

# Acquisition of Foreign Citizenship the Limits of *Afroyim v Rusk*

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### Recommended Citation

Alan M. Gunn, *Acquisition of Foreign Citizenship the Limits of Afroyim v Rusk*, 54 Cornell L. Rev. 624 (1969)  
Available at: <http://scholarship.law.cornell.edu/clr/vol54/iss4/7>

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## ACQUISITION OF FOREIGN CITIZENSHIP: THE LIMITS OF *AFROYIM v. RUSK*

In *Afroyim v. Rusk*<sup>1</sup> the Supreme Court abandoned its section-by-section attack on the expatriation provisions of the Nationality Act of 1940<sup>2</sup> and the Immigration and Nationality Act of 1952,<sup>3</sup> and stated flatly that an American citizen<sup>4</sup> has "a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."<sup>5</sup> Commentators have suggested that the impact of *Afroyim* may be restricted by a broad definition of "voluntary relinquishment."<sup>6</sup> In particular, it has been suggested that one who voluntarily obtains naturalization in a foreign country should be expatriated,<sup>7</sup> and that such result can be considered a "voluntary" renunciation under *Afroyim*.<sup>8</sup> Congress could not so define "voluntary relinquishment" because *Afroyim* requires intent to relinquish citizenship in

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<sup>1</sup> 387 U.S. 253 (1967).

<sup>2</sup> Nationality Act of 1940, ch. 876, §§ 401-10, 54 Stat. 1168-71, *superseded by* Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1481-89 (1964). Specifically, *Afroyim* overruled *Perez v. Brownell*, 356 U.S. 44 (1958), and held unconstitutional § 401(e) of the Nationality Act of 1940, which provided for loss of nationality for voting in a foreign election. *Perez* had held that section to be constitutional under the implied power of Congress to regulate foreign affairs.

<sup>3</sup> 8 U.S.C. §§ 1481-89 (1964).

<sup>4</sup> The distinction between "citizenship" and "nationality" is immaterial for the purposes of this note and the terms will be used interchangeably.

<sup>5</sup> 387 U.S. at 268. Had the Court based its decision on the narrow ground that voting in a foreign election does not have "a sufficient relationship to the relinquishment of citizenship—nor a sufficient quality of adhering to a foreign power," *Perez v. Brownell*, 356 U.S. 44, 83 (1958) (Douglas, J., dissenting), to justify expatriation, the impact of the case on other expatriation provisions of the 1940 and 1952 acts would have been minimal. But by relying on the "unequivocal terms of the [Fourteenth] Amendment itself," 387 U.S. at 262, the Court has cast a shadow of constitutional doubt over the loss-of-nationality area. Despite the apparent clarity of the Court's opinion in *Afroyim*, Congress has made no attempt to revise the Immigration and Nationality Act. Indeed, the government continues to "expatriate" those who serve in foreign armies, though such expatriation seems clearly unconstitutional under the "voluntary relinquishment" test. *See* 1967 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 28. However, a recent Justice Department ruling suggests that the Government may take a more flexible attitude. The Justice Department has concluded that although "[v]oluntary relinquishment" of citizenship is not confined to a written renunciation . . . , "it is open to the individual concerned to raise the issue of intent. The ruling states that "[i]n each case the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision *and has in fact* voluntarily relinquished his citizenship." Justice Dep't Announcement, 37 U.S.L.W. 2444 (Jan. 18, 1969) (emphasis added).

<sup>6</sup> *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 138 (1967).

<sup>7</sup> *See id.* at 137-38.

<sup>8</sup> *See Note, "Voluntary Relinquishment" of American Citizenship: A Proposed Definition*, 53 CORNELL L. REV. 325, 332 (1968).

order for that citizenship to be lost. But the use of a presumption offers a constitutional and workable method of dealing with American citizens who obtain naturalization elsewhere.

## I

## THE CONCEPT OF "VOLUNTARY RELINQUISHMENT"

Presently, section 349(a)(1) of the Immigration and Nationality Act of 1952<sup>9</sup> provides that an American citizen shall lose his nationality by "obtaining naturalization in a foreign state."<sup>10</sup> Short of a formal renunciation of citizenship,<sup>11</sup> naturalization by personal application in another country would seem as unequivocal a renunciation of American citizenship as possible. There are, however, situations in which the retention of American citizenship despite the voluntary acquisition of a foreign nationality seems mandated by the reasoning of *Afroyim*.

