THE LOSS OF AMERICAN NATIONALITY — THE DEVELOPMENT OF STATUTORY EXPATRIATION

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It is not generally recognized how recently the United States took notice of nationality problems.1 Although it is not quite accurate to say that prior to 1907 expatriation had no statutory foundation, there was no general enactment governing either the substance or the procedures of expatriation. There were naturalization treaties which authorized loss of citizenship, but there were many nations with whom these agreements had not been concluded. Furthermore, the treaties were of two radically different types. Some, like the naturalization convention of 1870 with Great Britain,2 merely recognized naturalization in a foreign state as effecting loss of American nationality. Others, such as the Bancroft Treaties with the German states,3 not only authorized loss by naturalization in the specified country, but also virtually prescribed it under certain circumstances. Beyond these treaties loss of citizenship was legally unknown, and the denationalizing activities of the Department of State—although a practical necessity—were wholly without statutory warrant. The courts differed radically, for example, on the result of marriage by an American woman to an alien husband. Did such a marriage involve the wife's assuming the nationality of her husband? Or did the common law rule of indefeasible allegiance underwritten by the Supreme Court in an early case 4 still control?

Until 1905 Congress refused to take any action on the problem, despite repeated urging by the executives. However, the Fifty-Ninth Congress, which was responsible for the passage of the Naturalization Act of 1906 providing, inter alia, for denaturalization, also took the problem of expatriation under consideration. The House Committee on Foreign Affairs requested Secretary of State Root to supply it with all possible information on the subject. In line with this suggestion, Root appointed the so-called "Citizenship Board of 1906". In December, 1906, Secretary Root submitted the Board's report 5 to the Speaker

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1. For some discussion of this fact and the reasons for it see the author's Eary Development of United States Citizenship (1949) and his Pre-Statutory Denaturalization, 35 Cornell L.Q. 120 (1949).
2. 16 STAT. 775 (1870).
3. 15 STAT. 615 (1868).
5. See 3 Hackworth, Digest of Int'l L. 164 (1942) (hereinafter cited Hackworth).
of the House of Representatives. Congress acted rapidly, and on March 2, 1907, President Roosevelt approved the first general statute providing for loss of American nationality. 6

There was, it should be noted, one enactment in force in 1907 relating to the problem under discussion. The Act of March 3, 1865, 7 provided for forfeiture of “rights of citizenship” by persons who deserted the United States armed forces. Although the meaning of the term “rights of citizenship” was never clarified, the application of this section will be included in this study.

Before commencing a detailed analysis of the operation of the Expatriation Act of 1907 and its successors, one important question must be answered. By what constitutional authority did Congress pass this measure?

CONSTITUTIONAL BASIS FOR DENATIONALIZING LEGISLATION

The Fourteenth Amendment states that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.” Thus United States citizenship, after many years of confusion, received specific constitutional definition. But nowhere in that document is Congress given the right to deprive a person of, or prescribe a mode of loss of, United States citizenship. On what constitutional basis is the power to denationalize citizens exercised?

One justification was founded on Congress’ power to establish a uniform rule of naturalization. The early proponents of an expatriation law argued that the inclusion in the Constitution of a specific authorization to admit foreigners to the American community implied the recognition of a right of other nations to do likewise. Therefore, the power to admit persons to citizenship was concomitantly the power to provide for loss of citizenship. 8 However, this argument was discredited in a dictum by Chief Justice Marshall. Insisting that the naturalization power be narrowly construed, Marshall stated that “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.” 9 Justice Gray, three-quarters of a century later, amplified this by adding that “the power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away.” 10 Although both these statements were

6. 34 Stat. 1228 (1907).
dicta, the scope of the naturalization power was severely limited by the tradition they established. Bucking such a tradition is usually fruitless, so the advocates of expatriation were forced to seek other constitutional support for the legislation they desired.

The solution was found by grounding such legislation on an "inherent power of sovereignty" in the area of foreign relations. The Supreme Court has always taken a generous view of governmental actions based on this nebulous concept. Those desiring denationalizing legislation maintained that the right to provide for loss of citizenship was essential to the proper conduct of foreign relations, and, as such, did not require explicit constitutional authorization. In 1915 the Supreme Court endorsed this application of the doctrine of inherent powers of sovereignty, holding that

"As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. . . ." 12

Thus it was constitutional for Congress to pass statutes regulating nationality, for without this power the United States would not be fully sovereign. The tradition that expatriation must be voluntary was so strong that the Court entered one qualification.

"It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen." 13

However, as the expatriation laws have been interpreted, it is not necessary that there be a voluntary renunciation of American allegiance; it is enough that one voluntarily perform an act that the statute establishes as a criterion of voluntary expatriation.14

Assuming that the power to provide for loss of citizenship is an inherent attribute of Congress, vital to maintaining the sovereignty of the United States in the area of foreign relations—and to argue otherwise would really be windmill tilting—we may now examine the manner in which the various denationalizing provisions have operated.

13. Ibid.
14. See 3 HACKWORTH 209. This interpretation of "voluntary" is an absolute essential to the administration of the statute. Without it, no general rules could be applied. Conversation with Charles Gordon, Senior Counsel, Immigration and Naturalization Service, Washington, D.C., July 6, 1949.
Loss by Naturalization in a Foreign State

The Expatriation Act of 1907 provided that an American who became a naturalized citizen of a foreign state thereby lost his American citizenship. This provision was reenacted in the Nationality Act of 1940, and has been in force continuously since 1907. The enforcement of this section has been primarily in the hands of the Department of State. The State Department has instructed every United States foreign service officer to notify it whenever he ascertains that an American citizen has become lawfully naturalized in a foreign state.

The Department has ruled that involuntary naturalization does not effect loss of United States citizenship. Some difficulty has arisen in determining when naturalization in a foreign country is by voluntary action. It was decided that one Doriani, who applied for Soviet citizenship after being told that he "would be without the law" during his stay in Russia if he did not become a Russian, retained his American citizenship. Similarly, the Circuit Court of Appeals, Third Circuit, recently held that a woman who became a naturalized citizen of France to protect herself from the Nazis had become naturalized under duress and did not thus lose her American citizenship. There are many pleas of duress, but when this defense appears to be based primarily on hindsight and is not made within a reasonable length of time after the foreign naturalization the Department has ruled the American citizenship lost.

Certain countries have nationality laws which automatically bestow their citizenship upon persons who meet certain requirements. This could be described as "constructive" naturalization, for the individual is under no burden to apply, fill out forms, or take an oath of allegiance.

The operation of these statutes has presented the State Department with a problem. How can it be ascertained whether the individual accepts or rejects the citizenship thus thrust upon him?

17. See Ass't Sec'y Carr to Clum, March 16, 1934, and other citations under same heading, 3 Hackworth 209. For a humorous sidelight see id. at 208 for the case of one who obtained Canadian citizenship while drunk and claimed his action to be involuntary.
18. MS Dept' State, file 130 Dorianani, Waldemar, Id. at 210; Doreau v. Marshall, 170 F.2d 721 (3d Cir. 1948). For district court decision to the same effect see Schioler v. United States, 75 F. Supp. 353 (N.D. Ill. 1948).
20. E.g., id. at 211 (Irish Free State), 212 (Greece), 214 (Rumania), 213-14 (Italy). The Immigration and Naturalization Service has likewise held that the promulgation of a blanket edict conferring citizenship on all persons living in a state does not automatically expatriate Americans affected thereby. Such Americans must indicate by a voluntary act that they accept the citizenship. Opinion, Legal Branch, I. & N., Aug. 4, 1941, file #23/50490.
For use in such cases the Department formulated what may be described as the "doctrine of supplemental acts" which is exemplified by the following dispatch:

"No inflexible rule could properly be adopted by the Department to determine when an individual has indicated his acceptance of Italian nationality involuntarily conferred upon him by the operation of . . . the Italian law of June 13, 1912. . . . the Department ordinarily considers that if an individual who . . . applies for and obtains an identity card describing him as having Italian nationality, [as authorized by Italian law] obtains an Italian passport as an Italian subject, . . . joins the Italian National Fascist Party, or performs any other act ordinarily open only to Italian subjects, he should be considered as having thus indicated his acceptance of Italian nationality. . . ." 21

In similar circumstances it was decided that holding office as a member of the Dail Eireann, Parliament of the Irish Free State, indicated acceptance of Irish nationality. 22 Each case had to be judged on its merits, with the burden of proof resting on the individual who claimed that he did not accept foreign citizenship. 23 It should be noted that the Nationality Act of 1940 eliminated most problems of this character by providing that voting in foreign elections; accepting office or employment with a foreign government for which only nationals of such country are eligible; and serving in a foreign army, if such service bestows the citizenship of such country on the soldier, work loss of American citizenship.

The Expatriation Act of 1907 included a proviso that "no American citizen shall be allowed to expatriate himself when this country is at war." In view of this limitation, what was the status of those Americans who were naturalized in foreign states between April 6, 1917, the date of United States entrance into World War I, and July 2, 1921, the official date of termination? In answer to this question, Secretary of State Hughes advised that such expatriation would not be recognized by the United States during the war, but it would be

"considered reasonable as a rule to recognize the foreign naturalization as effective in causing expatriation . . . after the termination of the war." 24

21. Dep't State to consul at Venice (1935), 3 HACKWORTH 214. See United States ex rel De Cicco v. Longo, 46 F. Supp. 170 (D. Conn. 1942) in which the court held that De Cicco's accepting duty in the Italian Army without objection was an affirmative act showing that he accepted the Italian nationality which reinvested after two years' service.
22. MS Dep't State, file 130 McCarten, Patrick, 3 HACKWORTH 211.
23. Acting Sec'y Carr to Ambassador Long (1934), id. at 213.
24. Sec'y Hughes to diplomatic and consular officers (1923), id. at 265.
As a result of this interpretation, United States citizens who received foreign citizenship during the war, did not lose their American citizenship until July 2, 1921. Several courts, and Attorney General Jackson, later endorsed this view. The ban on wartime loss of citizenship was discarded by the Nationality Act of 1940, so Americans were able, throughout World War II, to give up their United States citizenship.

The outstanding difficulty in the administration of the loss of naturalization section was created by the status of American born children of parents who, subsequent to the birth of the children, became naturalized in foreign states. In most cases the naturalization of the parents automatically naturalized the children. But was this "constructive" naturalization equivalent to voluntary expatriation on the part of the child affected? Or did the child have dual nationality with the right to elect American or foreign nationality at majority?

The State Department, prior to 1939, consistently maintained that it would be inconsistent to permit the child to retain American nationality. Even when the parents' foreign naturalization imposed foreign citizenship on the child without his consent, he still lost his American nationality. However, loss of United States citizenship under these circumstances did not occur if the child remained a resident of the United States "until after attaining the age of twenty-one years." The Immigration and Naturalization Service, then part of the Department of Labor, appeared to support the opposite interpretation: that minors who were naturalized abroad through parental action were entitled to elect American or foreign nationality on attaining majority. However, in 1932 the Attorney General supported the Department of State's interpretation. This view was subsequently buttressed by the Ninth Circuit.

Until 1939 this view prevailed, but in that year the Supreme Court reversed the State Department. Marie Elizabeth Elg, born in Brooklyn of naturalized Swedish born parents, was taken as a small child to Sweden by her parents. Subsequently, her parents reassumed Swedish

27. This provision was repealed by § 504 of the Nationality Act, 54 Stat. 1172 (1940), 8 U.S.C. § 904 (1946).
28. Sec'y Stimson to Kellogg, June 11, 1929, 3 Hackworth 238.
30. Citizenship of Tobiassen, 36 Ops. Att'y Gen. 535 (1932). Congress realized that this was the case, and occasionally passed special legislation such as the following: "Be it enacted . . . That . . . James Lincoln Hartley, a native born citizen of the United States who involuntarily lost his citizenship at the age of seven years by reason of the naturalization of his father as a citizen of Canada, shall be held and considered to have been legally admitted to the United States . . . [and may be naturalized]." 50 Stat. 1030 (1937).
31. United States v. Reid, 73 F.2d 153 (9th Cir. 1934).
nationality. Miss Elg returned to the United States when she was twenty-one and established permanent residence. She was admitted as a citizen, but shortly thereafter was informed by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. She instituted suit for the purpose of clarifying her status. The Supreme Court upheld her claim; children whose parents were naturalized abroad during the minority of such children were dual nationals who were entitled to choose whichever nationality they desired on attaining majority. Chief Justice Hughes stated:

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is the essence of the right is lacking." 32

This decision, of course, forced a reversal in administrative policy.33 However, a way was devised to compel all dual nationals in the Elg class to commit themselves to one nationality or the other. Under the Nationality Act of 1940, all persons of the Elg class who had already reached majority were required to take permanent residence in the United States before January 13, 1943 in order to maintain their United States citizenship.34 Those who were still minors must take permanent residence in the United States before their twenty-third birthday, or lose United States citizenship.

