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Expatriation of Naturalized Citizen Held Discriminatory and Unconstitutional

Recent Decision:
Expatriation of Naturalized Citizen Held Discriminatory And Unconstitutional

Angelika Schneider, a German national by birth, emigrated to the United States where she acquired American citizenship. In 1956 she married a German national and has since resided in Germany. In 1959 she was refused a passport by the State Department on the ground that, by her residence for three years in the country of her birth, she had forfeited her citizenship under Section 352(a)(1) of the Immigration and Nationality Act of 1952.[1] Mrs. Schneider sued in a federal district court for a judgment declaring her an American citizen, but was denied relief. On appeal, the Supreme Court reversed, *holding* that section 352(a)(1), in its unjustifiable discrimination between naturalized and native-born citizens, is violative of the due process clause of the fifth amendment. *Schneider v. Rusk,* 84 Sup. Ct. 1187 (1964).

In 1868 Congress declared voluntary expatriation to be the "natural and inherent right" of all citizens.[2] At the same time, the United States extended equal diplomatic protection to all naturalized Americans residing abroad.[3] From that time until the present, the naturalized citizen has been the object of numerous governmental restrictions which have, to a greater or lesser degree, threatened his citizenship.

Prior to 1907 it was the duty of the State Department to determine when, in fact, an American citizen had chosen to sever his allegiance to the United States.[4] The confusion spawned by conflicting departmental regulations often placed the fate

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[1] The Immigration and Nationality Act, 66 Stat. 269 (1952), 8 U.S.C. § 1484 (1958), provides in § 352(a) that "a person who has become a national by naturalization shall lose his nationality by—(1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated. . . ."

[2] REV. STAT. § 1999 (1875). While this statute, which repudiated the common-law doctrine of perpetual allegiance, was originally intended to protect the interest of arriving immigrants, it was clear that an American citizen, native-born or naturalized, might choose to exercise the "right" and reject his United States citizenship.

[3] "All naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens." REV. STAT. § 2000 (1875), 22 U.S.C. § 1731 (1958).

[4] Under reciprocal agreements with several countries, when a naturalized American citizen returned to his native land for an extended period of time, a presumption arose that he intended to reassume that prior nationality. See, *e.g.,* Naturalization Convention With Costa Rica, June 10, 1911, 37 Stat. 1603 (1912); Convention With Great Britain, May 13, 1870, 16 Stat. 775 (1870). This presumption was rebuttable. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 393 (1942). See generally Comment, 35 CORNELL L.Q. 120 (1949).

of the naturalized citizen in jeopardy. At one time an extended residence in the land of his birth might, in itself, be construed as a voluntary renunciation of allegiance;[5] at other times it might not.[6]

To remedy this situation, Congress, in 1907, codified the diverse regulations concerning expatriation into a single act[7] which created a *rebuttable* presumption that a naturalized citizen[8] had voluntarily relinquished his United States citizenship when he returned to the country of his origin for two years.[9]

The Nationality Act of 1940[10] removed this rebuttable presumption and created in its stead a conclusive presumption of permanent expatriation upon completion of three years residence in the country of origin.[11] This latter provision was incorporated into the Immigration and Nationality Act of 1952 which was challenged in the instant case.

Theoretically, the present act merely prescribes the manner in which a citizen may expatriate himself. In practice, however, it demonstrates a profound transition which has vitiated the concept of "voluntary" expatriation as expounded in 1868. Until the passage of the Act of 1907, expatriation could only be effected by the willful renunciation of allegiance by the citizen. From that time, however, Congress has stipulated that certain acts, when freely performed, will result in expatriation. In *Savorgnan v. United States*,[12] it was held that citizenship would be forfeited whenever the act designated by statute was "voluntarily" performed, even though the citizen had no subjective intent to sever his allegiance. In effect, then, Congress no longer creates a procedure for the exercise of a right but rather proscribes certain "voluntary" conduct.[13]

The very existence of this congressional power to designate acts which, when freely performed, will effect expatriation has been

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[5] 3 MOORE, A DIGEST OF INTERNATIONAL LAW 737 (1906).