As Mr. Justice Harlan observed in his dissenting opinion in *Afroyim*, "voluntary renunciation" may mean either of two things as applied to expatriation: it could mean that there must be "a specific intent to renounce citizenship"<sup>12</sup> or that the "commission of an act conclusively deemed by law to be a relinquishment of citizenship"<sup>13</sup> was voluntary. Although earlier decisions often used the latter interpretation,<sup>14</sup> *Afroyim* renders irrelevant the mere voluntariness of the act.<sup>15</sup>

Since a "specific intent to renounce citizenship" is, therefore, a

<sup>9</sup> 8 U.S.C. § 1481(a)(1) (1964).

<sup>10</sup> *Id.* In fiscal 1967, 2,010 persons lost their citizenship, 921 of them because of "obtaining naturalization in, or taking an oath of allegiance to, a foreign state." 1967 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 28. The number of persons losing their citizenship has remained between 2,000 and 2,100 per year since 1965. In previous years it was considerably higher, the drop being due to the Supreme Court's decision in *Schneider v. Rusk*, 377 U.S. 163 (1964), which held unconstitutional expatriation of naturalized citizens for extended residence abroad. See 1965 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 20.

<sup>11</sup> 8 U.S.C. § 1481(a)(6) (1964) provides that citizenship may be lost by formal renunciation before an American consular officer abroad. 8 U.S.C. § 1481(a)(7) (1964) provides for a formal written renunciation within the United States, if the United States is not at war, and if the Attorney General approves the renunciation as not contrary to national defense interests.

<sup>12</sup> 387 U.S. at 269 n.1.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Savorgnan v. United States*, 338 U.S. 491, 506 (1950); *Mackenzie v. Hare*, 239 U.S. 299, 311-12 (1915).

<sup>15</sup> Mr. *Afroyim's* voting in Israel was certainly voluntary.

necessary prerequisite for expatriation,<sup>16</sup> the meaning of "intent" must be considered. It cannot have a meaning similar to that of "intent" in the law of torts—a knowledge that conduct will produce a given result with substantial certainty<sup>17</sup>—since such an interpretation would require no more than a voluntary act and a knowledge of the law of expatriation, a result clearly prohibited by *Afroyim*. At the other extreme, "intent" might simply mean "desire." If so—and there is language in the *Afroyim* opinion to that effect<sup>18</sup>—even the voluntary acquisition of foreign citizenship would not result in loss of American citizenship if the person concerned desired to remain an American.

There is a middle ground, however, which has been most clearly expressed in the dissenting opinions in *Perez v. Brownell*.<sup>19</sup> Justice Douglas suggested that citizenship could be lost by an act that was both voluntary and "consistent with a surrender of the right granted."<sup>20</sup> The Chief Justice stated that "citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country."<sup>21</sup> This "dilution of allegiance" test has been embraced by several commentators<sup>22</sup> and is quite appealing, for citizenship is generally considered as compelling undivided loyalty to one's country. Yet the adoption of such a test would transform the wall of protection of citizenship built by the *Afroyim* court from a solid bulwark to a crumbling shell.<sup>23</sup> The problem, of course, is that the catalogue of acts "in derogation of undivided allegiance" is almost limitless. For instance, in 1949 a bill was introduced in Congress that would have taken away citizenship for becoming a member of a communist organization.<sup>24</sup> Even opposition to American foreign policy—to the war in Vietnam, for example—might indicate a dilution of allegiance. The first amendment might prevent

<sup>16</sup> *Afroyim v. Rusk*, 387 U.S. 253, 255, 268 (1967).

<sup>17</sup> See W. PROSSER, *TORTS* § 8 (3d ed. 1964).

<sup>18</sup> See 387 U.S. at 257: "[W]e reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power . . . to take away an American citizen's citizenship without his assent." (Emphasis added.)

<sup>19</sup> 356 U.S. 44, 62 (Warren, C.J., dissenting); *id.* at 79 (Douglas, J., dissenting).

<sup>20</sup> *Id.* at 83.

<sup>21</sup> *Id.* at 68 (footnote omitted).

<sup>22</sup> See, e.g., *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 138 (1967); Note, *supra* note 8, at 332; Comment, *An Expatriation Enigma: Afroyim v. Rusk*, 48 B.U.L. REV. 295, 303 (1968).

<sup>23</sup> Cf. Dunne, *Freedom of the Press*, in MR. DOOLEY ON THE CHOICE OF LAW 64 (F. Bander ed. 1963): "A law, Hinnessy, that might look like a wall to you or me wud look like a thriumphal arch to th' expeeryenced eye iv a lawyer."