It should be noted that there was another limitation in this section. Only those dual nationals who had not previously elected their other nationality could take advantage of the saving provisions. This left the determination of what previous acts constituted election of the alternate citizenship in the hands of the administrators. Many cases on this point have come before the Board of Immigration Appeals. The Board has held that voting in Canadian elections,35 or selling a homestead which had been obtained during minority on the basis of Canadian citizenship,36 constituted proof that the person concerned had

33. See Dep't State Circular, July 24, 1939, from Counselor Moore to all diplomatic and consular officers, 3 Hackworth 244-45.
34. 54 Stat. 1168-9 (1940), 8 U.S.C. § 801a (1946). In accordance with § 601, Nationality Act of 1940, 8 U.S.C. § 906 (1946), the provisions of the Nationality Code did not take effect until 90 days after approval. The statute was approved October 14, 1940 and became operative January 13, 1941. Persons in the Elg class who had attained majority prior to 1941 were able to establish permanent residence before Jan. 13, 1943 and thus save their United States citizenship.
elected Canadian citizenship. In other cases the Board has held that previous admission to the United States as an American citizen constituted election of American nationality, even though the duration of the visit was as brief as one day. The Board has insisted, logically enough, that a dual national need only make one election. For instance, M———, a dual national of Canada and the United States, established residence in the United States when he was eighteen. Subsequently he returned to Canada, aged twenty-two, and voted in Canadian elections. Did his voting in Canada—at a time when voting in a foreign election did not forfeit citizenship—indicate an election of Canadian nationality? The Board said “No”, for so to rule would have forced M——— to make a second election. His moving to the United States at eighteen was an election of United States citizenship which extinguished his Canadian nationality. When he returned at twenty-two he was no longer a dual national, and his subsequent actions were not relevant to the question.

It should be noted that this provision applies only to dual nationals of the Elig class—those who have obtained foreign nationality through the naturalization of their parents. It does not cover dual nationals by birth. A person born in the United States of alien German parents, for example, did not have to make an election. Such persons have the right to elect their other nationality, but are under no obligation to do so. They may carry such dual nationality with them from birth to the grave.

Loss by Swearing an Oath of Allegiance to a Foreign State

Section 2, of the Act of March 2, 1907, reenacted in the Nationality Act of 1940 states that an American citizen may be expatriated by taking “an oath of allegiance to any foreign state.” But what constitutes an “oath of allegiance”? The types of oath that can be sworn vary from ironbound pledges of allegiance to vague and ambiguous affirmations of fealty or obedience. How can an oath effecting loss of American nationality be distinguished from one that does not?

37. See, e.g., In the Matter of S., file #56107/901 (B.I.A. Nov. 24, 1942); In the Matter of Y., file #56158/623 (B.I.A. July 8, 1944). For a situation of this sort which recently came into court see Petition of Di Iorio, 86 F. Supp. 479 (D. Mass, 1949).

38. In the Matter of M., 1 I. & N. Dec. 536 (B.I.A. 1943); see also In the Matter of F., 1 I. & N. Dec. 502 (B.I.A. 1943); In the Matter of G., 1 I. & N. Dec. 496 (B.I.A. 1943); In the Matter of S., 1 I. & N. Dec. 685 (B.I.A. 1943). Mere residence does not constitute adequate evidence of election. See In the Matter of S., 1 I. & N. Dec. 476 (B.I.A. 1943). In this case the Board held that long residence in Canada did constitute election of Canadian nationality, but the Attorney General exercised his power to review the Board’s finding, and reversed this determination.

Generally speaking, the administrative authorities have attempted to evaluate each oath on its merits. In the words of Secretary of State Hughes,

"It is the spirit and meaning of the oath, not merely the letter, which is to determine whether it results in expatriation. It is not a mere matter of words. The test seems to be the question whether the oath taken places the person taking it in complete subjection to the state to which it is taken . . . so that it is impossible for him to perform the obligations of citizenship to this country." 41

Furthermore, the oath must be one which is officially required by the laws of the foreign state, and should be sworn before a "competent official of the government concerned." 42 Thus the administrative bodies have decided that an oath taken before a notary public in Great Britain, 43 an oath sworn in pursuance of the regulations of a private employer without authorization by the government, 44 an oath taken by a priest on ordination in the Church of England, 45 or an oath sworn by a lawyer to obtain admission to the German Bar 46 did not expatriate an American citizen. 47

The problem of Americans who enlisted in foreign armies was one which proved difficult to solve. Originally the Department of State assessed each military oath and attempted to make a distinction between those which expatriated and those which did not. 48 However, in 1916 this difficult process was abandoned since the varying results

"seemed entirely unreasonable . . . Aside from technicalities, the practical effect of taking the oath in all cases seemed to be the same." 49

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41. Sec'y Hughes to Frank L. Polk, Mar. 17, 1924, 3 HACKWORTH 219.
42. Dep't State to Consul at Guadalajara, May 27, 1937, id. at 218.
43. Dep't of State to consular officer in charge at Birmingham, May 10, 1938, ibid.
44. See In the Matter of L., 1 I. & N. Dec. 317 (B.I.A. 1942). L. swore an oath to the Crown in pursuance of a regulation of the Canadian airline for which he worked. This, the Board ruled, was not an "oath of allegiance" within the meaning of § 401b.
45. Director of Consular Service to Consul Glazebrooke, Oct. 30, 1914, 3 HACKWORTH 223.
46. Dep't of State to Consul Gen'l in Berlin, Mar. 21, 1934, Ibid.
47. The oaths are examined to determine the degree of allegiance which they imply. For example the following were not oaths of allegiance within the purview of the statute: Oath for the Chinese Civil Service, Assistant Secretary of State Carr to Minister Johnson, Mar. 6, 1930, ibid.; oath for jurors in the British West Indies, Director of Consular Service to Consul McComnico, Dec. 11, 1915, ibid.; oath for the Indian Auxiliary Force, Director of Consular Service to Vice Consul Thorling, Apr. 5, 1921, ibid. The following oaths did effect loss of American Nationality: The Canadian Civil Service, Director of Consular Service to Consul Rest, Aug. 3, 1915, id. at 22; The Royal Canadian Mounted Police, Acting Secretary of Labor to Secretary Stimson, Oct. 12, 1932, ibid.; the Canadian teaching profession, Decision B.I.A., Sept. 7, 1944, file #56172/38.
48. Sec'y Hughes to Frank Polk, Mar. 17, 1924, id. at 224.
49. Ibid.
Subsequently in the same year, a federal district court reached the same conclusion, holding that no distinction existed between “permanent” and “temporary” oaths of allegiance. In each case, the Court held, the allegiance sworn was total, although the period of the allegiance might vary. Any such oath effected loss of American citizenship. This rule appears to have been followed consistently since 1916, although some exceptions may be found. The outstanding deviation, for which the Board of Immigration Appeals was responsible, was the specious decision that Americans who entered the Canadian Army prior to United States entrance into World War II, and swore an oath of “fealty” specially fabricated to avoid loss of United States citizenship, were not expatriated. As such Americans were merged in the totality of the Canadian Army and were in all respects in the identical situation vis a vis the Canadian government as their Canadian comrades in arms, this decision is difficult to justify except as an extension of “Lend-Lease” into the field of manpower.

Under certain circumstances the taking of an oath of allegiance to a foreign state did not effect expatriation. For example, an oath taken while the United States was at war was of no effect. Furthermore, an oath taken during the first World War did not automatically result in loss of United States citizenship at the conclusion of hostilities—as was the case, it will be recalled, with a foreign naturalization undertaken in wartime. In this case, other factors had to be taken into consideration. In the words of Attorney General Jackson:

“... if such a person prior to the time the United States ceased to be at war had returned to this country for permanent residence and thereafter did nothing that indicated continued allegiance to the foreign state but, on the contrary, acted consistently as a citizen of the United States, he did not lose his citizenship. . . . The reason for . . . [the distinction] arises from the fact that the nationality of the foreign state is not acquired through the mere taking of an oath of allegiance. . . .”

In other words, if an American swore an oath of allegiance to a foreign state between April 6, 1917 and July 2, 1921, he did not lose his United States citizenship unless he demonstrated by some confirmatory act that he had actually abandoned his allegiance to the United States.

51. See In the Matter of T., 1 I. & N. Dec. 596 (B.I.A. 1943). In 1929 the Ass't Sec'y of Labor held that an American who, on enlisting in the Japanese Army, swore to observe the “Seven Duties of a Soldier” had not thereby lost his citizenship. Opinion, July 15, 1929, file #4/2188.
52. 39 Ops.atty Gen. 481 (1940).
This interpretation, promulgated by Secretary of State Hughes in 1923, was subsequently ratified by two federal district courts.

The doctrine of "confirmatory acts" was also applied to Americans who took such an oath of allegiance during minority. This rule that minors could not expatriate themselves by swearing an oath of allegiance to a foreign state was adopted by the State Department after "a rather unsettled policy". At first the Solicitor of that Department held that minors did lose citizenship by so swearing, that

"in the absence of a clear showing of duress, any person, whether minor or adult, who takes an oath of allegiance to a foreign State thereby becomes expatriated." 

However, after several federal courts had decided that a minor could not expatriate himself, the Department subsequently adopted the doctrine of "confirmatory acts". The Board of Immigration Appeals has defined a "confirmatory act" as an

"affirmative, overt act which indicates a continued allegiance to the foreign state . . . . the overt act, in order to confirm the oath, must have a direct relationship to the purpose for which the oath was taken, thus amounting to a practical reaffirmation of the oath of allegiance." 

53. Sec'y Hughes to the diplomatic and consular officers, Nov. 24, 1923, 3 HACKWORTH 268.

54. In re Bishop, 26 F.2d 148 (W.D. Wash. 1927); In re Grant, 289 Fed. 814 (S.D. Cal. 1923). "A confirmatory act" was understood to be any action which demonstrated that the oath taken to the foreign state was a final renunciation of U. S. allegiance. E.g. MS Dep't State file #560c.117 Truty, Tadeusz, 3 HACKWORTH 268 (voting in foreign election). See In the Matter of C., file #56167/750 (B.I.A., Feb. 8, 1945); approved by the Attorney General, Oct. 2, 1946. The Board notes (footnote 1) that at the time of Attorney General Jackson's opinion, supra, "The Legal Advisor of the State Department . . . urged that a person in this category [those who took foreign oaths of allegiance while the United States was at war] became expatriated unless he returned to the United States within a reasonable period after July 2, 1921, and it is significant that the Attorney General declined to accept this view." Hackworth cites three cases in which the Department decided a person in this class was expatriated by a confirmatory act, 3 HACKWORTH 269, and the Board of Immigration Appeals noted that "An examination of the State Department files in two of these cases (the third file was unavailable) shows that in both instances there was conduct, in addition to residence, which could be regarded as confirming the oath of allegiance." In the Matter of C., supra note 36.


56. In the Matter of C., supra note 36.

57. MS Dep't State, file 130 Baglivo, Pietro, 3 HACKWORTH 274. This quotation was taken from an amplification of the opinion of the Solicitor, Dec. 17, 1926, Ibid. The original holding appears to have been made in an opinion by the Solicitor dated Aug. 22, 1919, id. at 271.

58. See United States ex rel. Baglivo v. Day, 28 F.2d 44 (S.D.N.Y. 1928); In re Zanetti, unreported, cited 3 HACKWORTH 274. This determination was supported by dicta in Ex parte Gilroy, 257 Fed. 110, 119 (S.D.N.Y. 1919) and later in McCampbell v. McCampbell, 13 F. Supp. 847, 849 (W.D. Ky. 1936).

