled to travel documents from each country. The Immigration and Naturalization Service is not in accord with this view. Matter of S., 8 I. & N. Dec. 604, 605-06 (Regional Comm'r 1960).

161 Matter of V., supra note 167.

162 See Shanks v. Dupont, 8 U.S. (3 Pet.) 395 (1830). This was the decided weight of authority. Montana v. Kennedy, 366 U.S. 303 (1961). For the view that citizenship was lost even though the woman had never been domiciled outside the United States, see In re Krausman, 28 F.2d 1004 (E.D. Mich. 1928); In re Page, 12 F.2d 135 (S.D. Cal. 1926).


164 Matter of H., supra note 157. In such cases she was considered to have been naturalized in that country and to have lost American nationality thereby. See Matter of G., 4 I. & N. Dec. 93 (Central Office 1950), where there was no naturalization treaty and she was not held expatriated.

165 MacKenzie v. Hare, 239 U.S. 299 (1915). If the marriage was void at its inception, or perhaps was voidable and was thereafter annulled, nationality was not lost. Inaba v. Nagle, 36 F.2d 481 (9th Cir. 1929).


167 MacKenzie v. Hare, supra note 174.
istratively held that the statute was inoperative if the husband were an American citizen at the time of the marriage. The fact that he might have become an alien during coverture did not affect her citizenship.\textsuperscript{177}

The statutory bar to expatriation during wartime applied to a woman who married an alien and, therefore, such marriage during World War I would not result in expatriation.\textsuperscript{178} In such instances where the marital status was not previously terminated, citizenship was deemed lost on July 2, 1921, when the war was declared at an end.\textsuperscript{179} However, if the husband was naturalized during the war period, so that at its end he was no longer an alien, citizenship was retained.\textsuperscript{180}

This provision was substantially repealed by the Act of September 22, 1922,\textsuperscript{181} but such repeal did not restore citizenship lost thereunder. Mere marriage after that date did not cause loss of citizenship,\textsuperscript{182} unless a woman married an alien ineligible for citizenship.\textsuperscript{183} The last remnants of the effect of marriage on loss of citizenship were eliminated on March 3, 1931,\textsuperscript{184} and since that date marriage alone has not caused expatriation.\textsuperscript{185}

\textbf{By Naturalization in a Foreign State}

From the beginning, one of the most obvious and effective forms of expatriation has been that of naturalization under the laws of another nation, which automatically

\textsuperscript{177} Matter of K., \textit{supra} note 175.
\textsuperscript{179} \textit{In the Matter of Peterson}, 33 F. Supp. 615 (E.D. Wash. 1940); 3 HACKWORTH, \textit{op. cit. supra} note 133, at 267 (1942).
\textsuperscript{180} Matter of M., 4 I. & N. Dec. 398 (Central Office 1951).
\textsuperscript{181} 42 Stat. 1021 (1922).
\textsuperscript{182} Matter of W., 3 I. & N. Dec. 107, 109 (BIA 1948). It would be lost if, in connection with marriage, she performed an affirmative act required by the law of her husband's state as a prerequisite to the acquisition of his nationality. 3 HACKWORTH, \textit{op. cit. supra} note 133, at 258 (1942).
\textsuperscript{183} \textit{Ex parte Hing}, 22 F.2d 554 (W.D. Wash. 1927).
\textsuperscript{184} 46 Stat. 1511 (1931): "A woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after this section, as amended, takes effect, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens."
results in loss of American citizenship. Prior to the 1940 Act, naturalization had been defined as "the raising of an alien to the rank of citizen and the clothing of this alien with the privileges of citizenship." That Act defined it as the "conferring of nationality of a state upon a person after birth," and the current statute added "by any means whatsoever." Thus, naturalization is not limited to the conferring of nationality upon a person as a result of his own application but includes the derivative naturalization of minors through the naturalization of their parents, acquisition of nationality through marriage, and collective acquisition of the nationality of a state by inhabitants of territory annexed by that state. It does not include a person who acquired American citizenship at birth abroad by virtue of the citizenship and prior residence of a parent.

The language "has been naturalized in any foreign state" refers to the naturalization into the citizenship of any foreign state and not to the place where the naturalization proceeding occurs. Thus, a person may be naturalized in a foreign state even though the proceedings which led to citizenship therein took place in the United States.

A foreign state means a country which is not the United States or its possession or colony and not as that term is used in international law. Under the former definition, it has been held that occupied Japan and

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184 Acheson v. Kuniyuki, 189 F.2d 741 (9th Cir. 1951), rehearing denied, 190 F.2d 897 (9th Cir.), cert. denied, 342 U.S. 942 (1952).
occupied Germany and Italy while under allied military government were foreign states.

Under the 1907 Act, a foreign naturalization could have occurred automatically without a formal judicial proceeding. Foreign citizenship automatically conferred by operation of a foreign statute, the repatriation of a former citizen by a foreign country upon his entry into its armed forces, and the acquisition of a new nationality by operation of a treaty designed primarily to transfer territory were all regarded as naturalizations. There was no distinction whether the foreign nationality was acquired directly or through a parent or husband.

However, where naturalization in a foreign country occurred by operation of law, such as by residence in a foreign country or through the naturalization of a parent, it was considered a permissive form of naturalization under the 1907 Act. Loss of American citizenship did not result prior to January 1941, unless acceptance of the foreign nationality was manifested by an overt voluntary act which clearly and unambiguously manifested a decision to accept such foreign nationality. Whether a particular act constituted an overt act manifesting a voluntary acceptance

depended on the facts in each individual case. Under this concept, subsequent voluntary military service and service on foreign government missions, continuous travel upon a foreign passport, joining the Fascist Party of Italy, membership in the Italian Fascist Confederation of Agriculturists, for which only citizens of Italy were eligible, voting in political elections, applying for and receiving an Italian card of identity describing one as an Italian national, and maintaining after majority a homestead which had been acquired by applying for a foreign nationality during minority, were all regarded as manifesting an acceptance of the foreign nationality involuntarily acquired and to effect expatriation under the 1907 Act, as of the date of the act evidencing acceptance. It should be noted that the act manifesting acceptance must have been performed between 1907 and 1941 in view of the prospective repeal of the 1907 Act by the 1940 Act. Further, since a formal application to obtain foreign naturalization was a prerequisite for expatriation under successor statutes, such

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203 Matter of G., supra note 200, at 98.
204 DeCicco v. Longo, supra note 199.
211 Matter of Picone, supra note 198; Matter of DiP., 9 I. & N. Dec. 660 (BIA 1962). Prior to these cases it had been held that where there had been an acceptance of the involuntary naturalization, loss of nationality related back to the date upon which the nationality had been acquired. This doctrine was re-examined and the retroactive feature modified for the reason that the involuntary naturalization was regarded as a continuing offer, the acceptance of which completed the naturalization. Since the act of acceptance was probative only of intent at the time the act was performed, expatriation was deemed to date from such act. In Picone, the Attorney General found it unnecessary to consider what acts constitute an acceptance and what factual showing is required to establish their character. However, in view of the nature of acts of acceptance, it is doubted whether he intended to overrule previous decisions in this area.
212 Matter of Picone, supra note 198. In addition, § 403 of the 1940 Act provides that nationality shall be lost solely from the performance of the acts or fulfillments of the conditions specified and there is no provision covering the acceptance of a foreign nationality acquired by operation of law.
naturalizations by operation of law did not affect a United States citizen after January 1941.\footnote{Matter of P., 9 I. \& N. Dec. 362 (BIA 1961).}