<sup>24</sup> H.R. 3435, 81st Cong., 1st Sess. (1949).

the most extreme abuses of an "allegiance test"; but many activities, such as the burning of one's draft card, are not protected by the first amendment<sup>25</sup> and may demonstrate "derogation of undivided allegiance," yet such acts surely should not result in expatriation. Indeed, even voting in foreign elections might show a lessening of allegiance,<sup>26</sup> although the dissenters in *Perez* thought that it did not.<sup>27</sup>

Despite the *Afroyim* Court's citation of the principal dissents in *Perez*,<sup>28</sup> the rationale of *Afroyim* would seemingly bar an "allegiance test." Such a test would necessarily involve a legislative determination of what acts were sufficiently contrary to the obligations of citizenship to result in expatriation. The Court emphatically denied *any* congressional power to take away citizenship involuntarily.<sup>29</sup> If a person does not want to lose his citizenship, its loss as a result of doing specified acts is involuntary so long as there is any possibility that the act is reconcilable with a desire to retain American citizenship.

## II

### MISGUIDED LADIES AND OTHERS

It so happens that I know quite a number of misguided ladies who have married foreigners, and I am deeply concerned that when that takes place in the future there should not be any undue hardship inflicted on them. Let them have a complete right to keep their British nationality if they want to.<sup>30</sup>

The British Nationality Act of 1948<sup>31</sup> repealed a previous statutory provision that anyone naturalized in a foreign country would lose his British citizenship,<sup>32</sup> and substituted a procedure for formal renun-

<sup>25</sup> See *United States v. O'Brien*, 391 U.S. 367, 375 (1968).

<sup>26</sup> See, e.g., H.R. REP. NO. 216, 74th Cong., 1st Sess. 2 (1935): "Certainly any native-born citizen who becomes so much interested in the affairs of a foreign state as to voluntarily vote abroad . . . does not hold United States citizenship so dear that its loss . . . would seriously disturb such citizen voting abroad."

<sup>27</sup> See 356 U.S. at 85 (Whittaker, J., dissenting): "[N]or, I believe, can [voting in a foreign election] . . . be reasonably said to constitute an abandonment or any division or dilution of allegiance to the United States."

<sup>28</sup> 387 U.S. at 256 n.7, 267, citing *Perez v. Brownell*, 356 U.S. at 62 (Warren, C.J., dissenting), 79 (Douglas, J., dissenting).

<sup>29</sup> 387 U.S. at 257, quoted in note 18 *supra*.

<sup>30</sup> 156 PARL. DEB., H.L. (5th ser.) 1063 (1948) (remarks of Viscount Maugham).

<sup>31</sup> 11 & 12 Geo. 6, c. 56.

<sup>32</sup> British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17, § 13, repealed by British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 34, sched. 4, pt. II.

ciation of that citizenship, if desired.<sup>33</sup> Also repealed was a provision that a woman marrying a foreigner would lose her British citizenship if by her marriage she acquired another nationality.<sup>34</sup> The records of the debates on the 1948 Act show that Parliament was concerned with the welfare of British girls who had lost their citizenship by marrying foreigners and who later wanted to return to England.<sup>35</sup>

American law no longer expatriates women who marry aliens.<sup>36</sup> However, there may be circumstances in which it would be advantageous, or even necessary, for a woman to acquire foreign citizenship at the time of her marriage to a foreigner. In *Savorgnan v. United States*<sup>37</sup> petitioner voluntarily acquired Italian citizenship in order to obtain the consent of the Italian government to her marriage to a member of the Italian Foreign Service.<sup>38</sup> Despite the district court's finding of fact that petitioner had not intended to renounce her allegiance to the United States or to endanger her American citizenship,<sup>39</sup> the Supreme Court held that petitioner had expatriated herself. The decision was justified on the ground that the statutory expatriation provision were objective;<sup>40</sup> constitutional issues were not considered, even by the dissent.<sup>41</sup>

*Savorgnan* seems incorrect under the *Afroyim* test of voluntary relinquishment. An American woman who acquires foreign nationality

<sup>33</sup> British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 19. The 1948 Act provided in § 20 that naturalized British citizens could be deprived of their citizenship for continued residence abroad without annual registration of intent to retain citizenship, or even for "disloyalty." The British Nationality (No. 2) Act, 1964, c. 54, § 4 (2), repealed the provisions of the 1948 Act concerning expatriation for residence abroad. A similar American statutory provision was held unconstitutional in *Schneider v. Rusk*, 377 U.S. 163 (1964).