59. Opinion of the Solicitor of the State Dep't, Nov. 24, 1928, 3 HACKWORTH 274, as modified by decision of Nov. 10, 1934, id. at 275.

60. In the Matter of C., supra note 54 (1945).
Examples of acts which have been held to confirm an oath taken during minority include: the swearing of another oath after attaining majority, the performance of two reserves drills in the Czechoslovak Army, voting in Irish elections, and obtaining an Italian identity card.

An oath of allegiance to a foreign state taken under duress does not forfeit American citizenship, but the person claiming duress must carry the burden of proof. Furthermore, when a person has served in a foreign army which requires an oath of allegiance of all soldiers, he is presumed to have taken the required oath. A person who has been judicially declared *non compos mentis*, a district court held, cannot expatriate himself in this manner. In addition, the State Department has decided, a parent's loss of American citizenship by taking an oath of allegiance has no effect on the nationality of his children.

Previously reference has been made to the fact that a person naturalized in accordance with the laws of a foreign state while in the United States does not lose his United States citizenship until he establishes foreign residence. However, since few countries other than the Soviet Union allow aliens to become nationals without establishing residence, this limitation has not restricted loss of citizenship by foreign naturalization to any great extent. On the other hand, it has had a considerable effect on loss by taking an oath of allegiance, for many such oaths are taken by persons while still residing in the United States.

Prior to 1940 there was no statutory justification for this rule. The State Department merely decided, at some unidentified point in history, that expatriation must be accompanied by removal from the United States. The basis for this was the early interpretation of expatriation as a *transfer* of allegiance from one sovereign to another—as opposed to simple *loss* of nationality. Such a transfer, according to this line of reasoning, could not by definition take place within the United States.

61. MS Dep't State, file 130 Sharp, David, 3 *HACKWORTH* 275.
62. MS Dep't State, file 130 Moravic, Joseph, *ibid*.
63. MS Dep't State, file 130 Montgomery, William, *ibid*.
64. MS Dep't State, file 130 Monte, Pasquale Del, *ibid*.
68. McCampbell v. McCampbell, *supra* note 58. The court need not have decided the case on this ground, for McCampbell swore the oath in 1903, prior to the passage of the Act of 1907, and the Dep't had earlier held that an oath taken prior to 1907 did not work loss of citizenship. Under-Sec'y Grew to Consul Gen'l Washington, Jan. 15, 1926, 3 *HACKWORTH* 218.
69. Dep't of State to consular officer in charge at Prague, Jan. 19, 1938, *ibid* at 245. This was prior to the decision of the Supreme Court in Perkins v. Elg, *supra*, and was in line with that decision; see *In the Matter of B.*, 1 I. & N. Dec. 429 (B.I.A. 1943) for a holding that a husband's oath has no effect on the citizenship of his wife.
jurisdiction of the United States.\textsuperscript{70} The Supreme Court in \textit{Mackenzie v. Hare}\textsuperscript{71} opened this argument to serious doubts by holding that the marriage of an American woman to an alien resident \textit{in} the United States effected her expatriation. But the State Department managed, by dint of some rather vigorous dictum citing, to distinguish the effect of marriage in the United States from the effect of an oath taken \textit{in} the United States. The Department claimed that

"... the [Supreme] court held in effect that the woman's citizenship became ... merged in that of her husband, regardless of their residence. Thus the case was essentially different from that of an individual who, while remaining in the United States, attempts to subject himself to the sovereignty of a foreign state, through the taking of an oath of allegiance."\textsuperscript{72}

In pursuance of this interpretation, the Department of State has held that a person who swore an oath of allegiance to, or became naturalized in, a foreign state while residing in the United States did not lose his American nationality unless he left this country and established residence in such foreign country.\textsuperscript{73}

Congress apparently agreed that the State Department's addition to the expatriation statute was wise and valid, for the Nationality Act of 1940 provided that loss of citizenship as the result of naturalization abroad or the swearing of an oath of allegiance to a foreign state, \textit{inter alia}, would not take place until the citizen concerned left the United States or any of its outlying possessions and established residence abroad.\textsuperscript{74}

In addition, the Nationality Act of 1940 eliminated the prohibition on wartime expatriation, and included a proviso that no national under eighteen years of age could lose his United States citizenship by swearing an oath of allegiance to a foreign state.\textsuperscript{75} Thus today an American citizen loses his nationality by taking an oath of allegiance to a foreign state unless the oath was demonstrably taken under duress; or the person taking the oath was mentally incompetent; or under eighteen years of age; or residing within the United States or its outlying possessions. An oath taken by a minor may be confirmed by a subsequent act of allegiance to the foreign state undertaken as an adult, and an oath taken

\textsuperscript{70} See MS Dep't State, file #136/740, Feb. 3, 1933, 3 HACKWORTH 229 \textit{et seq.} for a long and tendentious justification of this point of view.
\textsuperscript{71} 239 U.S. 299 (1915).
\textsuperscript{72} 3 HACKWORTH 231. This is part of the opinion cited \textit{supra} note 70.
\textsuperscript{73} See the cases cited \textit{id.} at 232 \textit{et seq.; In the Matter of W.,} 1 I. & N. Dec. 558 (B.I.A. 1943), in which the Board held that an oath of allegiance to the British Crown sworn in Boston did not, of itself, expatriate \textit{W.}
\textsuperscript{74} 54 STAT. 1169 (1940), 8 U.S.C. \$ 803 (1946).
\textsuperscript{75} Ibid.
within the United States results in expatriation upon the departure of
the citizen from the United States for residence abroad. In instances
where the full meaning of an oath is in doubt, investigation and decision
are undertaken by the administrative authorities on the merits of each
case.

**Loss by Naturalized Citizens on Resumption of Foreign
Residence**

The second paragraph of Section 2, Act of March 2, 1907, pro-
vided that if a naturalized citizen returned to live for two years in the
state from which he emigrated, or for five years in any other foreign
state, it would be presumed that he lost his American nationality.
This presumption of loss of citizenship could be overcome by the presen-
tation of satisfactory evidence to a diplomatic or consular officer of
the United States.\(^7\) A study of the background of this proviso reveals
that it was included in the act for the purpose of freeing the United
States from the obligation of protecting naturalized American citizens
who took up foreign residence.\(^7\)

At first the State Department held that a person who was unable
to overcome the presumption of loss of citizenship was thereby ex-
patriated.\(^7\) The rules for overcoming the presumption were simple.
A naturalized citizen could overcome the presumption by demonstrating
that he was residing abroad "solely as a representative of American
trade and commerce"; or "for health or education"; or that "some
unforeseen and controlling exigency" had prevented his return to the
United States. Such naturalized citizens must also show that they
intended to return to the United States.\(^7\) These rules were later ex-
panded to include other categories of Americans engaged in various
types of business abroad.\(^8\) In all cases these naturalized Americans
had to prove that "they intend eventually to return to the United States
permanently to reside."

However, in 1910, Attorney General Wickersham, in effect, held
that these rules were irrelevant to loss of citizenship.\(^8\) Since the law
was framed solely to relieve the State Department of the burden of
protecting naturalized citizens on extended stays abroad, Wickersham

\(^{76}\) 34 STAT. 1228 (1907).
\(^{77}\) See Citizenship, Expatriation, and Protection Abroad, H.R. Doc. No. 326,
59th Cong., 2d Sess., 23 et seq. (1906).
\(^{78}\) Acting Sec'y Bacon to Ambassador Riddle, May 29, 1908, id. at 290.
\(^{79}\) Cited by Flournoy, Naturalization and Expatriation, 31 YALE L.J. 702, 856
(1922).
\(^{80}\) Rules in effect April 21, 1926, cited by Hazard, International Problems in
Respect to Nationality by Naturalization and of Married Women, 20 PROC. AM. SOC.
INT'L L. 67, 75 (1926); see 3 HACKWORTH 310 for rules in effect in 1938.
\(^{81}\) 28 Ops. Att'y Gen. 504, 510 (1910).
decided that the presumption only had relevance to *protection* and not to loss of *citizenship*. The return of a naturalized American citizen to the United States automatically rebutted the presumption, even though the foreign residence might have extended over a long period. The presumption of loss of citizenship could be infinitely extended in time, but never actually effected loss of citizenship.

Attorney General Wickersham's interpretation of the statute was not uniformly followed. The State Department, which understandably was not fond of preparing ineffectual rules, kept a watchful eye on the courts in hopes of discovering a basis for reversing the Attorney General's rule. Finally in 1916 the Southern District of New York held squarely to the contrary, deciding that one Anderson had not succeeded in rebutting the presumption of loss of citizenship and was, therefore, expatriated. The State Department immediately returned to its original holding, but later in the year, probably after the same court in *Stein v. Fleischmann Co.*

upheld the Wickersham interpretation, it also reassumed Wickersham's position. This zig-zag course continued until 1926, when Secretary of State Kellogg accepted Wickersham's view. In all probability the retreat was motivated by the Supreme Court's dictum in 1924 that a presumption of loss of citizenship based on foreign residence was "a presumption easy to preclude, and easy to overcome. It is a matter of option and intention." Thus from 1926 to the passage of the Nationality Act of 1940 the second paragraph of Section 2, Act of March 2, 1907, related only to loss of *protection* by naturalized citizens abroad.

However, the Department of State did not completely relinquish its old point of view. It still wished extended residence abroad to effect automatic loss of American *citizenship*. Thus, when it was proposed that the United States codify and revise its nationality laws, the Department of State seized the opportunity to write its interpretation into the law of the land.


63. 237 Fed. 679 (S.D.N.Y. 1916). For the State Dep't's reversal see 3 HACK- worth 294.

64. *Ibid*.

65. Sec'y Kellogg to Att'y Gen. Sargent, Mar. 26, 1926, id. at 295; for shifts in policy between 1916 and 1926 see id. at 294. The court decisions were confusing. See in support of Wickersham: Camardo v. Tillinghast, 29 F.2d 527 (1st Cir. 1928); United States v. Eliasen, 11 F.2d 785 (W.D. Wash. 1926); *semble: United States v. Gay, 264 U.S. 353 (1924); Miller v. Sinjen, 289 Fed. 388 (8th Cir. 1923); Banning v. Penrose, 255 Fed. 159 (N.D. Ga. 1919). *Contra:* Nurge v. Miller, 286 Fed. 982 (E.D.N.Y. 1923); Sinjen v. Miller, 281 Fed. 889 (D. Neb. 1922). These cases are in addition to those cited in the text.

The proposed Section 402 (b) of the Nationality Code eliminated any reference to "presumption", providing that a naturalized citizen of the United States would lose his nationality by

"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, . . . ." 87

Discussing this provision before a sub-committee of the House Committee on Immigration and Naturalization, Mr. R. W. Flournoy, State Department spokesman, expressed the opinion that:

"This . . . I should say is the most important proposed change in the whole code, and may be the subject of some controversy. . . . We have every day in the State Department, cases of persons applying to us for passports or protection . . . . who have been naturalized in the United States and then gone back and settled down in their native countries and resided there for years. We think there should be some point at which such person should lose not only his right to protection but his citizenship itself. We consider it very undesirable that we should have persons [abroad] who are not entitled to the protection of our Government and yet remain as citizens of the United States." 88

Pointing out that the Act of 1907 provided a presumption of loss of citizenship which "never ripens into actual expatriation", Mr. Flournoy asked that, in cases where naturalized Americans returned to their native lands, three years residence terminate United States citizenship granted by naturalization. Subsequently in his testimony Flournoy suggested that Congress should also provide for expatriation if a naturalized American took up residence in a foreign country other than the one from which he came.89 He called the attention of the congressmen to the problem created by Zionists, born in Russia or Germany, naturalized in the United States, but residing in Palestine.90

The congressmen accepted Mr. Flournoy's advice and wrote it into law as Section 404 of the Nationality Act of 1940.91

87. See 1 CODIFICATION OF THE NATIONALITY LAWS OF THE UNITED STATES (H.R. COMMITTEE PRINT, 76th Cong., 1st Sess.) 69 (1939) (hereinafter cited CODIFICATION). The reason for this provision was that such naturalized citizens "who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling." Id. at 71.