[6] *Id.* at 928-29.

[7] 34 Stat. 1228 (1907).

[8] One writer contends that the State Department recommended the passage of an act declaring *any* American citizen presumptively expatriated after five years foreign residence; he asserts that Congress, disregarding this recommendation, limited the presumption of expatriation to naturalized citizens alone and gave "no reason . . . for this unwarranted discrimination." Comment, 49 CORNELL L.Q. 52, 64 (1963). Justification for the provisions of the act affecting naturalized citizens only has been found, however, in the theory that, being more likely to remain abroad and intermingle with native populations, the naturalized citizen will be the source of constant embarrassment to the government in its conduct of foreign affairs. Schneider v. Rusk, 218 F. Supp. 302, 310 (D.D.C. 1963), *rev'd*, 84 Sup. Ct. 1187 (1964).

[9] In actual practice, it would appear that the naturalized citizen residing abroad longer than the prescribed statutory period lost only the diplomatic protection of the United States. 28 Ops. Att'y Gen. 507, 508 (1910). Moreover, the rebuttable presumption of voluntary expatriation might be overcome by reaffirming allegiance (Camardo v. Tillinghast, 29 F.2d 527, 532 (1st Cir. 1928)), or by attempting to return to this country (Miller v. Sinjen, 289 Fed. 388, 393 (8th Cir. 1923)). It is interesting to note that no such statutory presumption has ever arisen from the prolonged foreign residence of any native-born American.

[10] 54 Stat. 1170 (1940).

[11] The act of 1907 did not prove satisfactory in practice. 35 Ops. Att'y Gen. 399, 404 (1928). Moreover, the judicial process in expatriation cases was long and expensive. The rebuttable presumption, therefore, was replaced by an automatic loss of citizenship in the interest of administrative convenience. Schneider v. Rusk, *supra* note 8, at 309.

[12] 338 U.S. 491 (1950) (plaintiff had become a foreign national). *But see* Perkins v. Elg, 307 U.S. 325, 334 (1939).

[13] See generally Note, 54 COLUM. L. REV. 932 (1954); 9 CATHOLIC LAW. 330 (1963).

vigorously contested in the United States Supreme Court. Although Article I, Section 8 of the Constitution empowers Congress to create uniform laws of naturalization, the Court has been reluctant to admit of any converse congressional power to denaturalize.[14] However, the Court has affirmed congressional action in the area of expatriation when necessary and proper to the furtherance of a constitutionally enumerated power. Thus, in *Perez v. Brownell,*[15] it was held that where a rational nexus existed between expatriation and the successful conduct of foreign affairs, Congress was empowered to denaturalize.[16] A strong minority of the Court refused to recognize any congressional power to expatriate. They reasoned that expatriation could be effected only when the sovereign citizen chose to renounce his allegiance.[17]

The recent judicial approval in *Perez* of the power of Congress to create norms for constructive expatriation has had the effect of reducing the issue in similar cases to a question of due process: "Is the means, withdrawal of citizenship, reasonably calculated to effect the end that is within the power of Congress to achieve, the avoidance of embarrassment in the conduct of our foreign relations . . . ?"[18]

In *Lapides v. Clark,*[19] with a factual pattern similar to the present case, a federal district court, finding the necessary reasonable nexus between denaturalization and the proper conduct of foreign affairs, affirmed a congressional distinction between naturalized and native-born citizens.[20]

To justify the power of Congress to distinguish citizens according to the origin of their citizenship, without violating due process, the court in *Lapides* relied heavily on the reasoning in *Mackenzie v. Hare.*[21] In that case it was held that an American woman lost her citizenship by "voluntarily" performing an act (marrying a foreigner) designated by the statute as a ground for expatriation. Since the statute, upheld in *Mackenzie,* was discriminatory since it did not expatriate American men who married nonnationals, the decision was construed in *Lapides* as a precedent for valid congressional discrimination in the area of expatriation.