The 1940 Act modified the 1907 Act by requiring that the foreign naturalization be obtained upon one's own application or through the naturalization of a parent having legal custody. There were provisos to the effect that when the foreign naturalization was acquired through a parent the child had until age twenty-three to return to this country, and if he was still a dual national he was accorded an additional two years (to January 13, 1943) to return.\footnote{54 Stat. 1168 (1940).} This section provided for a definite method of election and a definite period within which it must have been made,\footnote{Matter of O., 2 I. \& N. Dec. 6 (BIA 1944).} granting such dual nationals, whether United States citizens by birth or naturalization, the opportunity to elect within two years of reaching majority the country to which they chose to pledge allegiance.\footnote{Gaudio v. Dulles, 110 F. Supp. 706 (D.D.C. 1953). This has reference to dual nationals who became American citizens either by birth or naturalization and thereafter acquired a foreign nationality. If dual nationality status was acquired at birth, an election to retain American citizenship is not required. See notes 156-57 \textit{supra} and accompanying text.} While the first part of the statute was clearly prospective in its effect, the second proviso applied to American citizens who, prior to its passage and during their minority, had acquired foreign citizenship through the naturalization of their parents\footnote{Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953).} and who were residing abroad at the time of its enactment.\footnote{Matter of M., I I. \& N. Dec. 536 (BIA 1943).} The statute did not affect one who, upon attaining majority and prior to the effective date, had already made a valid election to retain American citizenship and thereafter had abided by such election.\footnote{Matter of G., I I. \& N. Dec. 496 (BIA 1943).} The statute was not applicable unless the parent also had been expatriated by such a naturalization.\footnote{Matter of Monastra, Interim Decision No. 1309 (Central Office 1963); Matter of P., \textit{supra} note 202.} On the other hand, it was applicable to
one who, although a dual national at birth, later lost the foreign citizenship and subsequently reacquired it.\(^{221}\)

Where a person was still a dual national on the effective date of the 1940 Act, he was given two years to return to this country even though over twenty-three years of age at that time.\(^{222}\) If he did not return by the statutory deadline, citizenship was lost, unless the failure to return was involuntary.\(^{223}\) Thus, American citizenship was retained where a dual national did everything within his power to return to the United States before the deadline but was prevented from so doing because of the war,\(^{224}\) closing of American consulates,\(^{225}\) denial or delay of his application by government officers\(^{226}\) or inability to secure transportation.\(^{227}\) However, such disabilities did not postpone forever the duty of making the choice to come here,\(^{228}\) since such choice must have been made within two years after one was free to do so.\(^{229}\) The current act extends the time from twenty-three years of age to twenty-five for a citizen to return to the United States if he had been naturalized in a foreign state while under twenty-one years of age.\(^{230}\)

\(^{221}\) Dulles v. Iavarone, 221 F.2d 826 (D.C. Cir. 1954). The court further held that the Secretary of State was required to show not only the father's foreign naturalization and the derivative naturalization of the plaintiff, but that his father also had legal custody of the plaintiff at the time of his naturalization in the foreign state.

\(^{222}\) Attorney General of the United States v. Ricketts, 165 F.2d 193 (9th Cir. 1947); Matter of S., 1 I. & N. Dec. 481, 482-83 (Att'y Gen. 1943). This two-year limitation applied to the application for permission to come to the United States and not to the time of his actual arrival. Perri v. Dulles, supra note 217.

\(^{223}\) In the Matter of Bernasconi, 113 F. Supp. 71 (N.D. Cal. 1953).


\(^{225}\) Perduzzi v. Brownell, supra note 224.


\(^{227}\) Perri v. Dulles, supra note 217.

\(^{228}\) In the Matter of Bernasconi, supra note 223, at 75.

\(^{229}\) Perri v. Dulles, supra note 217; Matter of M., supra note 224. See also Perduzzi v. Brownell, supra note 224.

\(^{230}\) 66 Stat. 267 (1952), 8 U.S.C. §1481(a)(1) (1958): "From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—(1) obtaining naturalization in a foreign state upon his own application
By an Oath of Allegiance to a Foreign State

Prior to the enactment of the 1907 Act, there had been a lack of uniformity concerning the effect upon American citizenship of an oath of allegiance to a foreign state. After March 2, 1907, the taking of such an oath caused loss of nationality. The 1940 Act substantially re-enacted this provision, expanding it to include an affirmation or other formal declaration of allegiance to a foreign state. The current statute continued the language of the 1940 Act but included political subdivisions of foreign states as well as the foreign state itself.

What constitutes an oath of allegiance is determined by its spirit and meaning and not the letter. The test is whether the oath taken places the person taking it in complete subjection to the state to which it is taken, at least for the period of the contract, so that it is impossible for him to perform the obligations of citizenship to this

filed in his behalf by a parent, guardian, or duly authorized agent, or through the naturalization of a parent having legal custody of such person: Provided, That nationality shall not be lost by any person under this section as the result of the naturalization of a parent or parents while such person is under the age of twenty-one years, or as the result of a naturalization obtained on behalf of a person under twenty-one years of age by a parent, guardian, or duly authorized agent, unless such person shall fail to enter the United States to establish a permanent residence prior to his twenty-fifth birthday. This extension was enacted for the benefit of those citizens who were caught abroad during the war and who were unable, through no fault of their own, to return to this country within the time required by the 1940 Act. See Matter of C., 8 I. & N. Dec. 511 (BIA 1959).

HACKWORTH, op. cit. supra note 201, at 217-18. In the absence of a statutory declaration or federal court decision, the State Department took the view that an oath of allegiance taken prior to March 2, 1907, did not expatriate. Ibid. In United States ex rel. Francassi v. Karnuth, 19 F. Supp. 581, 583 (W.D.N.Y. 1937), the court commented that the 1907 Act was merely declaratory of the law as it had long been recognized.

This provision was included in the Act to prevent one from deliberately placing himself in a position where his services might be claimed by more than one government and his allegiance due to more than one: H.R. Doc. No. 326, 59th Cong., 2d Sess. 23 (1906).

Since some governments do not recognize the "oath" which has a religious connotation, it was deemed desirable to expand the rule to include the affirmation or formal declaration. 1940 Hearings 490.

Such an oath contemplates a solemn, formal and binding obligation to serve a foreign state, made in the presence of a person authorized to administer it, and acceptance thereof by the foreign state in accordance with its laws. There must be evidence in the record that it was in fact taken and not merely subscribed to. If such an oath of allegiance were taken, it was no defense to expatriation that allegiance to the United States was not specifically abjured therein, that the oath was not legally valid for the purpose of gaining foreign citizenship, that it was limited for only a specified time, that it had been taken to a sovereign and not to a foreign state, that one had been subsequently discharged from

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235 Hackworth, op. cit. supra note 201, at 219-20. Matter of T., 1 I. & N. Dec. 596 (BIA 1943). In its application to the facts of that case, it was held that although the words "fealty" and "allegiance" might be used interchangeably, where "fealty" was regarded by the foreign government as having a special meaning—a loyalty less than allegiance—and was administered to persons who were not nationals of the foreign country with the understanding that their own citizenship would be retained, an oath of "fealty" was not an oath of allegiance within the meaning of the statute.


See also Grassi v. Acheson, 101 F. Supp. 431 (D.D.C. 1951), where the court held that the oath had been taken where the citizen was present when the oath was administered to the group entering the foreign armed forces. Since there must now be more than inference, hypothesis or surmise before a person can be stripped of his citizenship, Acheson v. Maenza, 202 F.2d 453 (D.C. Cir. 1953), a mere denial that the oath was taken, or evidence that actual practice departed from the rule, makes this presumption ineffective. Monaco v. Dulles, 210 F.2d 760 (2d Cir. 1954).

240 Matter of E., supra note 237.

241 See Ex parte Griffin, 237 Fed. 445, 455 (N.D.N.Y. 1916). Cf. Fletes-Mora v. Rogers, 160 F. Supp. 215 (S.D. Cal. 1958), which held that if allegiance to the United States is not renounced or no declaration of allegiance to a foreign state is contained therein, no oath of allegiance has been taken.