88. 2 Hearings before Committee on Immigration and Naturalization on H.R. 6127, 76th Cong., 1st Sess., 134 (1940) (hereinafter cited Nationality Hearings).

89. Id. at 140.

90. Ibid.

91. 54 STAT. 1170 (1940), 8 U.S.C. § 804 (1946). Section 404 also provided that the naturalized citizen would lose his nationality by a continuous two year stay in his native land if such a stay reinvested him with his original citizenship. It was also provided that a continuous five year stay abroad in any foreign country would effect
Two further limitations were included in the Nationality Act. Section 407 provided that an American minor residing abroad with a parent who lost nationality under Section 404 should also lose his nationality unless he re-established permanent residence in the United States before his twenty-third birthday.92

Section 409, after several amendments, declared that Sections 404 and 407 would be inoperative until October 14, 1946.93

These provisions have been detailed at some length for they represent a revolutionary change in citizenship policy. It should be emphasized that this legislation did not create a presumption of loss of citizenship on the part of naturalized citizens remaining abroad. It provided for automatic denationalization for those who could not claim immunity under Sections 405 and 406. At the end of three years residence in his native land, or five years in any other state, a naturalized citizen simply ceases to be an American. On the other hand, a native born American, unless he commits one of the acts specified in Section 401, e.g., voting in a foreign election, can remain abroad for a lifetime and retain his nationality. Thus, in a very real way, Congress created second class citizens. Agreeing that some legislation on the subject was necessary, was there any justification for classifying citizens on the basis of birth versus naturalization? Was there any reason why these provisions should not also apply to native born nationals? Furthermore, did Congress have the power to make such a classification?

It is possible that Congress could constitutionally create second class citizenship. If it could be demonstrated that the classification between citizens based on whether they were born or adopted bears a reasonable relationship to a legitimate end, if it is supported by “considerations of policy and practical convenience that cannot be condemned as arbitrary”,94 then such a dichotomy could be sustained. There seems to be little question but that the great mass of Americans who have established residence in foreign countries were nationals by adoption. Many people formerly came to this country to make money and then returned to live in relative splendor in their native lands. It could therefore be maintained that Congress utilized a legitimate classifi-

92. Id. at § 807.
93. See ibid; 55 Stat. 743 (1941); 56 Stat. 779 (1942); 58 Stat. 747 (1944); 59 Stat. 544 (1945).
fication, based on a reasonable and non-arbitrary distinction between citizens by birth and by naturalization. Thus this could be considered a distinction borne out in actual fact, justifying the establishment of two grades of citizenship.

On the other hand, assuming that Congress has the power to provide for the divesting of citizenship, there is a strong tradition that it cannot use any classification based on birth as opposed to naturalization. Chief Justice Marshall stated in an early case that a naturalized citizen

"is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction; the law makes none." 95

This dictum has since been echoed many times by the Supreme Court.96 Thus, it can be maintained, the classification employed by Congress in Section 404 is an arbitrary one, proscribed by the Fifth Amendment to the Constitution.97

These issues were recently presented to the federal courts of the District of Columbia by one Louis Bernard Lapides. Lapides was born in Austria, naturalized in the United States, and resided in Palestine from 1934 to 1947. In 1947 he returned to the United States, but was excluded as an alien on the ground that his residence in Palestine had expatriated him. He brought action in the federal district court, under Section 503 of the Nationality Act, for a declaratory judgment that he was a citizen. The court dismissed Lapides' action without written opinion, and Lapides appealed, maintaining that Section 404 (c) of the Nationality Act was unconstitutional.98

The District of Columbia Court of Appeals agreed that Lapides lost his United States citizenship. Emphasizing that the provision under attack was primarily concerned with the conduct of foreign affairs, the Court stated:

"The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one's own acts, with notice of the consequences. In that sense there is concurrence by the citizen. . . . [In the case of Mackenzie v. Hare

98. Lapides had previously attempted to get admitted through habeas corpus proceedings, claiming the I. & N.S. had no right to exclude him without a judicial determination of his citizenship. The court rejected his contention without ruling on his citizenship. United States ex rel. Lapides v. Watkins, 165 F.2d 397 (2d Cir. 1948).
the law provided] that any American woman marrying a foreigner should take the nationality of her husband. The distinction thus drawn between female citizens marrying Americans and those marrying foreigners was held not to be an arbitrary exercise of power, as it was dictated by a policy to avoid embarrassments and controversies with foreign governments. In view of . . . [the decision in Mackenzie v. Hare] supporting classification as between native born citizens, we cannot doubt that for a similar purpose Congress has the power to distinguish between native born and naturalized citizens. 99

Judge Edgerton dissented. Noting that with the exception of the limitation on the Presidency to native born citizens, the Constitution makes no distinction between native born and naturalized citizens, he urged that once an alien is naturalized he is completely merged in the American community.

"Congress may expatriate citizens on reasonable grounds. No doubt these may include five years residence abroad. But it does not follow that Congress may expatriate some citizens and not others on this ground. . . . Together with the immigration law the Nationality Act makes it in effect a crime punishable by banishment, which may well be called cruel and unusual, for some citizens but not for others to live five years abroad." 100

Unfortunately, because of the importance of the issues involved, the Supreme Court failed to grant certiorari in this case.

One peculiar situation which merits mention has arisen since the passage of the Nationality Act. Section 409, it will be recalled, gave naturalized Americans living abroad six years to get home. Until October 14, 1946 naturalized American citizens living abroad longer than the periods stipulated in the statute were divested of protection under color of the Act of 1907, but not of citizenship under the Act of 1940. However, the administrative authorities changed the rules, holding in several cases that return to the United States did not rebut the presumption of loss of citizenship. 101 It should be added by way of explanation, that the naturalized nationals concerned had lived for years in Germany, and made no attempts to return to the United States until the outbreak of war. Nonetheless, the Board of Immigration Appeals' 99. Lapides v. Clark, 176 F.2d 619 (D.C. Cir. 1949), cert. denied, 338 U.S. 860 (1949).
100. Ibid. Emphasis added.
altering of the long-standing rule that return to the United States rebutted the presumption of loss does not appear to be quite legitimate in view of the fact that the Nationality Act specifically continued the presumption.102

LOSS BY MARRIAGE

Prior to the passage of the Expatriation Act of 1907 the effect of the marriage of an American woman to an alien on her nationality was in doubt. The Secretaries of State operated generally on the principle that an American woman who married an alien lost her right to protection, and tended to consider that her American citizenship was in abeyance during the period of her marriage. The courts were divided on the point. Section 3 of the Act of 1907 settled this problem by declaring that

“any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation, by continuing to reside therein.” 103

The phrase “shall take the nationality of her husband” was naturally interpreted as providing for loss of American nationality by such marriage, although the United States was powerless to provide for the woman’s taking the nationality of her husband. She might, or might not, obtain her husband’s nationality, depending on the nationality law of her husband’s state.104

This enactment established a simple rule for future use: American women marrying foreigners lost their nationality for the duration of coverture. But could it be applied retrospectively? Did it deprive of their nationality American women who before 1907 married foreigners? One authority recommended that the phrase “who marries a foreigner” be construed to read “who marries or is married to a foreigner” thus making the “state of marriage . . . controlling as to the

103. 34 STAT. 1228 (1907).
104. GETTYS, LAW OF CITIZENSHIP IN THE UNITED STATES 120 (1934). The law stated that registration should take place within one year, but the Dep’t held this to be “directory” and not “mandatory” so that registration could take place after one year if cause for the delay was shown. Hover, Citizenship of Women in the United States, 26 Am. J. Int’l L. 700 (1932). What criteria were used to separate directory from mandatory provisions is unknown; if this one year limit could be circumvented, it would seem that any other provision could equally well be interpreted out of existence.
native woman's citizenship, rather than the date of its inception.”

Unfortunately, from the point of view of the State Department, which justifiably looks with favor on nice neat rules, easy of administration, this interpretation was not considered valid. After considering all the factors involved, and particularly the Supreme Court’s holding in Mackenzie v. Hare that the marriage of an American woman to an alien expatriated her, since she contracted the marriage of her own volition with knowledge of the consequences, Secretary of State Hughes ruled that this provision could not be given retrospective application.

With the failure to make this unifying interpretation controlling, the decision as to whether such a marriage involved loss of citizenship was left to individual courts. There has been no unity in the court decisions on the point, for each district judge has attempted to determine the issue for himself on the basis of pre-statutory precedents.

Elsewhere it was noted that the State Department did not believe that expatriation could be effected in the United States. Did this limitation on loss of nationality also apply to expatriation by marriage? Logically speaking, this rule, if valid, should have universal application, for an American married to a foreign husband in the United States is no less subject to American jurisdiction than an American in the United States who has sworn an oath of allegiance to a foreign state. However, in the case of Mackenzie v. Hare the Supreme Court held that Mrs. Mackenzie, the American born wife of a resident British subject living with her husband in California, had indeed lost her American nationality. Pointing to the “ancient principle” of unity of husband and wife, the Court declared that Congress intended this principle to apply to all marriages of this type whether contracted within or without the United States. It should be noted that the identity of husband and wife was not an ancient principle of common law jurisprudence so far as nationality was concerned. Unless there were

105. Hover, op. cit. supra note 104, at 710.
106. 239 U.S. 299 (1915).
107. Opinion of the Solicitor, Dep’t of State, Jan. 24, 1925, approved by Sec’y Hughes. 3 HACkWORTH 247.
108. For holdings that the marriage of an American woman with an alien prior to 1907 resulted in her losing citizenship, see In re Wohlgemuth, 35 F.2d 1007 (W.D. Mich. 1929); In re Kraussmann, 28 F.2d 1004 (E.D. Mich. 1928); In re Page, 12 F.2d 135 (S.D. Cal. 1926). Contra: In re Lynch, 31 F.2d 762 (S.D. Cal. 1929); Petition of Zogbaum, 32 F.2d 911 (D.S.D. 1929); In re Fitzroy, 4 F.2d 541 (D. Mass. 1925). The point at issue here, it should be emphasized, is not the retrospective operation of the Act of 1907, but the law in effect prior to that date. The rule of thumb devised by the Dep’t of State was that if an American woman married an alien prior to 1907 and took up permanent foreign residence with him prior to the passage of the Cable Act in 1922, or if as a result of marriage she acquired the nationality of her husband, she was considered to have lost her citizenship. UNITED STATES CONSULAR REGULATIONS, 1933, 3 HACkWORTH 248.
109. See note 70 supra.
110. 239 U.S. 299, 308 (1915).
statutory provision to the contrary, the marriage of an American or British woman to an alien did not under the common law affect her nationality. Justice McKenna accepted the "Expatriation Act" of 1868 as legislation countervening the common law, although only the preamble to this law dealt with expatriation, and preambles are of no legal force. However, the concern here is with the Court's holding which established, in connection with this specific problem, that expatriation by marriage under the Act of 1907 could take place in the United States.

The Supreme Court's affirmation of the identity of husband and wife raised another question. If an American woman married an American national who subsequently transferred his allegiance to a foreign state through naturalization or by swearing an oath of allegiance, did his wife lose her American citizenship simultaneously? The State Department at first held that the nationality of the wife should in all cases follow that of the husband. Subsequently this rule was modified insofar as it related to loss by oaths of allegiance, so that the wife only lost her American citizenship if she acquired foreign citizenship through the act of her husband. This modification was endorsed in 1915 by Attorney General Gregory. However, since most states granted citizenship to the wife of a naturalized person, the naturalization of an American husband in a foreign country usually expatriated his wife.

The marriage of an American woman to a foreigner during her minority was held to result in loss of United States citizenship.

111. "It had been the unexcepted doctrine of English common law that marriage to an alien did not affect a woman's nationality." Hover, op. cit. supra note 104, at 703, and authorities cited.