It would appear, however, that the *Mackenzie* case was not a valid precedent for

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[14] "The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824) (dictum); *accord,* United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

[15] 356 U.S. 44 (1958) (plaintiff had voted in a foreign election).

[16] See generally Maxey, *Loss Of Nationality: Individual Choice Or Government Fiat?,* 26 ALBANY L. REV. 151 (1962).

[17] Perez v. Brownell, 356 U.S. 44, 64 (1958) (dissenting opinion). See generally Boudin, *Involuntary Loss of American Nationality,* 73 HARV. L. REV. 1510 (1960); Hurst, *Can Congress Take Away Citizenship?,* 29 ROCKY MT. L. REV. 62 (1956).

[18] Perez v. Brownell, *supra* note 17, at 60, as quoted in Schneider v. Rusk, 84 Sup. Ct. 1187, 1189 (1964).

[19] 176 F.2d 619 (D.C. Cir.), *cert. denied,* 338 U.S. 860 (1949).

[20] The dissent in the instant case utilized similar reasoning. Schneider v. Rusk, *supra* note 18, at 1190. The distinction which was justified in *Lapides* was substantial. As in the instant case the statute operated to allow the native-born citizen to reside abroad indefinitely with impunity, while the naturalized citizen might do so only at the risk of losing his citizenship forever. In effect, the statute expatriated the naturalized citizen for voluntarily performing an act innocent in itself and without sanction when performed by others.

[21] 239 U.S. 299 (1915).

the holding in *Lapides*. One distinguishing feature was that Mrs. Mackenzie's citizenship was not taken from her permanently – it merely abated during the term of her marriage. Moreover, at the time of this decision many countries accepted the common-law doctrine that the citizenship of a wife merged with that of her husband. Viewed in this light, *Mackenzie* is *not* a precedent for legislative discrimination between native-born and naturalized citizens.[22]

Judge Edgerton, dissenting in *Lapides*, argued that naturalized citizens are in all respects equal to native-born citizens, and under no circumstances can Congress distinguish between them.[23] Support for this view is easily found. The Supreme Court itself has stated that the naturalized citizen, once he obtains valid naturalization, "stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency."[24]

It was in accord with this sentiment that the majority in the instant case declared section 352(a)(1) unconstitutional. Mr. Justice Douglas, speaking for the Court, began with the premise "that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive."[25] The majority found that section 352(a)(1) "proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born"[26] and, as a result, is unjustifiably discriminatory in violation of due process.[27]

Citizenship is so basic to the well-being of any person that it has been described as the right to have rights. Without this basic "right," a man is reduced to the inherently

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[22] The fourteenth amendment declares that all persons born or naturalized in the United States are citizens thereof, and the courts have traditionally upheld the theory of a single and equal citizenship. United States v. MacIntosh, 283 U.S. 605, 624 (1931); Osborn v. Bank of the United States, *supra* note 14, at 827 (dictum). *But see* Schneider v. Rusk, *supra* note 18, at 1190 (dissenting opinion). Nevertheless, the Supreme Court has, in certain limited instances, affirmed congressional legislation which, in fact, classified citizens either by economic activity or by race, *e.g.*, Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (exclusion of Japanese-Americans from a designated area); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (curfew on Japanese residents only); Steward Mach. Co. v. Davis, 301 U.S. 548, 584 (1937) (tax applied only to those employing eight or more persons). It is important to note that congressional classifications based on race have only been allowed in times of great national peril.

In Knauer v. United States, 328 U.S. 654, 658 (1946), the Court indicated that, besides ineligibility for the presidency, there are other "exceptions of limited character" to the theory of single citizenship – listed among these exceptions was § 404 of the Nationality Act of 1940 (the predecessor of the present statute). Since constitutionality was not involved in the *Knauer* case, the mere mention of § 404 as an existing example of distinction between citizens should not be construed as judicial approval or toleration of the underlying theory.