243 Ex parte Griffin, supra note 241, at 458.

244 Ex parte Griffin, supra note 241.
the armed forces of a foreign state upon the ground that he was not a citizen thereof, or that it was in a foreign language of which the citizen was ignorant where, under the circumstances, the citizen recognized that she was taking an oath of allegiance. Conversely, citizenship was not lost by the taking of an oath of allegiance to a foreign state in connection with employment by a private company pursuant to its regulations where the oath was not required, authorized or accepted by the foreign state, or where it was administered contrary to or in violation of the laws of the foreign country.

An oath of allegiance taken in connection with entry into the armed forces of a foreign country terminated citizenship under these statutory provisions provided it was not taken under circumstances amounting to duress. If it was taken as a concomitant to conscription by one required to submit to a foreign draft law or suffer punishment as an alternative, expatriation did not result.

It must be remembered that oaths of allegiance taken during World War I did not expatriate under the 1907 Act in light of the express prohibition thereof, but that such oaths could be effectively confirmed after the wartime

246 Revedin v. Acheson, supra note 242. In Kawakita v. United States, 343 U.S. 717, 725-26 (1952), the Supreme Court stated that where a dual national of this country and Japan had intended to renounce his American citizenship, his facing the East each morning and paying his respects to the emperor, signing a Japanese family census register and changing his registration as an alien with the police and a university, might suggest the making of a formal declaration of allegiance to Japan within the meaning of this section.
248 Matter of N., 6 I. & N. Dec. 792 (BIA 1955). In that case, a citizen took an oath of allegiance to Canada upon entry into the Canadian armed forces. Canadian Orders in Council, then in effect, did not require an oath by one not a Canadian national where the taking of such an oath would cause loss of nationality under the laws of the country of which the person was a citizen.
249 Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950); Dos Reis ex rel. Camara v. Nicholls, 161 F.2d 860 (1st Cir. 1947); Matter of C., 3 I. & N. Dec. 586 (BIA 1949).
period by clear and unequivocal acts denoting a continued allegiance to the foreign state and an intention to relinquish American citizenship.\footnote{251} Similarly, oaths of allegiance which were non-expatriating because taken during minority could be confirmed after attaining majority by a course of conduct having a direct relationship to the purpose for which the oath was taken with a resulting loss of citizenship under that Act.\footnote{252} Where the oath of allegiance was effectively confirmed in peacetime, nationality was deemed lost under the 1907 Act as of the date the confirmatory act was performed.\footnote{253}

\textit{By Service in a Foreign Armed Forces}

Prior to January 1941 mere service in the armed forces of a foreign state did not affect citizenship.\footnote{254} If one had or acquired the nationality of a foreign state, such service, per se, became grounds for loss of citizenship under the 1940 Act, unless such service was expressly authorized by our law.\footnote{255} This legislation was based upon the theory that one who had voluntarily entered or continued to serve in the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred

\footnote{251} Matter of S., 8 I. & N. Dec. 604 (Regional Comm'r 1960).
\footnote{252} Matter of W., 4 I. & N. Dec. 22 (Central Office 1950). In that case a minor took an oath of allegiance to Canada in order to teach school and entered into a contract for that purpose. After reaching majority, she voluntarily entered into a new contractual relationship to teach school. This course of conduct was held to amount to an affirmation of the oath. \textit{Cf.} Mazza v. Acheson, 104 F. Supp. 157 (N.D. Cal. 1952) (in which under the facts of that case it was held that subsequent acts confirmed the oath taken during minority); Riccio v. Dulles, 116 F. Supp. 680 (D.D.C. 1953) (in which confirmation was not found).
\footnote{253} Matter of Amico, Interim Decision No. 1299 (BIA 1963). Where oaths of allegiance taken during wartime were subsequently confirmed after the war, the "relation back" theory had been followed and nationality was held lost as of July 2, 1921. Matter of S., \textit{supra} note 251. The modification of this principle in connection with acceptance of foreign nationality involuntarily acquired, was deemed applicable to oaths of allegiance taken during wartime and during minority, and the prior view was abandoned.
\footnote{254} Perri v. Dulles, \textit{supra} note 217; \textit{Ex parte} Griffin, \textit{supra} note 241; See Soccodato v. Dulles, 226 F.2d 243 (D.C. Cir. 1955); Acheson v. Maenza, 202 F.2d 453, 457 (D.C. Cir. 1953). However, if an oath of allegiance was voluntarily taken in connection with such service, citizenship would have been lost under the 1907 Act. Parachini v. McGrath, 103 F. Supp. 184 (S.D.N.Y. 1952); Matter of A., 2 I. & N. Dec. 304 (BIA 1945).
\footnote{255} 54 Stat. 1168 (1940).
his allegiance to that state.256 The words “unless authorized by the laws of the United States” were intended to relate not only to statutes of this country providing for service of American nationals in foreign armies, but also to conventions concluded by this government with other countries under which each of the parties was allowed to draft persons having the nationality of the other under certain conditions.257 This language was also applicable to certain executive agreements made by the President with many foreign countries during World War II permitting similar foreign military service without expatriation.258 However, where such an agreement was not applicable, e.g., where it did not cover dual nationals of both countries, such service would cause expatriation.259 The military service contemplated by this statute was only that part of the foreign armed forces which was activated or subject to active military duty.260 Service in an officers’ training corps which did not subject one to liability for active duty,261 in a home defense force during a period when it was not activated,262 or employment by a munitions corporation controlled by and under the orders of the armed forces of a foreign state263 was not within the purview of this statute.

Such service did not result in loss of nationality if one did not have foreign nationality at the time of service, 256 1940 Hearings 490; Matter of A., supra note 254, at 307. An excellent discussion of the legislative history of this section is contained in Dos Reis ex rel. Camara v. Nicholls, supra note 249, at 863-66. 257 1940 Hearings 490. Such conventions were concluded with Canada, France, Great Britain, Greece and Italy during World War I. 258 Matter of K., 2 I. & N. Dec. 243 (BIA 1945). See S. Rep. No. 1515, 81st Cong., 2d Sess. 749 (1950), for the countries with which such Executive Agreements were made. It should be noted that these Executive Agreements covered only draft service and were not broad enough to include voluntary enlistments. 259 Matter of S., 2 I. & N. Dec. 783 (Central Office 1947). In that case, the Executive Agreement with Canada permitted only citizens of one country who were residing in the other country as “aliens” to be drafted into the armed forces of the latter. Since no provision was made for dual nationals, it was held that one who was a citizen of both the United States and Canada would lose American citizenship upon voluntary enlistment in the Canadian armed forces. 260 Matter of Z., 2 I. & N. Dec. 346 (BIA 1945). 261 Matter of L., 2 I. & N. Dec. 455 (Central Office 1946). 262 Matter of S., 8 I. & N. Dec. 340 (BIA 1959). 263 Kawakita v. United States, supra note 246.
or did not acquire such nationality by reason of such service.264 Even though a native of the United States also had possessed a foreign nationality, if he had lost such foreign nationality prior to his entry into the foreign armed forces, such service did not expatriate.265

Although this statute was prospective in operation,266 if a citizen entered the armed forces of a foreign state prior to January 1941, either voluntarily or involuntarily, but continued to serve after that date, expatriation could result if such continued service was voluntary.267 Thus, where one continued to serve after being offered a choice of discharge or continued service,268 or could have secured release on the ground of American citizenship, foreign law, or otherwise,269 continued service was construed as voluntary and expatriating. Similarly, where one claimed that he had involuntarily entered the German armed forces prior to January 1941 but continued to serve thereafter as a spy, citizenship was held to have been lost.270 However, if one was drafted into the foreign army prior to January 1941, and subsequent service therein was under the original draft, such service was prima facie involuntary.271