112. The preamble of the United States Constitution, for example, is not the source of any substantive power, but merely a declaration of the intention of the framers. Jacobson v. Moss, 197 U.S. 11 (1905). "Both in England and in this country it was at one time a common practice to prefix to each law a preface or preamble stating the motives and inducement to the making of it; but it is not an essential part of the statute . . . [and] is without force in a legislative sense, being but a guide to the intentions of the framers. As such guide it is often of importance . . . [and] is properly referred to when doubts or ambiguities arise upon the words of the enacting part. It can never enlarge. It is no part of the law." State v. Superior Court, 92 Wash. 16, 159 Pac. 92 (1915). (Emphasis added.) The only reference to the right of expatriation in the 1868 statute was in the preamble. The remainder of the law was concerned with the protection of naturalized Americans abroad. To hold that the preamble enacted the right of expatriation would be to hold that the preamble enlarged the enacted part of the statute in an entirely different direction; i.e., transferring the force of the law from the protection of Americans abroad to the establishment of the right of expatriation.

113. Opinion of Solicitor, Dep't State, Jan. 23, 1924, 3 HACKWORTH 254. Contra: MS Dep't State, file 130 Kelly, Henrietta, ibid.

114. See Citizenship of Berryman, 30 Ors. ATT'Y GEN. 412 (1915).


116. Opinion of Solicitor, Dep't State, Sept. 27, 1928, 3 HACKWORTH 272.
did not result in loss of American nationality until the conclusion of the official period of hostilities on July 2, 1921.\textsuperscript{117} An American woman who lost citizenship by marriage automatically regained it on the annulment of the marriage.\textsuperscript{118} One interesting exception to the rule has arisen in the cases of women who have both American nationality and the nationality of their husbands \textit{at birth}. Assuming that a woman was born in the United States of British parents, thus gaining dual nationality at birth, her subsequent marriage to a British subject would not have extinguished her American citizenship, since she did not by \textit{marriage} obtain British nationality.\textsuperscript{119}

The discussion of loss by marriage thus far has been solely concerned with the application of the Act of 1907. However, in 1922 Congress completely revolutionized the rules, authorizing, in the so-called “Cable Act”, independent citizenship for American women. This enactment did not affect the validity of what has been discussed above—the old rules and interpretation continued to be applied to marriages contracted between 1907 and 1922.\textsuperscript{120} However, from 1922 on the “ancient principle of identity of husband and wife” was completely abandoned. Section 3 of the Cable Act declared:

“\textit{That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this Act, unless she makes a formal renunciation of her citizenship . . . Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence.”}\textsuperscript{121}

With the passage of this statute, loss of American nationality by marriage was limited to two groups: those who married aliens ineligible for citizenship, and those who renounced their American citizenship. The State Department soon added a third group: those who in connection with marriage to an alien performed “a positive, affirmative act required by the law of her husband’s state as a prerequisite to the acquisition of his nationality.”\textsuperscript{122} Each of these modes of loss deserves brief elaboration.

The marriage of an American woman to an alien ineligible to citizenship carried with it loss of American nationality. The primary

\begin{itemize}
  \item \textsuperscript{117} See 39 Ops. Att’Y Gen. 474 (1940).
  \item \textsuperscript{118} MS Dep’t State, file 130 L., M.M., 3 HACKWORTH 253.
  \item \textsuperscript{119} MS Dep’t State, file 130 Beauce, Marie E., 3 id. at 248.
  \item \textsuperscript{120} The Cable Act included a statement precluding retrospective operation of the repeal of section 3 of the Act of 1907. 42 STAT. 1022 (1922).
  \item \textsuperscript{121} Ibid.
  \item \textsuperscript{122} MS Dep’t State, file 130 Dupont, Dorothy D., 3 HACKWORTH 259.
\end{itemize}
groups affected by this proviso were Chinese-Americans and Japanese-Americans who frequently married alien Chinese and Japanese husbands who were ineligible for citizenship.\textsuperscript{123} It also would have expatriated any American woman who married an alien who was ineligible for citizenship due to deserting the United States armed forces, leaving the country to avoid the draft, or withdrawing his declaration of intention in order to plead alienage as a bar to military service.\textsuperscript{124} Happily, this piece of discriminatory legislation was repealed in 1931,\textsuperscript{125} so that today marriage per se in no case effects loss of American nationality.\textsuperscript{126}

The provision that an American woman might renounce her citizenship was subsequently amended to forbid such renunciation in wartime, or "if war shall be declared within one year after such renunciation . . . [it] shall be void."\textsuperscript{127} This renunciation had to be made before a court; it could not be made before a consular officer of the United States.\textsuperscript{128} The Nationality Act of 1940 repealed this renunciation provision, but declared that any American citizen, male or female, could lose citizenship by renunciation before a consular officer.\textsuperscript{129} Since this latter enactment was far broader than the previous ones—which related solely to marriage—it will be discussed separately.

The State Department’s decision that marriage plus an affirmative act was equivalent to expatriation was apparently based on the assumption that if an American woman took action to obtain her husband’s nationality, she thereby became naturalized in a foreign state. Inasmuch as the Department consistently ruled that foreign citizenship and

\textsuperscript{123} For a discussion of some of the effects of this provision see 14 Geo. L.J. 202 (1926).


\textsuperscript{125} 46 Stat. 1511 (1931).

\textsuperscript{126} Krichefsky, in Loss of United States Nationality: Expatriation, 4 L & N.S. Monthly Rev. 9, 14 (1946) states that two persons “lost citizenship by marriage to a treaty national” during fiscal 1945. Yet the State Department has held that even in cases where American women are supposed under the terms of a treaty to lose their citizenship on marriage to a national of the state with which the treaty was concluded, such loss of nationality will not be recognized. This was determined on the premise that “it appeared to be the clear intent of Congress that no woman should lose her American citizenship as a consequence of her marriage to an alien.” Opinion of the Solicitor, Dep’t State, Aug. 17, 1927; Dep’t State to Consul Gen. at Montreal, Sept. 24, 1931, 3 Hackworth 264. It is possible that the Department has modified this rule since the appearance of Hackworth’s compilation. Unfortunately the Department did not allow this writer to use its files in preparing this analysis, so that Mrs. Krichefsky’s statement is at present inexplicable.

\textsuperscript{127} 48 Stat. 797 (1934). Undoubtedly due to an oversight in drafting, no reference was made to the previous provision on this subject, nor was § 3 of the Cable Act repealed until 1940. However, the administrative authorities took the logical position that the Act of 1934 amended the Cable Act by implication. 3 Hackworth 263.

\textsuperscript{128} Att’y Gen. Dougherty to Sec’y Hughes, Apr. 6, 1923, 3 id. 263.

its benefits bestowed on an American woman without application on her part did not expatriate her;\textsuperscript{130} it seems quite reasonable that when an American woman did take positive action resulting in the acquisition of her husband's citizenship she should be considered as expatriated under Section 2 of the Act of 1907, as having obtained naturalization in a foreign state. Persons in this category today are expatriated under color of Section 401 (a) of the Nationality Act.\textsuperscript{131}

The discussion so far has been concerned with the methods of expatriation established by the Expatriation Act of 1907. It is now necessary to launch into the study of the new methods by which denationalization can take place created by the Nationality Act of 1940 and its amendments.

\textbf{Loss by Service in the Armed Forces of a Foreign State}

Section 401 (c) of the Nationality Act of 1940 declared that United States citizenship would be lost by

"Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state." \textsuperscript{132}

It should be noted that this provision is considerably narrower in scope than the other denationalization sections. While, under Section 401 (b), United States citizenship is lost by simply swearing an oath of allegiance to a foreign state, nationality is not lost by a person serving in the foreign armed forces unless he "has or acquires the nationality of such foreign state." Under Section 403 (b) of the Nationality Act no American national could lose citizenship in this manner unless he were over eighteen years of age.\textsuperscript{133}

The purpose of Section 401 (c) was to denationalize Americans who served in foreign armies but did not swear an oath of allegiance. As originally presented to Congress it did not include the sentence "if he has or acquires the nationality of such foreign state." \textsuperscript{134} Fournoy,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{130} See Circular instruction to diplomatic and consular officers, July 15, 1936, 3 Hackworth 259. \textit{But see} Citizenship of Berryman, 30 Ops. Atty Gen. 412 (1915).
\item \textsuperscript{131} 54 Stat. 1169 (1940); 8 U.S.C. § 801a (1946). The Expatriation Act of 1907 provided for loss of citizenship for a woman who had acquired U. S. citizenship by marriage, unless she registered with an American consul if living abroad or continued to live in the U. S. The Cable Act of 1922, however, changed all this with its provision that foreign women could not attain U. S. citizenship merely by marrying U. S. citizens.
\item \textsuperscript{132} 54 Stat. 1169 (1940), 8 U.S.C. § 801c (1946).
\item \textsuperscript{133} 54 Stat. 1170 (1940), 8 U.S.C. § 803b (1946). Nor under § 403a could citizenship be thus lost unless the person had left the jurisdiction of the United States.
\item \textsuperscript{134} See 1 CODIFICATION 66.
\end{enumerate}
\end{footnotesize}
the State Department representative at the congressional hearings on the Nationality Act, justified the original provision, stating

"it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be reasonable to provide for recovering the citizenship readily in such cases." 135

The House Committee on Immigration and Naturalization approved the section without the qualifying clause, but the Senate insisted on an amendment limiting the operation of this provision to persons who had or acquired the nationality of the foreign state by serving in its armed forces. 136

In interpreting this section the administrative authorities have been faced with two major problems: the definition of "armed forces", and the determination whether certain executive agreements signed by President Roosevelt constituted an express authorization of foreign service. In various cases the Board of Immigration Appeals held that a dual national of the United States and Canada who joined the Canadian Officers' Training Corps 137 or the Queens University Air Reserve 138 did not lose his United States citizenship, as neither of these organizations was an active component of the Canadian armed services. However, service in the Canadian Air Force by such a dual national extinguished his American nationality. 139 The executive agreements were construed line by line—one is tempted to say between the lines as well—and it was determined that a dual national of the United States and Mexico who was drafted into the Mexican Army after the conclusion of the Executive Agreement with Mexico on January 22, 1943, did not thereby lose his American citizenship. 140 On the other hand, the agreements with Great Britain and Canada were conversely interpreted, so that a dual national of the United States and Canada, 141 or of the United States and Britain, 142 would lose his American nationality since his service "was not expressly authorized by the laws of the United States." The Executive Agreement of June 13, 1944, with China was held to protect the American nationality of a dual national if he was drafted into the Chinese Army, but not if he enlisted! 143

143. Rudnick, op. cit. supra note 142, at 12.
Since Section 401 (c) did not go into effect until January 13, 1941, and was not retroactive, it has been held that a dual national who entered the armed forces of the foreign state of his twin nationality prior to that date did not expatriate himself. Such a person being under obligation to complete his period of service, his remaining in the foreign army after January 13, 1941 could not be considered "voluntary." Similarly, a dual national of the United States and Portugal who was drafted into the Portuguese Army against his will was recently held to be a United States citizen, reaffirming the rule that expatriation must be based on voluntary action. However, the person affected must prove duress; mere induction under compulsory draft laws does not constitute duress unless the individual protested this action to the best of his ability.

Another question arose with regard to a minor with dual nationality who entered the armed forces of the state of his twin allegiance before he reached the age of eighteen. In this event, he could not have been expatriated by his entrance due to minority, but did his continued service after reaching eighteen expatriate him? Secretary of State Marshall referred this problem to Attorney General Clark in 1947, and the Attorney General ruled that

"... My conclusion is that continued service after the age of eighteen, whether the service began prior thereto by voluntary enlistment or by involuntary induction, is not alone sufficient to cause loss of United States nationality. I think such continued service would be sufficient, however, in any case in which it was reasonably possible for the individual concerned to obtain a discharge and he, knowing that he could obtain discharge, failed to do so within a reasonable time after reaching eighteen years."

Loss by Accepting Office or Employment

Section 401 d of the Nationality Act provided that an American would lose his citizenship by

"Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible."
Presumably an American who accepted such a position as a minor, or before the passage of the Nationality Act, would lose his nationality if he continued so to serve.