<sup>34</sup> British Nationality and Status of Aliens Act, 1914, 4 & 5 Geo. 5, c. 17, § 10, amended by British Nationality and Status of Aliens Act, 1933, 23 & 24 Geo. 5, c. 49, § 1, repealed by British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 34, sched. 4, pt. II.

<sup>35</sup> See 156 PARL. DEB., H.L. (5th ser.) 1061-67 (1948); 453 PARL. DEB., H.C. (5th ser.) 396, 423-25 (1948). In particular, a number of British subjects who had married Czechs were apprehensive about the impending communist takeover in Czechoslovakia. *Id.* at 424-25.

<sup>36</sup> Act of March 2, 1907, ch. 2534, § 3, 34 Stat. 1228, provided that an American woman who married a foreigner would "take the nationality of her husband." If the marriage ended, such a woman could regain her citizenship by registration. The Act was modified in 1922 to apply only to women who married foreigners ineligible for citizenship. Act of Sept. 22, 1922, ch. 411, § 3, 42 Stat. 1022. The Act of March 3, 1931, ch. 442, § 4(a), 46 Stat. 1511, amending § 3 of the 1922 Act, provided that no woman would lose her citizenship by marriage to an alien. *Cf.* 8 U.S.C. § 1489 (1964).

<sup>37</sup> 338 U.S. 491 (1950).

<sup>38</sup> *Id.* at 494.

<sup>39</sup> *Savorgnan v. United States*, 73 F. Supp. 109, 111 (W.D. Wis. 1947), *rev'd*, 171 F.2d 155 (7th Cir. 1948), *aff'd*, 338 U.S. 491 (1950).

<sup>40</sup> 338 U.S. at 497, 499.

<sup>41</sup> See *id.* at 507 (Frankfurter, J., dissenting).

in order to marry a foreigner may want to retain her American citizenship, if only to facilitate return to this country upon divorce or the death of her husband. An even stronger case for retention of American citizenship is presented when foreign law provides for "automatic" naturalization of women who marry its nationals, as did the law of England until 1948.<sup>42</sup> Constitutional questions notwithstanding, however, such "automatic" naturalization would not result in loss of American citizenship under present statutes.<sup>43</sup>

Similarly, acts done under duress will not result in loss of citizenship.<sup>44</sup> However, if the pressures upon a person to acquire foreign citizenship are not great enough to constitute duress, they may nevertheless be sufficient to make credible a declared intent to retain American citizenship. Plaintiff in *Dubonnet v. Marshall*<sup>45</sup> was an American woman resident in France during World War II. She had acquired French citizenship in order, she maintained, to avoid being interned by the Germans. The court did not "believe that the German Gestapo were ignorant of the real facts in the case nor [*sic*] that she actually believed that unless she became a French citizen her life was in danger . . . ."<sup>46</sup> Even if the court was correct on the facts, a person finding himself in an enemy-occupied country might have good reason for acquiring a foreign citizenship, while wishing to retain his American citizenship.

Perhaps the clearest example of a situation in which one might acquire foreign nationality without any intent to renounce American nationality is that of a person unaware of his American citizenship. Persons born in the United States and taken abroad as infants may be unaware of their place of birth, and thus of their American citizenship, for many years.<sup>47</sup> Could such a person have intentionally renounced his American citizenship, if, believing himself a citizen only of the country of his parents' nationality, he becomes naturalized in a third country? A more important group, from the point of view of likely future litigation, consists of those persons deprived of their citizenship for

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<sup>42</sup> British Nationality and Status of Aliens Act, 1933, 23 & 24 Geo. 5, c. 49, § 1, repealed by British Nationality Act, 1948, 11 & 12 Geo. 6, c. 56, § 34, sched. 4, pt. II.

<sup>43</sup> The law requires that, in order to lose his citizenship by naturalization abroad, a person must obtain "naturalization in a foreign state upon his own application" or upon that of his parent or guardian together with his failure to establish a permanent residence in the United States prior to his twenty-fifth birthday. 8 U.S.C. § 1481(a)(1) (1964).

<sup>44</sup> See, e.g., *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958): "[N]o conduct results in expatriation unless the conduct is engaged in voluntarily." (Italics by the court.)

<sup>45</sup> 80 F. Supp. 905 (D.D.C. 1948).

<sup>46</sup> *Id.* at 906.