The 1952 Act modified this basis for expatriation by eliminating the necessity that the expatriate have or acquire the nationality of the foreign state,272 and by requiring, in lieu of a general statutory authorization, a specific authorization by the Secretaries of State and Defense to enter or serve in foreign armed forces to avoid nationality loss.273

268 Matter of A., supra note 254, at 310.
269 Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953).
270 Bauer v. Clark, 161 F.2d 397 (7th Cir. 1947).
271 Perri v. Dulles, supra note 269.
272 Nishikawa v. Dulles, 356 U.S. 129, 130 n.1 (1958). This was predicated upon the desire to make the statutory provisions uniformly applicable to all persons who served in foreign armed forces and to eliminate dependency upon foreign law. S. REP. No. 1515, 81st Cong., 2d Sess. 749 (1950).
It also contained a new provision to the effect that a person who entered foreign armed forces while under eighteen years of age could lose nationality if there existed an option to secure a release from such service and he failed to exercise that option when he became eighteen years of age. This provision has been interpreted similarly to its predecessor in the 1940 Act, to wit, where service commenced prior to its effective date and continued thereafter, its provisions are not applicable if there is nothing to indicate that release from service could have been secured. It has also been administratively held that only specific authorization from the Secretaries of State and Defense can avoid expatriation and that permission from a local draft board to enter the armed forces of a foreign state is not sufficient. Although the constitutionality of this statute has been sustained by the Court of Appeals for the Second Circuit in United States ex rel. Marks v. Esperdy, certiorari has been granted by the Supreme Court.

By Foreign Government Employment

Prior to January 1941 there was no statutory provision with respect to the effect upon citizenship of accepting public employment. It was believed that such employment was, under certain conditions, an act amounting to renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in

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274 Although the legislative history contains no explanation for this addition, it was apparently designed to make statutory the view which was being administratively followed under the 1940 Act. See Matter of R., 3 I. & N. Dec. 470, 473 (Central Office 1949).

275 Matter of P., 8 I. & N. Dec. 194 (BIA 1958). In such a case the conclusive presumption of voluntariness is not applicable. Id. at 198.


277 315 F.2d 673 (2d Cir.), cert. granted, 375 U.S. 810 (1963). That case also held that service in the rebel army of Cuba after January 1, 1959, the date upon which Castro came to power, constitutes service in the armed forces of a foreign state. This point has also been raised in the appeal to the Supreme Court.

The constitutional questions presented to the Supreme Court will be: (1) whether this statute imposes cruel and unusual punishment; (2) whether it is an improper and unconstitutional exercise of power; and (3) whether it unconstitutionally impairs status as a native-born citizen. See 32 U.S.L. WEEK 3125 (1963).
which the person resided and, therefore, should be treated as expatriation.278 The 1940 Act made this principle statutory by providing that the acceptance or performance of the duties of an office, post or employment under the government of a foreign state for which only nationals of such state were eligible was a cause of expatriation.279 The current act changed this provision by eliminating the requirement that the employment be limited to nationals of the foreign state, providing instead that its terms are applicable to dual nationals, and added employment for which an oath, affirmation or declaration of allegiance is required.280

Under the 1940 Act, the words “under the government of a foreign state” meant the relationship that public employees have with their government or with the bureaus or corporations which are government owned281 and con-

278 14 Ops. Att’y Gen. 295, 297 (1873). See also Kawakita v. United States, supra note 246; cf. H.R. Doc. No. 326, 59th Cong., 2d Sess. 163 (1906) to the effect that the performance of duties of a consul for another country had no effect upon the citizenship of the person so acting.
279 54 Stat. 1169 (1940). This provision was intended to be applicable to dual nationals of this country and the foreign state, including naturalized citizens of the United States who came from countries which did not recognize the right of expatriation or which had declined to enter into naturalization treaties. Its meaning and desirability seemed to require little explanation, in view of the aim to prevent embroilments with foreign governments in cases of persons who reside in foreign countries and have to all intents and purposes abandoned the United States. 1940 Hearings 490, 514.
280 66 Stat. 267 (1952), 8 U.S.C. § 1481 (1958). The change from the 1940 Act was intended to strengthen the law and make for an elimination of dual citizenship. It was found that the 1940 Act did not, in many cases, affect dual nationals. S. Rep. No. 1515, 81st Cong., 2d Sess. 748-49 (1950).

Where employment commenced prior to the effective date of the current Act, and continued thereafter, expatriation under the 1952 Act was found. Matter of L., 9 I. & N. Dec. 313 (BIA 1961).
281 Kawakita v. United States, supra note 246.

In Kamada v. Dulles, 145 F. Supp. 457 (N.D. Cal. 1956), in dictum, the court stated that the statute was “intended to encompass service in or on behalf of a foreign government, the performance of which required absolute allegiance to the employing government and necessarily excluded allegiance to our government.” Id. at 459. Administratively, the position is taken that the test is not whether the employment is inconsistent with retention of allegiance to the United States, but whether the employment is under the government of a foreign state and that the person employed had the nationality of the foreign state. Matter of L., supra note 280, at 319.
trolled. Thus, employment as a police officer in Mexico, or as a second mate on a Norwegian vessel was held to come within the purview of the statute, whereas employment by a private company whose business was supervised and whose labor supply was controlled by the foreign government in time of war did not. Whether employment as a school teacher is of the nature contemplated by this statute evoked a difference of opinion. Administratively it has been held that such employment under the conditions specified in the statute causes loss of nationality; whereas, judicially there is dicta to the effect that it does not.

The requirement that the employment be such for which only nationals of the foreign state are eligible has been narrowly construed. It has been held that the statute was not applicable where: (1) the employment was not restricted to nationals of the foreign state; (2) was available to persons who had commenced proceedings to become nationals of the foreign country; (3) the foreign statute generally permitted only nationals to be so employed but "foreign" workers could be substituted in the absence of qualified technicians; (4) the foreign statute limiting employment to nationals was not enforced or even considered, and (5) the foreign statute did not clearly establish that positions

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284 Kawakita v. United States, supra note 246. In Naito v. Acheson, 106 F. Supp. 770 (S.D. Cal. 1952), employment as a clerical assistant to the paymaster sergeant at an army provision depot, and in Foruno v. Acheson, 106 F. Supp. 775 (S.D. Cal. 1952), employment in the engine room on foreign government ferry boats were considered but not decided.
286 Kamada v. Dulles, supra note 281. That case was decided in favor of citizenship on the ground that the employment was the result of economic duress. In Oye v. Acheson, 110 F. Supp. 635 (N.D. Cal. 1953), the court did not reach this issue but found that the government had failed to sustain its burden of proof on the issue that only foreign nationals were eligible for the employment. See also Dulles v. Katamoto, 256 F.2d 545 (9th Cir. 1958).
were available only to nationals. Similarly, it has been held that a conclusion that such government employment was restricted to nationals of the foreign state was unwarranted merely because the foreign nationality statute exempted government workers from loss of that status until termination of the employment, or where a foreign pension law provided for loss of pension rights upon loss of the foreign nationality. Whether foreign law requires the employee to have the nationality of that state has been held to be a question of fact. Whether the employment is under the government of the foreign state must be established by reference to the constitution, laws and regulations of the foreign state and by properly authenticated documents.

**By Voting in a Foreign Political Election**

Prior to January 1941, voting in a foreign political election did not, of itself, result in loss of citizenship. Motivated by the belief that taking an active part in the political affairs of a foreign state by voting involved a political attachment and practical allegiance to that state, which was inconsistent with continued allegiance to this country, Congress made such voting or participation in an election or plebiscite to determine the sovereignty over foreign territory a ground for loss of nationality. This is continued without change in the current act.