The primary task faced by the administrators in the operation of this provision was the determination of which posts foreign governments reserve exclusively for occupation by their nationals. For example, the Board of Immigration Appeals held that an American who took a school teaching job in Canada, a job as a forest ranger in Mexico, a position on a Canadian price control board, or a position in the Canadian Civil Service, did not thereby lose his American nationality. On the other hand, an American who took a police job in Mexico was thereby expatriated. Unfortunately the Department of State has not made available its determinations under this section so that the above list does not pretend to be comprehensive. However, the Department is keeping a watchful eye on Americans abroad who accept foreign office or employment.

**Loss by Voting in a Foreign Election**

Section 401 (e) of the Nationality Act of 1940 declared that an American would lose his citizenship by

"Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory."

The rationale offered for this provision was that participation in the affairs of another nation carries with it an allegiance which is inconsistent with American nationality.

The primary problem created for the administrators by this section was the definition of a "political election." If an American voted for a dog-catcher in Lyons or a melon inspector in Iran, did this act cost him his nationality? On what basis could a "political election"
be distinguished from a non-political election? One criterion was suggested by Assistant Secretary of State Berle, who said the test is "... whether political issues are involved or the campaign is being waged along political lines between candidates of opposing political parties." 158

Following this line of reasoning the Board of Immigration Appeals decided that a person voting in a non-partisan school board election in Canada was not thereby expatriated.159 However, the Board previously ruled that voting in a Canadian municipal election, most of which are conducted on an officially non-partisan basis, did cost an American his citizenship since the right to vote in such elections was, by statute, extended only to British subjects.160 This was true even if the person voting did so in violation of Canadian law.161

The process of divination used to separate non-political from political elections has also been applied to referenda. In 1942 the Canadian government held a "Dominion Plebiscite" to determine the attitude of the people towards sending drafted troops overseas. The Liberal Party of Mackenzie King found itself trapped behind an election pledge not to send such troops abroad, and used this device as a trial balloon. Inevitably Americans voted in this referendum, and a problem was created for the Immigration and Naturalization Service. Was this inspired political maneuver a "political election"? The Board of Immigration Appeals, relying on a common sense approach, held that this plebiscite was not a "political election" but a glorified public opinion poll conducted under official auspices. Pointing out that the result was not binding on the Canadian government, the Board said "the term 'political election' extends to a vote upon a question submitted for the determination of the electorate." 162 In other words, the basis for distinguishing a political from a non-political election was the conclusive nature of the vote rather than the subject matter.

But this interpretation also had its drawbacks. A vote in some foreign town on the question of whether or not to extend the sidewalks fifty feet thus became a "political election." In 1946 the Board was confronted with the question of whether voting in a municipal "local option" referendum in Canada expatriated an American woman. The

159. In the Matter of C., file #56175/489 (B.I.A. 1945). See also In the Matter of R.R., file #A-6877345 (B.I.A. 1950) where it was held that voting for the officers of a rural farm cooperative organized by the Mexican government was voting in a political election.
Board asked Mr. Flournoy, then Legal Advisor to the State Department, for his views, and Flournoy stated it was not a "political election." The Board of Immigration Appeals accepted this view, but was reversed by the Attorney General. As Mr. Clark did not see fit to divulge his criteria for separating one election from another the question must be considered open.

However, these are borderline cases. The majority of those which arise can be decided on a rather simple basis. Although the State Department has not divulged any material on the subject, apparently several thousand Americans lost their citizenship by voting in the critical Italian election of April, 1948. The American Consul at Haifa warned United States citizens against voting in the recent Israeli election. Participation in a general election in a foreign state is obviously voting in a "political election". Unquestionably any American who voted in the recent referendum to determine the future sovereignty of French India, or in the United Nations' Kashmir plebiscite, would lose his citizenship.

Citizenship can not be lost under color of this provision by any American under eighteen years of age. Nor does it apply to a person who voted under duress. Approximately seven hundred Japanese-Americans voted in the Japanese general election in April, 1946. The Department of State held that they had thereby expatriated themselves, but a United States District Court reversed this holding on two counts. First, it determined that occupied Japan was not a "foreign state" within the meaning of the statute, but a sort of United States mandate ruled by an American proconsul. Second, both psychological and actual duress were applied to the plaintiffs to get them to vote, so that even if Japan were a foreign state their voting would not have resulted in expatriation.

Loss by Renunciation in a Foreign State

Section 401 (f) of the Nationality Act of 1940 provided that American nationality would be lost by formal renunciation. This section was explained as being designed for dual nationals.

164. Ibid.
165. See editorial, N.Y. Times, June 12, 1949, p. 6E, col. 2: "A joint resolution has been introduced in both houses of Congress to exempt the two or three thousand Americans in Italy who have lost their citizenship. . . ."
166. N.Y. Times, Jan. 18, 1949, p. 9, col.1.
"... who, upon reaching majority, elect the nationality of a foreign state. It is obvious that such persons cannot obtain naturalization in the foreign state, since they are [already] nationals thereof, and it frequently happens that there are no provisions in the laws of the foreign state ... under which they may take an oath or make a formal affirmation of allegiance thereto, and thus divest themselves of their American nationality under the provision of [Section 401 (b)]. ... This provision may also be of use to American nationals who, upon marrying aliens, acquire the nationality of their alien husbands or wives, and who may desire to have their American nationality terminated." 170

The Secretary of State immediately provided a standard form for the renunciation of American citizenship, and apparently no renunciation is valid unless this form is used.171 During the fiscal year 1945, the only one for which statistics have been released, three hundred and forty-four American nationals expatriated themselves in this manner. It has apparently been utilized by several young Americans as a protest against "separate national sovereignties," these idealists becoming on completion of the procedure "World Citizens".172 Americans under eighteen are barred from thus expatriating themselves by the statute.173 Presumably if someone under eighteen did slip by, the doctrine of "confirmatory acts" would be employed to determine whether he retained his intention of renunciation after reaching majority. It is difficult to conceive of duress in the operation of this provision, but unquestionably if it could be proved that the oath of renunciation was taken under pressure, loss of nationality would not result therefrom. The statutory provision that loss of citizenship under Section 401 (f) will not result from an oath of renunciation taken in the United States 174 is in this case superfluous, since the only people qualified to administer the oath are the foreign representatives of the State Department.

Loss by Committing Treason

Section 401 (h) declared that an American would lose his citizenship by conviction of "any act of treason against, or attempting by force to overthrow or bearing arms against the United States".175

170. 1 CODIFICATION 67.
171. Dep't State, Departmental Order No. 908, Jan. 2, 1941.
175. 54 STAT. 1169 (1940), 8 U.S.C. §801h (1946).
This provision was not in the Nationality Act as suggested by the President's Committee, nor was it in the draft as approved by the House Committee on Immigration and Naturalization. It was added during the discussion on the floor of Congress at the suggestion of the Senate Committee on Immigration.

It should be noted that this provision penalizes more than mere treason. Its proscription encompasses those who "attempt by force to overthrow" the government of the United States.

This provision raises several problems. In the first place, the statutory limitation to persons over eighteen years of age does not apply to Section 401 (h). This could indicate that Congress felt that age was irrelevant to the commission of, and punishment for, treason. On the other hand, in view of the tradition that a minor could not expatriate himself, it could indicate that Congress did not intend this section to apply to Americans under twenty-one—the legal age of majority. A second problem is concerned with the application of this provision. What is to be done to put it into effect? Is the person convicted of treason upon his release from jail to be put, like Hale's Man Without A Country, on a boat to sail the seven seas to the end of his days? The Constitution forbids his being branded "EXP" and turned loose, so how can persons expatriated under this provision—stateless persons in the full sense of the term—be distinguished from other members of society once they have completed their terms in prison? Presumably the answer to this question must await the release from jail of "Axis Sally" Gillars and Edward Best, both recently convicted of treason.

It should be noted that this provision is a probable result of congressional refusal to distinguish between loss of citizenship and loss of the rights of citizenship. What the congressmen probably intended was that anyone who was convicted of treason would lose his civil rights—a stipulation which already appears in part on the statute books. In the sense that it is used in Section 401 (h), loss of nationality is a penalty measure not unlike the old practice of banishment employed by the Greeks against Aristiades and Themistocles. Presumably a Presidential pardon would carry with it reinstatement of nationality. Cases of treason are few and far between, so that the problems dis-
cussed above will probably never assume serious proportions. However, if this section were interpreted to embrace those like the Minneapolis Trotskyites, or the leaders of the American Communist Party, convicted of "advocating the overthrow of the Government of the United States by force and violence," a more serious problem would be created.

RENUNCIATION IN THE UNITED STATES

The Act of July 1, 1944 amended the Nationality Act of 1940, adding a provision that in time of war American citizenship would be lost by renunciation in the United States, subject for security reasons to the consent of the Attorney General. The background of this amendment is very interesting. In 1942 all alien Japanese and citizen Japanese-Americans living in the Pacific coast states were apprehended as a security measure, and herded into concentration camps designated "relocation centers." Subsequently, in an attempt to segregate the "loyal" from the "disloyal," the War Relocation Authority, which administered the relocation centers, asked each inmate to fill out a questionnaire. All citizen males were called upon to answer two specific questions considered relevant to "loyalty."

"27. Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?

28. Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese Emperor, or any other foreign government, power, or organization."

These questions were also asked of citizen women with the exception that they were queried as to whether they would volunteer for the Army Nurse Corps or the Women's Army Corps.

7,272 Nisei refused to swear unqualified allegiance. This refusal however, was due to far more than disloyalty—although unquestionably some Japanese-Americans were disloyal.

183. Ibid.
184. Ibid.
185. Important factors for such refusal were, in the words of the Acting Director of the War Relocation Authority:
   "(a) A protest against what many evacuees believed to be a violation of their rights as citizens.
   (b) In certain blocks at some centers, community pressure was very strong and the fear of physical violence apparently deterred some from answering affirmatively."
However, the West Coast congressmen were not interested in motivation, and soon introduced several bills in Congress to deprive persons who refused to swear unqualified allegiance of their citizenship. 188

Attorney General Biddle appeared before the House Committee on Immigration and Naturalization and succeeded in convincing the Committee that a less drastic measure would suffice. Section 401 (i) was the wording he suggested, and the Congress agreed to this form. 187

Approximately 5,000 Japanese-Americans renounced their United States citizenship under this provision. 188

The Japanese-American renunciants were interned until the conclusion of the war, the intention being to deport them as soon as such an operation was feasible. However, with the conclusion of the war many of the Nisei began to regret their hasty action and some of them instituted habeas corpus proceedings, claiming that they were unlawfully held in custody as aliens. Their renunciations, it was claimed, had been executed under duress, so that the oath had not really cost them their American nationality. In 1947, a sweeping decision of the Southern District of California ruled that five Nisei had indeed renounced their nationality under duress. By implication, this decision undermined the whole government position, for the Nisei declared to be citizens were typical of the great majority of the group.

First, the court pointed out that plaintiff Inouye had renounced his citizenship at the age of seventeen. The Nationality Act provided that with the exception of Sections 401 (g), 401 (h) and 401 (i), no
national under eighteen years of age could be expatriated.\textsuperscript{189} This was interpreted by the government to mean that age was \textit{no limitation} on expatriation under Section 401 (i) providing for renunciation in the United States. The court rejected this contention, stating that the purpose of this provision was to lower the age limit on loss of citizenship for the specified grounds (voting in a foreign election, serving in a foreign army, etc.) from twenty-one to eighteen. Where this lower age limit was not specified, the Judge implied, the legal age of majority—twenty-one—should be assumed.\textsuperscript{190}

Second, the renunciations of all five were declared invalid as obtained under duress. True, no one had forced these Nisei to sign, but

\begin{quote}
"The modern view and true doctrine of duress and coercion . . . [based on] threats and fear of actual or apparent physical injury or violence producing a state of mind of the injured party . . . [depends on] whether such person was deprived of the free exercise of his will power. Freedom of will is essential in the exercise of an act which is urged to be binding, and the right of citizenship . . . can only be waived as the result of free and intelligent choice."
\end{quote}

The United States appealed this determination, and obtained a reversal on a jurisdictional point. The appellate court did not discuss the substance of the decision below.\textsuperscript{192}

Encouraged by this decision, Tadayasu Abo and Mary Furuya introduced action in the District Court, Northern District of California, on behalf of 2300 renunciants. They were exceptionally fortunate in their judge, for Goodman, D. J., wrote a brilliant and cogent opinion combining sociology and jurisprudence in a manner reminiscent of Justice Brandeis. Describing the conditions in the relocation camps, the Judge held that although undoubtably some Nisei renounced of their own free will, the great majority were coerced. "The renunciants acted abnormally because of abnormal conditions not of their own making."\textsuperscript{193} On this basis he held that unless the United States wished to introduce evidence in specific cases to prove that the renunciation was taken without coercion—presumably by a pro-Japanese—all 2300 Nisei must be held citizens of the United States. He concluded:

\begin{quote}
"The Government of the United States under the stress and necessities of national defense, committed error in accepting the renunciations of the greater number of the plaintiffs herein. . . .
\end{quote}

\begin{itemize}
\item[189.] 54 Stat. 1170 (1940), 8 U.S.C. §§ 801 g, h, and i (1946).
\item[190.] Inouye v. Clark, 73 F. Supp. 1000, 1002 (S.D. Cal. 1947).
\item[191.] \textit{Id.} at 1004.
\item[192.] Clark v. Inouye, 175 F.2d 740 (9th Cir. 1949).
\item[193.] Tadayasu Abo v. Clark, 77 F. Supp. 806, 811 (N.D. Cal. 1948).
\end{itemize}
The Government must be neither reluctant nor evasive in correcting wrongs inflicted upon a citizen. By so doing it demonstrates to the people of the world the fairness and justice of our form of society and law.”