<sup>47</sup> See, e.g., *Jalbuena v. Dulles*, 254 F.2d 379 (3d Cir. 1958).

voting in foreign elections or for violation of other statutory provisions since held unconstitutional by the Supreme Court.<sup>48</sup> Believing themselves stateless, many became naturalized in foreign countries. It could hardly be said that such people have renounced their citizenship by that naturalization. To deprive such people of their citizenship would take away the very right which *Afroyim* purports to assure.<sup>49</sup>

These few examples demonstrate that the automatic operation of section 349(a)(1)<sup>50</sup> to expatriate everyone voluntarily naturalized elsewhere is not constitutionally permissible under *Afroyim*. What, then, are the alternatives?

### III

#### DETERMINING INTENT—PRESUMPTIONS, PROCEDURES, AND POLICY

##### A. *The British System*

Under the British Nationality Act of 1948,<sup>51</sup> the only method by which a native-born citizen of the United Kingdom can lose his citizenship is by making a declaration of renunciation in a prescribed manner.<sup>52</sup> Such a rule has an appealing simplicity and definiteness, yet is unsatisfactory in many respects. A test which makes expatriation difficult may be harsher than an "automatic" expatriation provision. Dual nationality is generally an undesirable status for the person concerned: he may be subject to military service in two countries and, in the event of war between the countries of which he is a citizen, he may have "to pay with [his life] for adopting the cause of one of the States against the other."<sup>53</sup> Loss of nationality has been asserted as a defense in a number of prosecutions for treason.<sup>54</sup> It is not realistic to assume that everyone

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<sup>48</sup> The 1965 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. states that the number of expatriations in fiscal 1965 dropped sharply, largely as a result of *Schneider v. Rusk*, 377 U.S. 163 (1964). The report also states that there were "a considerable number of cases in which a finding of expatriation was reversed as a result of the *Schneider* decision and other restrictive rulings by the Supreme Court during recent years." 1965 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 20.

During the past 10 years nearly 10,000 Americans were held to have lost their citizenship under the statutory section held unconstitutional in *Afroyim*. 1967 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 28.

<sup>49</sup> The Immigration and Naturalization Service will re-open cases decided before *Afroyim*. 1967 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 28.

<sup>50</sup> 8 U.S.C. § 1481(a)(1) (1964).

<sup>51</sup> 11 & 12 Geo. 6, c. 56.

<sup>52</sup> *Id.* § 19.

<sup>53</sup> N. BAR-YAACOV, DUAL NATIONALITY 4 (1961) (footnote omitted).

<sup>54</sup> See, e.g., *Kawakita v. United States*, 343 U.S. 717 (1952).

wishing to renounce a former citizenship upon naturalization elsewhere will take the trouble to go through formal renunciation procedures, and it would be unreasonably harsh to attach citizenship to many who do not desire it and are unaware of it. The major drawback of the British approach is, therefore, that it would lead to an excessive number of cases of dual nationality.

Although dual nationality has been cited as "detrimental . . . to the friendly relations between nations,"<sup>55</sup> it is difficult to see why this should be true. For all the complaining by the Court<sup>56</sup> and Congress<sup>57</sup> that expatriation should be allowed in order to prevent embarrassment in foreign affairs, there seem to be no examples of heightened international tensions because of the dual nationality of individuals. Of course, if the United States were to attempt to protect an American citizen against another country of which he was also a citizen, some friction might develop; but there are rules of international law dealing with the espousal of claims of dual nationals in international forums,<sup>58</sup> and such matters as diplomatic protection of citizens abroad are discretionary.<sup>59</sup> Consequently, dual nationality, however onerous a burden it may be for the individual concerned, is not necessarily harmful for the countries involved.<sup>60</sup> Nevertheless, the disadvantages for individuals of dual nationality seem adequate grounds for rejecting the British approach.

### B. *Dramatic and Dull Oaths*

In order to obtain naturalization in the United States, a person must take an oath "to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which [he] was before a subject or citizen."<sup>61</sup> Many

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<sup>55</sup> N. BAR-YAACOV, *DUAL NATIONALITY* 4 (1961).

<sup>56</sup> In *Perez v. Brownell*, 356 U.S. 44 (1958), the Court seems to have used the fact that great difficulties were caused by the refusal of some nations to permit voluntary expatriation as an argument for the necessity of involuntary expatriation. *Id.* at 48. Such reasoning seems somewhat unsound.

<sup>57</sup> See, e.g., H.R. REP. NO. 216, 74th Cong., 1st Sess. (1935).