Under the 1940 Act, a political election was defined as the act of choosing by vote a person to fill an office which pertains to the conduct of government. Voting

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295 Matter of M., 1 I. & N. Dec. 536 (BIA 1943). It should be noted that voting may have had an expatriating effect under the 1907 Act where it was an act of acceptance of a foreign nationality previously involuntarily acquired, or of confirmation of an act performed while under a disability.
for candidates for office is a prime requisite.\footnote{Moldoveanu v. Dulles, 168 F. Supp. 1 (E.D. Mich. 1958).} Classes of elections, non-political in the colloquial sense, in which participation by Americans could not possibly have any effect on the relations of the United States with another country, are excluded.\footnote{Perez v. Brownell, \textit{supra} note 297, at 59-60.} Thus, a plebiscite to determine whether a foreign government should be released from obligations arising out of past commitments restricting the methods of raising men for military service,\footnote{Matter of H., 1 I. & N. Dec. 239 (BIA 1942).} and a plebiscite to permit the voters to express approval or disapproval of the manner in which the country had been governed by an individual\footnote{Moldoveanu v. Dulles, \textit{supra} note 300.} were held not to come within this section. However, where the election is a political one, its scope, whether local or national, is immaterial.\footnote{Bisceglia v. Clark, 196 F.2d 865 (D.C. Cir. 1952).} Thus, voting for a president, a mayor, a member of a city council, in a local primary election, or to choose an assembly for a state can all result in expatriation.\footnote{See Perez v. Brownell, \textit{supra} note 297; Acheson v. Wohlmut, 196 F.2d 866 (D.C. Cir. 1952); Bisceglia v. Clark, \textit{supra} note 304; Miranda v. Clark, 180 F.2d 257 (9th Cir. 1950); Matter of P., 1 I. & N. Dec. 267 (BIA 1942).} Even though one did not have the legal right to vote in the foreign election nationality was lost upon voting.\footnote{Matter of A., 2 I. & N. Dec. 82 (BIA 1944) (falsely claimed to be a national); Matter of N., 3 I. & N. Dec. 829 (Central Office 1949) (under age specified by the foreign law).} Moreover, this statute was intended to apply to Americans who voted in a foreign state whether or not they were nationals thereof and, therefore, it was held that the fact that one was not a national of the foreign state in which he voted did not prevent expatriation.\footnote{Matter of A., \textit{supra} note 306.} The fact that elections were held in countries which were occupied subsequent to World War II did not change their character as political elections. Thus, elections held in the American-occupied zone of Germany,\footnote{Acheson v. Wohlmut, \textit{supra} note 305.} occupied Japan,\footnote{Acheson v. Kuniyuki, 190 F.2d 897 (9th Cir. 1951), \textit{cert. denied}, 342 U.S. 942 (1952). This case overruled several district court cases holding to the contrary and Congress confirmed the holding in the \textit{Kuniyuki} case}
Germany,310 and Russian-occupied Hungary311 were deemed within the purview of this statute.

*By Formal Renunciation in a Foreign State*

Prior to January 1941, it was believed that a formal renunciation of United States citizenship abroad should be regarded as an act of expatriation, if the renunciant emigrated to a foreign country and took the renunciatory action with a view of acquiring its nationality.312 The first statutory provision respecting this method of expatriation was contained in the 1940 Act,313 and the 1952 Act continues it without change.314 These statutes required that the renunciation be before a diplomatic or consular officer of the United States, that it take place in a foreign state, and that it be in a form prescribed by the Secretary of State. If not taken before a diplomatic or consular officer in a foreign state it is a nullity and does not forfeit citizenship.315

by the Act of July 20, 1954, 68 Stat. 495-96, which, for a period of two years, permitted United States citizens who had lost citizenship solely by voting in specified Japanese elections to be expeditiously restored to citizenship.


312 14 Opns. Att'y Gen. 295 (1873).

313 54 Stat. 1169 (1940). This statute was designed for the use of dual nationals who elected on reaching majority the nationality of the foreign state, but could not otherwise divest themselves of American nationality, e.g., by naturalization or an oath of allegiance, because they already possessed the foreign nationality; or American nationals who, upon marrying aliens, acquired the nationality of the spouse and wished to terminate their American citizenship. 1940 Hearings 491.


315 In the Matter of Bautista, 183 F. Supp. 271 (D. Guam 1960); In the Matter of H., 9 I. & N. Dec. 411 (BIA 1961). In these cases formal renunciations were made before a notary public.

In considering this means of relinquishing citizenship, the technical meaning of the word "renunciation" must be borne in mind. Courts have found no "renunciations" of nationality where the provisions of these sections have not been involved. See, e.g., Kawakita v. United States, 343 U.S. 717 (1952); Jalbuena v. Dulles, 254 F.2d 379 (3d Cir. 1958). They have apparently employed the term in its general sense of "an act of giving up or abandoning."
By Formal Renunciation in the United States

Prior to the amendment of the 1940 Act in July 1944, formal renunciations of American nationality in the United States had been permitted only as an adjunct of marriage. Under the 1907 Act, a woman who obtained citizenship by marriage to a citizen of the United States could renounce that citizenship before a naturalization court upon termination of the marriage. Although the prohibition against expatriation in wartime was applicable, a formal renunciation made during this period was regarded as effective upon termination of the war where a woman was still unmarried and manifested no intention to retain her citizenship.

This portion of the 1907 Act was repealed in 1922, and replaced by a provision permitting any woman citizen who was married to an alien after September 22, 1922, to make a formal renunciation of her allegiance before a naturalization court. No substantial change was made until 1934, when it was provided that any citizen, male or female, could upon marriage to a foreigner formally renounce citizenship before a naturalization court, in peacetime only. There was also a provision for voiding such a renunciation if war was declared within one year thereafter.

This, in turn, was repealed by the 1940 Act, which made no provision for loss of nationality by a formal renunciation thereof in the United States. In 1944, however, this method of relinquishing citizenship was added, and it is continued without change in the current act. To

316 58 Stat. 677 (1944).
317 10 Stat. 604 (1855).
318 34 Stat. 1228 (1907).
319 This was the long standing view of the Immigration and Naturalization Service based on unpublished precedents. It followed the general principle of regarding expatriating acts, such as foreign naturalizations and marriage to a foreigner, performed during the restrictive period, as effective where the condition still existed upon termination of the war.
320 42 Stat. 1021 (1922).
321 Ibid. Such a formal renunciation could not be made before a consular officer abroad. See 3 Hackworth, International Law 263-64 (1942).
322 48 Stat. 797 (1934).
323 54 Stat. 1172 (1940).
324 58 Stat. 677 (1944).
be effective such a renunciation can only be made in time of war. It must be in writing, in a form prescribed by the Attorney General, before an officer designated by him, and approved by the Attorney General.\textsuperscript{326}

Inasmuch as this statute was not originally included in the 1940 Act, no provision was made with respect to the age at which a formal renunciation could be made in the United States. Absent such a provision, the common-law rule was applicable, and one under the age of twenty-one years could not divest himself of citizenship by this means.\textsuperscript{327} The 1952 Act is also silent with respect to the age at which such a renunciation may be made.\textsuperscript{328} In view of the established principle that doubts as to facts and law should be resolved in favor of citizenship, it is believed that the common-law rule will also be applied, and a renunciation made by one under twenty-one years of age will be held invalid. The provisions of the statute expressly except it from the restriction as to acts performed in the United States and if such a formal renunciation were made, nationality would be lost thereby even though a subsequent residence abroad was not taken up.\textsuperscript{329}

\textit{By Conviction for Treason}

The 1940 Act contained the first provision relating to expatriation based upon a conviction for treason.\textsuperscript{330} This ground was continued in the 1952 Act.\textsuperscript{331} In 1954, that Act was amended by adding convictions for acts or conspiracies involving rebellion or insurrection, sedition, and advocating the overthrow of the government.\textsuperscript{332} This cause

\textsuperscript{326} \textit{Ibid.}
\textsuperscript{327} McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951).
\textsuperscript{328} See 66 Stat. 269 (1952), 8 U.S.C. § 1483(b) (1958). The legislative history contains no indication as to the reason for its exclusion.
\textsuperscript{329} But see Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949), where thousands of formal renunciations by citizens of Japanese ancestry during World War II were held ineffective because of conditions existing at the relocation center.
\textsuperscript{330} 54 Stat. 1169 (1940).
\textsuperscript{331} 66 Stat. 267 (1952).