[23] Lapides v. Clark, 176 F.2d 619 (D.C. Cir.), *cert. denied*, 338 U.S. 860 (1949).

[24] Luria v. United States, 231 U.S. 9, 22 (1913).

[25] Schneider v. Rusk, *supra* note 18.

[26] *Id.* at 1190. There is no indication that the United States is subjected to any certain or substantial embarrassment because of the foreign residence of American naturalized citizens. For a discussion of the problems created by naturalized citizens residing abroad, see Boudin, *supra* note 17, at 1524-28, and Maxey, *supra* note 16, at 182. "The difference in degree of embarrassment, if any, is not shown to be substantial enough to warrant so great a difference in the consequence meted out only to the naturalized citizen." Schneider v. Rusk, *supra* note 8, at 322 (dissenting opinion).

[27] Schneider v. Rusk, *supra* note 18, at 1190. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (prohibiting unjustifiable racial discrimination as violative of due process).

disabling condition of statelessness[28]—he becomes an alien with only limited rights and privileges.[29] The decision strikes down a statute which has operated to deprive many Americans of their citizenship because of the mere fact that, as naturalized citizens, they had resided abroad. The Court has thus determined that a classification so based is creative of a second-class citizenship.[30] The *Schneider* case will also strike down at least twenty existing naturalization treaties,[31] and will affect the lives of some 50,000 ex-citizens who have been expatriated by extended foreign residence.[32]

It appears, moreover, that this decision may well provide the impetus for a re-examination of the naturalization and expatriation laws of the United States. One author predicts that unless the Immigration and Nationality Act of 1952 is repealed, at least six sections will now be viewed by the courts as discriminatory in violation of due process.[33]

It would appear that two alternatives remain open to Congress in this area. On the one hand, Congress may retain a conclusive presumption of expatriation equally applicable to all citizens in any statute replacing section 352(a)(1). If this is done, the Court, while recognizing the congressional power to expatriate in certain instances,[34] will continue to investigate each case individually in an attempt to ascertain violations of due process.[35]

On the other hand, Congress might replace the present nationality law with a statute creating a rebuttable presumption similar to that contained in the Expatriation Act of 1907.[36] In view of the inherent value of citizenship, this alternative would seem preferable. Such a law might apply only a *rebuttable* presumption of voluntary expatriation for *all* citizens who perform the act designated by statute. Thus, individual rights would not be limited for mere convenience of administration and no man would lose his basic right of citizenship without first being granted an opportunity to exhibit a real attachment to the United States.

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[28] Perez v. Brownell, *supra* note 17, at 64; *accord*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

[29] See generally Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L.J. 250 (1934).

[30] Schneider v. Rusk, *supra* note 18, at 1190.

[31] *Id.* at 1192 (dissenting opinion).

[32] Time, May 29, 1964, p. 57.

[33] Amundson, *No More Second-Class Citizenship*, 110 AMERICA 847 (1964).

[34] See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 214 (1963).

[35] *Compare* Schneider v. Rusk, 84 Sup. Ct. 1187 (1964), *with* Perez v. Brownell, 356 U.S. 44 (1957). In *Perez*, the act of expatriation was freely voting in a foreign political election. The Court apparently feels that activity of this type by those claiming American citizenship is clearly more conducive to international friction and embarrassment than is the neutral act of simple residence abroad. Therefore, Congress was empowered to expatriate in *Perez* without violation of due process; in *Schneider* it was not.

[36] See Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25 (1950).

Recent Decision: Appearance by Both Parties Held Insufficient to Validate Mexican Divorce Decree

Plaintiff husband commenced an action for annulment on the ground that a Mexican divorce procured by his wife and her former husband was a nullity. Having pre-