While the *Inouye* decision was reversed at the appellate level with no discussion of the issues of the renunciation, and the *Abo* case apparently was not appealed, the Court of Appeals for the Ninth Circuit undertook in a separate piece of litigation to settle the substantive issue. Miye Mae Murakami and two others, American citizens of Japanese ancestry, sued Secretary of State Acheson to cancel their wartime renunciations. They claimed that under the conditions which existed on the Pacific coast in 1942, these repudiations of nationality were in fact exacted under duress. The Southern District of California rendered judgment for the Nisei women, and the United States appealed. Chief Judge Denman, in an opinion bristling with hostility towards the wartime treatment of the Japanese-Americans, held that the renunciations were “null, void and canceled” as based on mental fear, intimidation and coercion. Apparently there has been no appeal from this decision, so the renunciation problem appears to have been finally settled.

There will be no more such renunciations—for the moment at least—as Section 401 (i) was a wartime measure which became inoperative on July 24, 1947. As far as the record discloses, the Japanese-Americans were the only persons to resort to this statute.

**Loss by Desertion—The Old Law and Its Successors**

Section 401 (g) of the Nationality Act of 1940 provided that any American would lose his citizenship by deserting the armed forces of the United States in wartime. Section 401 (j), added by the Act of September 27, 1944, declared that anyone who left or remained outside the limits and jurisdiction of the United States, “for the purpose of evading or avoiding training and service in the land or naval forces of the United States” was subject to denationalization. These sections were the logical successors of an old desertion statute.

195. Judge Denman, it should be added, had stated his opinion of the evacuation of the American-Japanese in similar uninhibited terms in 1942. See *Korematsu v. United States*, 140 F.2d 289, 300 (9th Cir. 1943).
196. *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949).
197. See 61 STAT. 451, 454 (1947).
The Act of March 3, 1865 provided that any person who thereafter deserted the United States armed forces was deemed

"... to have voluntarily relinquished and forfeited their rights of citizenship and their rights to become citizens; and such deserters shall be forever incapable of ... exercising any rights of citizens [of the United States]."

The meaning of the phrase "rights of citizenship" was never adjudicated, although courts had decided that conviction by a court-martial and approval by the President were procedural prerequisites to enforcement.

In 1912, this statute was amended by making its provisions applicable to any person who in wartime deserted the armed forces or,

"... being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service."

Although there were no judicial decisions on the subject, this law must have affected a large group of people during World War I. This fact can be deduced from President Coolidge's "Proclamation of Amnesty" of March 5, 1924, in which he declared:

"... Whereas, many persons who deserted from the military or naval service of the United States on or after November 11, 1918, and therefore were duly convicted of desertion committed in time of war, are now leading blameless lives and have reestablished themselves in the confidence of their fellow citizens, ... Now, therefore, be it known, that I, Calvin Coolidge, President of the United States of America, ... do hereby declare and grant amnesty and pardon to all persons who have heretofore or may hereafter be convicted of desertion ... committed ... on or since November 11, 1918, to the extent that there shall be ... fully remitted as to such persons any relinquishment or forfeiture of their rights of citizenship."

This proclamation, affecting only those who deserted after November 11, 1918, was motivated by the fact that the United States was technically at war with the Central Powers until July 2, 1921, so that desertion committed when all the world but the United States was at peace resulted in the application of a wartime penalty. It should be noted

200. 13 STAT. 490 (1865).
202. 37 STAT. 356 (1912). (Repealed by 54 STAT. 1172 et seq. (1940), 8 U.S.C. § 504 (1946).)
203. 43 STAT. 1940 (1924). (Emphasis added.)
that President Coolidge, like the framers of the 1865 law, considered the penalty as involving not loss of \textit{citizenship}, but loss of civil rights. This is indicated by his use of the term "\textit{fellow citizens}" in the Proclamation.

Apparently, this was not the State Department’s point of view. The proposed Nationality Act contained a provision that loss of American \textit{citizenship} would result from wartime desertion. Justifying this section at the Hearings on the Nationality Act, Flournoy of the State Department stated that this had always been the Department’s construction of the Act of 1865.

In other words, the Department of State held that citizenship and rights of citizenship, in this context, were indistinguishable. However, the Board of Immigration Appeals differed from this interpretation. Ruling on a question irrelevant here, the Board stated:

"This conclusion . . . assumes that a person may have the status of citizenship without possessing, . . . the 'rights of a citizen'. Under the Federal Constitution this result, we believe, is entirely possible. In many instances Congress has deprived citizens of all or a part of the ordinary rights of citizenship. Deserters from military service in time of war forfeit their rights of citizenship. . . . Citizens who commit certain Federal crimes are barred from holding public office."

In any event, the distinction no longer exists, since the congressmen adopted Mr. Flournoy's view and included Section 401 (g) in the Nationality Act of 1940. Desertion within or without the United States effects loss of citizenship, although no one under eighteen years of age can be thus expatriated. There are no recorded administrative or judicial decisions under this provision.

But this enactment did not encompass those who departed from the jurisdiction of the United States to avoid military service—and there were many of them. The serious nature of the problem of draft

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205. 1 Codification 68.
206. \textit{Nationality Hearings} 38.
209. Ibid., §403b.
210. Krichefsky states that in the fiscal year 1945 one person thus lost his citizenship. Supra note 226, at 14. There is no other available record of this case. The only recorded case in which the State Department considered the problem of distinction between loss of \textit{citizenship} and \textit{rights of citizenship} was the Bergdoll case. The department instructed that he should not be issued a passport. When he returned to the United States in 1939 to serve his sentence, the I. & N. S. claimed the State Department had held him an alien in 1920, and therefore he could not be admitted \textit{as a citizen}. The Attorney General ruled that he should be admitted as a citizen, "leaving the matter to be determined by the courts at such proper time in the future as subsequent developments may warrant." 39 Ops. \textit{Att’y Gen.} 303 (1939).
dodgers led the Attorney General on November 18, 1943, to request Congress to enact adequate legislation.\textsuperscript{211} Congress, in the Act of September 27, 1944, incorporated the Attorney General's recommendations into the Nationality Act, providing that loss of citizenship would result from

"Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States." \textsuperscript{212}

This section immediately created extremely difficult problems for the administrative authorities. First of all, there was no stipulation as to the minimum age limit. Did it apply only to those over age twenty-one? Or could it be utilized against those under twenty-one? After the Central Office of the Immigration and Naturalization Service and the Board of Immigration Appeals had reached diametrically opposing points of view on this question, the Attorney General decided that Congress intended that the statute should apply to those under twenty-one.\textsuperscript{213} Since that time a district court has held in the \textit{Inouye} case\textsuperscript{214} that the age limit under Section 401 (i)—which in this respect was identical in form with 401 (j)—was twenty-one. In the absence of congressional specification, that court held, the traditional minimum age of twenty-one is a prerequisite to loss of nationality. However, Attorney General Clark was unquestionably correct in his interpretation of the will of Congress. The legislators obviously intended that this section should be applicable to anyone eligible for the draft, that is, any male over eighteen years of age.

Although no citizenship was lost under this provision prior to September 27, 1944, the administrators have held that a person who departed from the United States before that date but remained outside afterwards with the intention of avoiding conscription lost his citizenship.\textsuperscript{215} This was true even where the departure was for sickness, if it could be demonstrated that the \textit{refusal to return} was motivated by draft-shyness.\textsuperscript{216} This section has also been held applicable to all for whom military service is an imminent possibility,\textsuperscript{217} including persons

\textsuperscript{211} Cited by the Central Office In the Matter of A-y H., file #56196/251 (1945).
\textsuperscript{213} In the Matter of A-y H., \textit{supra} note 249; reversed by Att'y Gen. (1946).
\textsuperscript{214} \textit{Inouye} v. Clark, 73 F. Supp. 1000 (S.D. Cal. 1947), \textit{rev'd on other grounds}, 175 F.2d 740 (9th Cir. 1949).
\textsuperscript{215} In the Matter of V., file #56175/93 (B.I.A. 1945).
\textsuperscript{216} In the Matter of V.L., file #A-6347956 (B.I.A. 1947).
\textsuperscript{217} In the Matter of V.D., file #56196/783 (B.I.A. 1946).
under eighteen years of age. However, in each case the administrative authorities examine all the evidence very carefully to determine whether the required "intent to avoid military service" is present, and have even gone so far as to hold in some instances where the person concerned confessed such intent, that the supplementary evidence did not warrant giving this confession credence. Loss of citizenship may not be based on mere violations of Selective Service regulations—although such violations "may be shown by the evidence to be an integral step in the consummation of the proscribed purpose"—and, on the other hand, a belated compliance with the regulations is no bar to establishing prior intent to evade service.

It should be noted that Section 401 (j) penalizes remaining outside the jurisdiction of the United States with the intent of avoiding service equally with departing from the United States with this in mind. However, the administrators have taken the view that for a person thus to lose his American nationality it must be proven that he "intended to come to the United States but refrained from doing so because he feared military service." This view put a heavy burden of proof on the administrative authorities, but Americans have been denationalized, when the evidence demonstrated that: 1) the citizen came to the United States boundary, applied for admission, but withdrew his request on hearing of his military obligations; 2) the person "hovered at the United States border for about 14 months before seeking admission"; 3) the citizen discussed returning with the United States consular officials; 4) the American demonstrated by conversation with his friends that he was avoiding the draft; 5) the person had no good reason to remain abroad; 6) the citizen's brothers had all come to the United States, and he had no excuse for not coming himself; 7) the American registered abroad after V-E Day with the belief that Japan was close to defeat.

Departure from the United States in order to result in loss under this section must be "voluntary". However, an ingenious American

221. Sharon, Loss of Citizenship by Draft Dodgers, 5 I. & N.S. MONTHLY REV. 97, 98 (1948). The author is indebted to Mr. Sharon for his valuable assistance.
224. In the words of one administrator: "Experience ... makes it clear that it is no easy task to establish the proscribed motive specified in this statute. Proof of a state of mind is elusive especially where the individual is bent on thwarting discovery." Sharon, op. cit. supra note 221, at 99. See e.g., Pence v. McGrath, 91 F. Supp. 23 (S.D. Cal. 1950).
225. Sharon, op. cit. supra note 221, at 99.
who succeeded in having himself arrested and deported as an alien, did not convince the Board of Immigration Appeals that his departure was involuntary. But the section does not apply to acts committed within the United States, so that an American who feigned alienage and spent the war working in the United States as a contract laborer could not be reached. Nor does a deserter from the United States Army who takes refuge abroad fall within the purview of this provision, as Section 401 (g) has special reference to such Americans.