The definition of treason is contained in the Constitution: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort." U.S.
of loss of nationality was specifically exempted from the restrictions as to acts performed in the United States, and excluded from the limitation as to the age at which expatriating acts may be performed. Although there have been cases in which American citizens have been convicted of treason, the effect of such a conviction upon citizenship status has not as yet been commented upon by the courts.

By Desertion from the Armed Forces or Draft Evasion

Statutes relating to forfeiture of citizenship rights upon desertion from the armed forces and leaving the jurisdiction of the United States to avoid a draft were first enacted in 1865. These statutes were amended in 1912 to make them inapplicable to peace time desertions or departures, and were repealed by the 1940 Act. That Act declared that nationality was lost if there was a court martial conviction for deserting the military or naval service of the United States in time of war. The current act continues this provision without substantial change.

Although it repealed the previous statute with respect to leaving the jurisdiction of the United States to avoid the draft, the 1940 Act, as enacted, made no provision for expatriation upon this ground, and it was not until 1944 that it was restored. The 1952 Act added a presumption that a departure during war time or a period of national emergency was for this purpose when there was a failure to comply with any provision of the compulsory service law.

Constr. art. III, §3. It may be committed within the United States or abroad. Kawakita v. United States, supra note 315.

335 See Kawakita v. United States, supra note 315; Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950).
338 54 Stat. 1172-74 (1940).
These provisions for expatriation for desertion or for evading the draft, however, have been held to be unconstitutional by the Supreme Court. In *Trop v. Dulles*, the Court held that expatriation for desertion was a cruel and unusual punishment and thus violative of the eighth amendment. In *Kennedy v. Mendoza-Martinez*, the Court held that the statutes relating to loss of citizenship for evasion of the draft lacked the procedural safeguards guaranteed by the fifth and sixth amendments.

**By Naturalized Citizens Residing Abroad**

Prior to 1907 mere residence in a foreign country by a naturalized American generally had no effect upon the person’s citizenship. Nationality could be lost only by operation of a treaty. Increasing numbers of Americans were leaving the United States and living within the jurisdiction of foreign countries and their protection caused increasing embarrassment to this government in its relations with foreign powers. This circumstance, coupled with the fact that naturalized citizens were more apt to go abroad than native citizens and to become merged with the native population, prompted Congress to enact the 1907 Act. This statute contained a rebuttable presumption that when a naturalized citizen resided for two years in the foreign state from which he came or for five years in any

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345 United States *ex rel.* Anderson v. Howe, 231 Fed. 546 (S.D.N.Y. 1916). *Cf.* Schneider v. Rusk, 218 F. Supp. 302, 305 (D.D.C. 1963), *prob. juris. noted*, 375 U.S. 893 (1963), to the effect that prior to 1907, the State Department considered in many instances that a naturalized citizen who returned to his native land for a protracted period had expatriated himself, or forfeited the protection of this government, especially if he manifested no intention of returning to the United States. However, exceptions were made for citizens who resided abroad in extension of legitimate American enterprises or who were prevented by pecuniary or other good reasons from returning to this country. 3 Hackworth, *op. cit. supra* note 321, at 288.

As to what constitutes naturalization, see note 190 *supra* and accompanying text.
346 For discussion of these treaties, see note 143 *supra* and accompanying text.
348 1940 *Hearings* 496.
foreign state, he ceased to be a citizen. It defined the place of residence as the place of general abode.\textsuperscript{349} This presumption was easy to overcome;\textsuperscript{350} but a conflict arose as to whether its effect, if not rebutted, was to cause expatriation or simply to relieve the United States of the obligation to protect such citizens who had resided abroad beyond the specified limits.\textsuperscript{351} Administratively the latter position has been taken and the presumption is not regarded as equivalent to loss of nationality.\textsuperscript{352}

During its consideration of the 1940 Act, Congress was very much concerned with avoiding our government's embroilment in controversies with foreign states. In the belief that the presumption of the 1907 Act had proved inadequate and unreasonable because the protection of the United States was denied to persons who had remained citizens,\textsuperscript{353} it was expressly provided in the 1940 Act that nationality itself would be automatically lost by naturalized citizens who had continuously resided in specified foreign states for two, three or five years.\textsuperscript{354} In order to prevent un-

\textsuperscript{349} 34 Stat. 1228 (1907).
\textsuperscript{350} United States v. Gay, 264 U.S. 353 (1924).
\textsuperscript{351} See Rosasco v. Brownell, 163 F. Supp. 45 (E.D.N.Y. 1958) and cases cited therein.
\textsuperscript{352} See 28 Ops. Att'y Gen. 504 (1910); 3 Hackworth, op. cit. supra note 321, at 294-95. Cf. Rosasco v. Brownell, supra note 351. It should be noted that there was a period when the Immigration and Naturalization Service and the State Department interpreted the presumption as affecting citizenship status and failure to rebut it resulted in expatriation. Matter of K., 1 I. & N. Dec. 587 (BIA 1943); Matter of G., 1 I. & N. Dec. 398 (BIA 1943); 3 Hackworth, op. cit. supra note 321, at 294.

Although the 1940 Act repealed the 1907 Act, a savings clause continued the presumption where applicable.

\textsuperscript{353} 1940 Hearings 490. Additional reasons advanced were that transmitting of American nationality would be prevented and since admission of an alien to citizenship is subject to the condition that he intended to reside permanently in the United States, termination of citizenship should follow abandonment of residence.

\textsuperscript{354} 54 Stat. 1170 (1940): "A person who has become a national by naturalization shall lose his nationality by:

(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 hereof.
necessary hardships, naturalized citizens residing abroad at the time of passage of the act were allowed a reasonable time to return and, thus, preserve their American citizenship. In fact, citizenship could not be lost under these sections before October 14, 1946.

The 1952 Act eliminated the provision relevant to loss of citizenship by residence for two years in a foreign state, and continued the three and five-year provisions of the 1940 Act. Its provisions were made retroactive to include residence abroad commenced prior to December 24, 1952, and expressly stated that residence abroad in certain excepted categories was not to be computed in the quantum of residence. It also made certain that the residence could be in more than one foreign state.

Provision had also been made in the 1940 Act for loss of nationality by minors residing in a foreign state with, or under the legal custody of, a parent who was expatriated under its pertinent sections, if the child did not acquire a permanent residence in this country before the age of twenty-three years. This provision is continued in the current

(c) Residing continuously for five years in any other foreign state, except as provided in Section 406 hereof."

The constitutionality of the five-year provision has been upheld. Lapides v. Clark, 176 F.2d 619 (D.C. Cir.), cert. denied, 338 U.S. 860 (1949).


This provision was repealed in order to avoid dependence upon the operation of foreign law and because positive provisions had been made relating to election of citizenship by dual nationals. S. Rep. No. 1515, 81st Cong., 2d Sess. 767 (1950). However, its purpose may still be served where treaties are in effect.

Although the 1940 Act contained no similar provision, this reasoning had been applied to it. Matter of W., 3 I & N. Dec. 860 (BIA 1950).

The 1940 Act did not make clear whether residence in several foreign states during the period would work expatriation. Since it provided that the foreign residence must have been continuous, it would appear that the foreign residence must have been continuous in one foreign state. S. Rep. No. 1515, 81st Cong., 2d Sess. 753 (1950).