With regard to minors, the controlling view at the moment is that Congress intended this denationalization provision to apply to anyone eligible for service in the armed forces. Thus, it has been held applicable to persons below twenty-one. Presumably if a foresighted lad left the United States when he was fifteen with the intention of avoiding the draft, his remaining outside the country after attaining the age of eligibility would cost him his nationality. A citizen who left the United States, or remained outside the United States, under duress—a rather improbable eventuality—would not be expatriated. The Board of Immigration Appeals has held, however, that such departure can not be considered coerced when the citizen claims that he is obeying a parental order.

**Presumption of Loss by Six Months Residence Abroad**

Section 402 of the Nationality Act declares in effect that any American who has nationality under the law of some foreign state, or any American who is the son of a person who has such dual nationality, who resides for six months in the state which claims either him or his parent as a national, shall be presumed to have entered the armed forces of such state or accepted employment under such state for which only its nationals are eligible. Furthermore, this presumption operates whether or not the individual has returned to the United States until overcome in accordance with established regulations. This is indeed a peculiar enactment.

Queried as to its purpose, officials of the Immigration and Naturalization Service maintained silence, stating only that the expatriations by force of its provisions had "been few and far between." How-

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229a. But see In the Matter of C.Z., file #A-6819342 (B.I.A. 1948) for such a case.
231. 54 STAT. 1169 (1940) ; 8 U.S.C. § 802 (1946).
ever, the answer to this question can be found elsewhere; i.e., in the pages of the *Hearings* on the Nationality Act of 1940.

This section was not included in the original proposed Nationality Act, but was added in the course of the hearings at the request of the War Department. Most of the discussion was held during executive sessions of the sub-committee, but there are enough passing references to this proviso elsewhere in the text so that its purpose can be fairly definitely determined. First of all, the original wording applied only to persons born in incorporated territories of the United States, or of a parent born in such a territory. Therefore, the only people who would have fallen within the purview of this provision as originally drawn were Americans born in Alaska and Hawaii, or of a parent born in Alaska or Hawaii.

Stray comments made at the Hearings show that the legislation was aimed at certain inhabitants of Hawaii, particularly at some of the Hawaiian Japanese, the "Kibei" who returned to Japan and served in the Japanese Army. In all probability the War Department believed that the Japanese government was training a "Fifth Column", and that some method should be devised to bar those who had been thus trained from returning to the United States.

The Hawaiian and Alaskan Delegates to Congress objected strenuously to this piece of discrimination against their bailiwicks, and, probably as a result of their objections, the wording of the section was changed so that it no longer applied specifically to inhabitants of incorporated territories. Changing the wording of the statute did not affect the operation of the measure, since the administrators knew what they were to look for.

The rules promulgated by the Department of State and the Department of Justice were very simple. Residence for the purpose of this section commenced after January 13, 1941, and the six months could not begin until the person concerned was eighteen years old. Any person could overcome the presumption by proving that he had not served in a foreign army or held office.

233. *Nationality Hearings* 147.
234. *Ibid.*; see 1 CODIFICATION 69.
235. *Nationality Hearings* 150. For example Mr. Flournoy of the State Department stated: "If a man is a citizen of the United States and Japan, both countries, as he would be in all these cases we have been discussing, and he is living in Japan . . . . if a Japanese is living in Hawaii, then under the kind of case we have been discussing, he goes to Japan and they take him into the Army when he reaches the military age [he always pleads duress]." *Nationality Hearings* at 150. (Emphasis added.) See also *id.* at 168.
236. *Id.*, at 364; 86 CONG. REC. 11962 (1940).
In summary, Section 402 appears to have been a special provision designed to cope with an extraordinary situation. According to officials of the Immigration and Naturalization Service, it was a wartime expedient and is not now considered an active part of the Nationality Law.\footnote{238}

**THE COURTS AND LOSS OF NATIONALITY**

What legal recourse does one have from an unfavorable administrative determination? Prior to 1940, the right to obtain a judicial determination of one's citizenship was in doubt. In the famous case of *United States v. Ju Toy*\footnote{239} the Supreme Court held that Ju Toy, whom the Secretary of Commerce and Labor had determined to be an alien, had no right to a judicial decision on the issue. Unless someone in Ju Toy's position could introduce new evidence on the matter, or prove an abuse of authority by the administrator, the administrative decision was conclusive. However, this rule was seriously modified in later decisions, the Court pointing out that citizenship in such an administrative proceeding was a *jurisdictional fact*—unless the person concerned were an alien, the Secretary of Commerce and Labor had no authority over his person.\footnote{240} In effect, if an alleged alien could present a good prima facie case for citizenship, the courts, usually in habeas corpus proceedings, would review the decisions of the administrators.

Another method of getting into court was employed in the *Elg* case, where Miss Elg brought suit against the Secretary of Labor to obtain a declaratory judgment that she was a citizen, and simultaneously enjoined Secretary Perkins from deporting her.\footnote{241} Ethel MacKenzie used injunctive proceedings in her attempt to clarify her citizenship status.\footnote{242}

These methods suffered from one outstanding limitation. They could be employed solely in the United States. What recourse did an American have who was informed by the Consul at Benin or Rangoon that he was no longer a citizen? The records do not disclose that any provision was made for this type of case. The only feasible alternative for such a person was to try and slip into the United States surreptitiously and, when apprehended, sue out a writ of habeas corpus. Considering the importance of American citizenship, there were remarkably

\footnote{238. Conversations with J. P. Sharon, Examiner, I. & N.S., and Charles Gordon, Senior Counsel, I. & N.S., Washington, D.C., July 6, 1949.}
\footnote{239. 198 U.S. 253 (1905).}
\footnote{240. *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927); *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Kwock Jan Fat v. White*, 253 U.S. 454 (1920).}
few procedural safeguards protecting the individual against loss of nationality by administrative injustice.

Fortunately, this is no longer the case. Although no provision for judicial review of administrative denationalization was included in the proposed Nationality Act, or in the act as approved by the House Committee on Immigration and Naturalization, the Senate insisted on adding Section 503 to the statute, providing that any person denied nationality by any Department or agency,

"... regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States." 245

If the person instituting suit was abroad, the section continued, he could obtain a provisional passport from a United States diplomatic or consular officer in order to go to the United States and defend his claim. However, anyone who is allowed to come to the United States on such a provisional passport is subject to immediate deportation if he loses his case.

There still remains an element of administrative discretion in this process. The law declares that the provisional passport will be granted to a person on whose behalf suit has been instituted, if he submits

"a sworn application showing [the United States diplomatic or consular officer] that the claim of nationality presented in such action is made in good faith and has a substantial basis ... and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision." 246

Although the Secretary must put his reasons for denial in writing, these exercises in composition are not available for the use of students of nationality problems. Therefore it is impossible to say at this time

243. 1 Codification 80.
244. Nationality Hearings 360.
245. 54 Stat. 1171-2 (1940). In addition, § 501 prescribed a certificate of loss of nationality to be filled out by the State Department and presented to each expatriate. In this manner, anyone who loses his nationality receives notification, and evidence on which to base a law suit under § 502. See Dep't State, Departmental Order No. 909, Jan. 2, 1941. For an example of a suit by one outside the United States, see N.Y. Times, June 1, 1949, p. 33, col. 6.
what criteria are used in accepting and rejecting applications under this section.

A steady trickle of lawsuits have come into the courts under Section 503. The outcome of most of these cases has emphasized the value of this provision in protecting the individual against arbitrary administrative determinations. Thus it would appear that at last procedural barriers have been established to prevent United States citizens from being arbitrarily stripped of their nationality.

**Conclusions**

It is still too early to reach more than tentative judgments on the operation of the Nationality Act of 1940, particularly since many of its expatriation provisions did not go into full effect until the end of the war. As a result, this analysis, like Mahomet's coffin, is suspended half-way between heaven and earth—the heaven of future consistency and the earth of past confusion. The following suggestions appear to the author to follow from the discussion.

*First*, all administrative decisions in connection with loss of nationality should be published at regular intervals. At present the decisions of the Board of Immigration Appeals are available for scrutiny, but the Department of State refuses even to discuss the criteria by which it proceeds. One of the drawbacks of this analysis is that it is based on incomplete data since the current

"administrative determinations of the Department [of State] on this question are for the guidance of the personnel of the Department and its officers in the field. They are not furnished to other persons." 248

Loss of nationality is an area particularly vulnerable to administrative injustice, and one cannot but feel that the State Department is the un-
easy possessor of a closet full of skeletons. This should not be the case. The State Department should be required to publish an annual abstract of its administrative determinations on loss of nationality. It is true that judicial review is available in theory to any person who believes himself unjustly denationalized. But, in practice there may be an administrative labyrinth between the individual and the United States courts. It should be emphasized that before a person can apply to the State Department for a provisional passport to come to the United States and defend his citizenship, someone has to institute suit on his behalf. The case of Dos Reis comes to mind at this point. In order to get a judicial determination that he served in the Portuguese Army under duress and therefore did not lose his citizenship, Dos Reis had to stow away in an aircraft bound from the Azores to Massachusetts, and, when apprehended, institute habeas corpus action. Presumably, if he had not illegally stowed away, he would still be arguing with the United States Consul at Fayal.

Second, the present tendency towards using denationalization as a penalty should be discarded. At the moment loss of citizenship is a supplemental penalty for desertion, treason, and leaving the United States to avoid conscription. Presumably, the intention of the lawmakers was to deprive those convicted of the above crimes of their civil rights. But as the law now reads, treason, desertion, and leaving the country to avoid military service are listed as criteria for the determination of when an American has voluntarily expatriated himself, along with voting in a foreign election, or taking an oath of allegiance to a foreign state. Carried one step further, this could be very dangerous to civil rights. For example, in March, 1949, Congressman Walter of Pennsylvania introduced a bill into the House of Representatives to amend the Nationality Act by making membership in the Communist Party evidence of voluntary expatriation! This would introduce the old penalty of banishment into American law disguised as "voluntary expatriation". The legitimate end of an expatriation statute is to eliminate international problems of nationality by establishing standards by which it can be determined when an American has transferred his allegiance to another sovereign. Ideally speaking, an American

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249. The Immigration & Naturalization Service began publishing its administrative decisions to comply with the Administrative Procedure Act of 1946, 60 Stat. 237. See Ugo Carusi, The Federal Administrative Procedure Act and the Immigration and Naturalization Service, in The Federal Administrative Procedure Act and the Administrative Agencies (1947). The Department of State was exempted from the provisions of this statute, for by its terms it was not to apply to the conduct of foreign relations.

250. Dos Reis ex rel. Camera v. Nicolls, 161 F.2d 860 (1st Cir. 1947).

should not be deprived of his citizenship until he has obtained that of some foreign state. At the very least, expatriation provisions should not be employed in the gratuitous creation of stateless persons by adding loss of citizenship to the other penalties for crimes against the sovereign.

Third, Section 404 of the Nationality Act, providing that a naturalized American who establishes foreign residence for longer than the stipulated periods loses his citizenship, should be amended so that such residence would create a rebuttable presumption of loss of nationality. Although the present provision may not be unconstitutional, it certainly is unwise. Assuming for the purpose of argument that a Supreme Court which allowed native born Americans to be classified on the basis of their ancestry\textsuperscript{22} will allow Congress to establish, for use in the conduct of foreign affairs, a classification among citizens based on birth as distinguished from naturalization, there is no reason why this classification should be employed in effecting loss of citizenship. The State Department’s fondness for clean cut rules may well be subordinated to the desire to prevent injustice being done to adopted Americans. In effect, the above suggestion entails a return to the 1907 procedures in this matter.

In conclusion, the Nationality Act of 1940 was an attempt to bring order out of chaos. Although some anomalies still remain, the methods by which American citizens lose their nationality have been codified and regularized as never before in our history. It is easy to criticize the administrative authorities for their early zig-zags, but acquaintance with the subject matter and its complexity forces one to respect their courage in tackling these knotty problems. However, today, while the problems are not as unexplored as before, there are more of them, and the administrative authorities in the Departments of State and Justice are making a tremendous number of decisions with a vital effect on the lives of human beings scattered throughout the world. It thus becomes even more imperative that all these decisions be available for public scrutiny—preferably in published form like those of the Board of Immigration Appeals—for administrative injustice burgeons in darkness.

\textsuperscript{252} Korematsu v. United States, 323 U.S. 214 (1944).