54 Stat. 1170 (1940). Section 101(g) of the 1940 Act, 54 Stat. 1137, defined the term “minor” as a person under the age of twenty-one. As did § 401(a) of the Act, this provision embodied the principle of the unity of the family. 1940 Hearings 503.
act with the modification that such a child is granted until age twenty-five to establish a residence in the United States before American nationality can be lost. The child is also subject to such a requirement if the parent is a dual national and has lost American nationality by seeking or claiming the benefits of the foreign nationality. It should be noted that a "child" was not defined in the loss of nationality provisions of the 1940 Act. The current act defines a "child" for citizenship, natu

Continuity of Foreign Residence

The 1940 Act contained no indication as to what constituted continuous residence. Difficulty in applying this term to nationals who had taken up foreign residence arose from the fact that such nationals broke the continuity of their foreign residence by trips to another foreign country or by a short visit to the United States. As a result, the current act contains a provision that residence is to be regarded as continuous for the purpose of this section even though continuity of stay is interrupted by physical presence in another foreign state. Once a naturalized citizen has established residence abroad, a return to this country for brief temporary visits, or for the sole purpose

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363 However, there was such a definition limited to the nationality through naturalization provisions thereof. Section 102(h) provided: "The term 'child' includes a child legitimated under the law of the child's residence or domicile, whether in the United States or elsewhere; also a child adopted in the United States, provided such legitimation or adoption takes place before the child reaches the age of sixteen years and the child is in the legal custody of the legitimating or adopting parent or parents." 54 Stat. 1138 (1940).
of retaining American citizenship,\textsuperscript{369} does not interrupt the continuity of the foreign residence. The return to the United States must be accompanied by the establishment of residence in this country. If this is done, a new period will commence.\textsuperscript{370} Hence, one who had returned to the United States to seek employment and had remained in this country for five months before again proceeding abroad was held to have interrupted the continuity of his foreign residence.\textsuperscript{371} In this connection, actual physical presence is strong evidence of residence, particularly when one has no settled place of residence.\textsuperscript{372} As with the other grounds, expatriation by foreign residence must be voluntary. Nationality was not lost where the foreign residence beyond the time limits specified in the statute was involuntary, e.g., where the naturalized person had made all arrangements to return to the United States but was precluded from doing so because of transportation difficulties,\textsuperscript{373} where consular officers had refused to issue a passport,\textsuperscript{374} where the person was prevented from leaving the foreign state because of refusal of officials to permit her to do so,\textsuperscript{375} where the foreign residence was prompted by a daughter's belief that it was her duty to remain and take care of her

\textsuperscript{369} Matter of C., 4 I. & N. Dec. 421 (Central Office 1951). See also United States v. Cuccaro, 138 F. Supp. 847 (E.D.N.Y. 1956), where it was held that one was expatriated despite the fact that in connection with his employment as a steward on a foreign vessel, he maintained temporary lodgings in the United States which he used as a place to sleep between voyages.

\textsuperscript{370} Matter of C., \textit{supra} note 369.

\textsuperscript{371} Talbot v. Acheson, 110 F. Supp. 182 (D.D.C. 1951). See Matter of C., \textit{supra} note 369, in which even a period of three weeks was stated to be sufficient for this purpose.

\textsuperscript{372} Garlasco v. Dulles, 243 F.2d 679 (2d Cir. 1957). See Strupp v. Herter, \textit{supra} note 368, where the plaintiff resided in hotels while in the United States and while abroad, he resided in hotels, at the home of a friend and at a house on which he held a mortgage. Since he had been abroad for all, except almost one year, of the five-year period involved, the court found that he had resided abroad, but continuity of foreign residence was not established.


\textsuperscript{374} Matter of R., 6 I. & N. Dec. 15, 19 (BIA 1953).

\textsuperscript{375} Matter of S., 9 I. & N. Dec. 711, 714 (Ass't Comm'r 1962).
ailing mother, and where the naturalized person was misled by a government official into remaining abroad.

The burden of proving residence abroad and its continuity is upon the government. If the continuity is interrupted by a brief stay in the United States, the government has the burden of proving that such a sojourn did not break the continuity of the foreign residence. It is to be noted that this method of loss of nationality is not included in the age restrictions. Accordingly, the common-law rule is applicable and not only may a person under the age of twenty-one not be expatriated under this statute, but the prescribed periods of foreign residence must be accumulated after attaining twenty-one years of age.

Exceptions

To avoid hardships and to promote American interests abroad, the 1940 Act made certain exceptions for government employees and disabled government pensioners concerning the two, three and five-year provisions for expatriation. Similar exceptions were made only with respect to the three and five-year provisions in the following instances: for persons over sixty-five who had resided in the United States for twenty-five years after naturalization; for employees of specified American organizations; for ill persons; for certain students; and for spouses and children of persons residing abroad for statutorily enumerated reasons. Limited exceptions were also made for per-

380 See note 70 supra and accompanying text.
384 In applying that portion of the 1907 Act which related to the procedure for overcoming the presumption contained therein, the Department of State had promulgated a series of rules whereby evidence that one came within many of the classes would have that effect. See 3 HACKWORTH, INTERNATIONAL LAW 310 (1942).
sons who had acquired American citizenship under the Organic Acts of Puerto Rico and Guam.

In the 1952 Act, classes, substantially similar to those which the 1940 Act had exempted, were enumerated as exceptions to both the three and five-year provisions, and new classes were exempted from the five-year provision only. Intending to liberalize the provisions of the 1940 Act, the principal changes in the 1952 Act, as amended, were:

1. As to both the three-year and five-year exceptions:
   (a) Reduction of the age at which foreign residence could be established without loss of citizenship from sixty-five years to sixty years;
   (b) Easing of the standard as to American religious organizations;
   (c) Broadening of the classes who were residing abroad because of the ill health or death of a parent, spouse or child, with certain conditions as to registration and return; and

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386 See 64 Stat. 385 (1949).
390 In view of the details and complexity of the statutes, it is believed that better purpose would be served by highlighting the principal changes rather than detailing the differences between the exemptions to protracted foreign residence contained in the 1940 and 1950 Acts.
391 This change was made to provide for several religious groups whose principal office is in some other country, but which, nevertheless, are recognized American religious organizations. S. REP. No. 1515, 81st Cong., 2d Sess. 767 (1950).
392 The condition as to registration is applicable only to those naturalized citizens who claim the exemption from loss of nationality upon the basis of the ill health of someone other than themselves. If it is the naturalized person himself who is ill, the registration requirement is not applicable to him. Matter of A., 7 I. & N. Dec. 619 (BIA 1957).
(d) More favorable exceptions to persons who became citizens upon annexation of territory by the United States;

2. As to the five-year exception only:

(a) Enlargement and liberalization of the provisions relating to veterans; \(^{393}\) and

(b) Creation of new classes with respect to persons residing abroad for purposes determined by the Secretary of State to be directly and substantially beneficial to the United States, \(^{394}\) and as to certain older persons and long-time residents of the United States.

The exception with respect to persons residing abroad to represent American organizations was not intended to be applicable to a naturalized citizen who was residing abroad and whose representation of the American organization was incidental. \(^{395}\) It has been held that it was not sufficient that a naturalized citizen who owned his own business in a foreign country could show that the greater part of his stock was composed of American goods. \(^{396}\) Nor did one who was an unofficial representative of an American corporation, but who was not paid a salary or other compensation come within this exception. \(^{397}\) However, where members of a religious organization rendered their services without fixed compensation, but received general maintenance from the organization, such general maintenance was regarded as substantial compensation and hence, they were entitled to the exception. \(^{398}\) It should be

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\(^{393}\) The 1952 Act contains a definition of "veteran" (for use only in the loss of nationality provisions) as one who served in the armed forces of the United States in an active duty capacity during the Spanish-American War, both World Wars, and the Korean conflict, and who was honorably discharged. 66 Stat. 166 (1952), 8 U.S.C. § 1101(a) (1958).

\(^{394}\) Cases involving this provision must be submitted to the Department of State for consideration. 22 C.F.R. §§ 50.12 (e), 50.13 (d) (1958).

\(^{395}\) 1940 \textit{Hearings} 502.

\(^{396}\) Matter of C., \textit{supra} note 368, at 256.

\(^{397}\) Strupp v. Herter, \textit{supra} note 368.

noted that the burden of proving that he comes within the exception is upon the person claiming it.\textsuperscript{399}

\textit{Retention by Persons Born Abroad}

There is yet another means whereby citizenship may be lost. It is not contained in the loss of nationality provisions of the laws but since it results in expatriation, it is appropriate that it be mentioned. Since 1802, under the principle of \textit{jus sanguinis}, statutes have conferred American citizenship upon a person born outside of the United States whose father\textsuperscript{400} was then a citizen and had resided in the United States. Until 1934 no statute existed which imposed any requirement of residence on the part of the child, and a person abroad prior to that date did not have to come to this country to retain citizenship.\textsuperscript{401} In the belief that persons born in foreign countries to parents of different nationalities, \textit{e.g.}, one parent was a citizen and the other an alien, would be more likely to have stronger ties with the foreign country,\textsuperscript{402} Congress, in 1934, annexed as a condition for retaining citizenship a five-year residence in this country between the ages of thirteen and eighteen.\textsuperscript{403} This retention provision was considered in the nature of a condition subsequent and, hence, acquisition of American citizenship did not depend upon fulfillment of the conditions. Such citizenship was acquired at birth subject to loss upon failure to fulfill the conditions.\textsuperscript{404}

The 1940 Act restated this principle with the modification that the person was, in effect, given to age sixteen \textsuperscript{405}

\textsuperscript{399} Strupp v. Herter, \textit{supra} note 368.
\textsuperscript{400} REV. STAT. § 1993 (1878). The Act of May 24, 1934, made a similar provision where the mother was a citizen to remove the discrimination against women contained in the statute. 1940 \textit{Hearings} 421.
\textsuperscript{402} 1940 \textit{Hearings} 409.
\textsuperscript{403} 48 Stat. 797 (1934).
\textsuperscript{404} 1940 \textit{Hearings} 421.
\textsuperscript{405} 54 Stat. 1138-39 (1940). Enlargement of the age from thirteen to sixteen was intended to avoid complications resulting from the 1934 Act, under which, in order to come to the United States at age thirteen, a child of tender years must have been separated from his parents, or at least one of them must have accompanied him. 1940 \textit{Hearings} 421. The ex-
to come to the United States before suffering loss of citizenship, and made such provision generally applicable to children born on or after May 24, 1934.\textsuperscript{406} The 1952 Act substantially continues this provision but modifies it to the extent that the time limit for one to come to the United States has been extended to twenty-three years of age. Also, a period of five years of physical presence between the ages of fourteen and twenty-eight is now requisite in order that citizenship be retained.\textsuperscript{407} It was also made retroactive to include children born abroad after May 24, 1934, with a savings clause as to the persons who had already taken up residence in the United States prior to age sixteen.\textsuperscript{408} The effect of these retroactive provisions has been that a person born abroad after May 24, 1934, has until age twenty-three to come to the United States and thereafter comply with the physical presence requirements.\textsuperscript{409} Moreover, even though such a person had already lost his citizenship under the 1940 Act by failing to come to the United States,\textsuperscript{410} he could regain that citizenship under the 1952 Act by coming to the United States before

\textsuperscript{406} 54 Stat. 1139 (1940).


It should be noted that absences from the United States of less than twelve months in the aggregate are not considered as breaking the continuity of such physical presence. See amendment 71 Stat. 644 (1957), 8 U.S.C. § 1401(b) (1958).


\textsuperscript{409} Matter of S., 8 I. & N. Dec. 226 (BIA 1958); Matter of M., 7 I. & N. Dec. 646 (Regional Comm'r 1958). In Lee You Fee v. Dulles, 355 U.S. 61 (1957), the Solicitor General confessed error to the decision of the Court of Appeals in the case, 236 F.2d 885 (7th Cir. 1956), which held that citizenship was lost under the 1940 Act by failure to come to the United States prior to the age of sixteen, and that the 1952 Act did not affect such case.

\textsuperscript{410} Such a situation could have occurred where a person was born in 1935 and had thereafter made no effort to come to the United States, so that prior to December 24, 1952, he would have been over sixteen years of age and unable to comply with the retention provisions of the 1940 Act.
he became twenty-three years of age.\footnote{Matter of M., supra note 409. The administrative view taken prior to the decision in Lee You Fee v. Dulles, supra note 409, was similar to that of the Court of Appeals in that case. See Matter of B., 5 I. & N. Dec. 291 (BIA 1953).} Under the 1952 Act, continuous physical presence is computed on the basis of the number of hours actually spent in this country each day whether or not residence here is established.\footnote{Matter of Bustillos-Ruiz, Interim Decision No. 1243 (BIA 1962); Matter of Maldonado, Interim Decision No. 1233 (BIA 1962).}

As under the general expatriation statutes, one is not divested of citizenship where failure to comply with the retention requirements was not the result of his own inaction or lack of diligence.\footnote{Matter of B., supra note 412.} Inability to come to the United States within the time limit due to conditions beyond the person's control, \textit{e.g.}, refusal by the State Department to issue a passport,\footnote{Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954).} mechanical failure of aircraft,\footnote{Lee Hong v. Acheson, 110 F. Supp. 60 (N.D. Cal. 1953); Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D. Hawaii 1951).} or misinformation by government officials,\footnote{Matter of S., 8 I. & N. Dec. 221 (BIA 1958).} have all prevented divestiture of American citizenship. Moreover, one over the age of twenty-three years upon arrival in this country, who had previously been informed that he had lost his citizenship by failure to return to the United States prior to his sixteenth birthday in accordance with the previous view and was thereby prevented from complying with the physical presence requirements, was regarded as being constructively present in this country for the period necessary to meet these requirements. Hence, his citizenship was retained\footnote{Ibid. This misinformation must have been supplied subsequent to June 27, 1952, the date of the enactment of this provision.} even though an affirmative expatriating act had been performed, in the meantime, in reliance upon such erroneous information.\footnote{Matter of S., 8 I. & N. Dec. 225 (BIA 1958).} Nor is nationality forfeited by failure to comply with this requirement where one did not know that he had a claim to citizenship
in such cases, citizenship is not lost until after he has had a reasonable opportunity to come to the United States after learning of such claim.419

CONCLUSION

Recent years have seen profound developments in the field of expatriation. Despite repeatedly expressed Congressional desires to avoid embroilments in relations with foreign countries and to eliminate dual nationality, the precious right of American citizenship is being meticulously protected. There has been more careful scrutiny of all the facts and circumstances which led to the purported expatriating act. Persons who were unaware that they were citizens when they performed otherwise expatriating acts are no longer regarded as having lost American nationality. The burden of proving expatriation has been imposed upon him who asserts it. Doubts as to fact and law are being resolved in favor of citizenship. Desertion from the armed forces in time of war and draft evasion, both of which worked a forfeiture of citizenship rights under the earliest enactment, have been eliminated as grounds for expatriation. At the present time questions are before the Supreme Court as to whether provisions for loss of nationality by service in the armed forces of a foreign state, and by the protracted residence abroad of a naturalized citizen are proper exercises of congressional authority. Indeed, the latter method of expatriation is the subject of several pending bills seeking its repeal or modification420 upon the ground that it discriminates between native-born and naturalized citizens.421 Unquestionably, more is yet to come.