<sup>58</sup> See generally H. VAN PANHUY, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* 73-81 (1959).

<sup>59</sup> "The United States . . . will as a rule not accord protection to an American citizen against a country whose nationality he also possesses, although it will do so in exceptional circumstances." P. WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 186 (1956) (footnote omitted).

<sup>60</sup> Furthermore, the *Afroyim* Court explicitly rejected embarrassment in foreign affairs as grounds for a congressional expatriation power. 387 U.S. at 263.

<sup>61</sup> Immigration and Nationality Act of 1952, § 337(a)(2), 66 Stat. 258, 8 U.S.C. § 1448 (a)(2) (1964).

countries, on the other hand, require only an oath of allegiance, with no express renunciation of other citizenship.<sup>62</sup> Should the form of oath a person has taken in acquiring Ruritanian citizenship determine whether he loses his American citizenship? Although it has been suggested that the question of whether one takes "a dramatic or a dull oath"<sup>63</sup> should have little or no significance,<sup>64</sup> the better view is that the form does matter. First, the taking of an oath in which one expressly renounces American citizenship seems no different, in principle, from a formal renunciation of citizenship before a State Department officer. Second, it is surely permissible for a country to insist upon abandonment of former nationality as a condition of naturalization. The only situation in which the voluntary taking of a "dramatic" oath might not be a voluntary renunciation of American citizenship is that of a person who did not know at the time that he was an American.<sup>65</sup>

### C. *Presumption of Intent to Renounce Citizenship*

To minimize the number of acquisitions of dual nationality by naturalization, it should be presumed that a person who voluntarily obtained naturalization in a foreign country intended to renounce his American citizenship. The presumption should be rebuttable by a clear showing of lack of the requisite intent. Such lack of intent might be shown by giving notice to the United States of intent to retain American citizenship at the time of obtaining a foreign nationality. A statutory requirement that such notice be given if American citizenship is to be retained would be highly desirable as a means of minimizing uncertainty as to citizenship status.

If such a requirement existed, a person obtaining naturalization in a foreign country might pursue one of four possible courses of conduct.

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<sup>62</sup> *E.g.*, Australia, Canada, Israel, and New Zealand. See LAWS CONCERNING NATIONALITY, U.N. Doc. ST/LEG/SER.B14 (1954). Of course the absence in the oath of any express renunciation of foreign citizenship does not necessarily mean that the country which administers the oath does not regard such nationality as being lost. See note 63 *infra*.

<sup>63</sup> 156 PARL. DEB., H.L. (5th ser.) 1079 (1948) (remarks of the Lord Chancellor (Viscount Jowitt)):

The noble Earl seems to think that the fact that a man takes this rather more dramatic Oath will have some real effect on his dual nationality. I do not think it will have any effect at all, because the nationalities which he has will depend, of course, on the laws of the various countries, including the country of origin. For instance, some States have a law that any of their subjects who becomes naturalised automatically loses the nationality of his State of origin—whether he takes a dramatic or a dull Oath.

<sup>64</sup> *Id.*

<sup>65</sup> See pp. 629-30 *supra*.

First, he might at the time of his naturalization take a "dull" oath and file a declaration of intent to retain his American citizenship. In such a case he would retain that citizenship. This might well be considered undesirable by the country in which he was naturalized, in which case that country might provide that his naturalization was void. An alternative solution would be for countries that do not want their naturalized citizens to retain their former nationality to require such persons to expressly renounce their former citizenship before becoming naturalized.<sup>66</sup>

Second, a person might take a "dramatic" oath and not file a declaration of intent to retain his American citizenship. In such a case he would lose his citizenship, absent duress or a lack of knowledge of his United States citizenship.

Should a person perform inconsistent acts, such as taking a "dramatic" oath *and* giving notice of intent to retain United States citizenship, neither of the acts could be conclusive proof of his intent. Since the purpose of a "dramatic" oath is to prevent a person's acquiring a country's citizenship without renouncing his former nationality, his naturalization under such circumstances would probably be void; expatriation would render him stateless. For that reason, or because there was no valid naturalization, such a person should not be held to have lost his citizenship.

Only in the case of a person who has taken a "dull" oath and filed no declaration of intent could there exist substantial doubt as to citizenship status. A presumption in such a case that citizenship has been lost would be realistic: in view of the drawbacks of dual nationality, naturalization usually implies renunciation of any former allegiance. Such a presumption would preclude our government's demanding the allegiance of those who have been naturalized elsewhere without stating their intent to retain American citizenship. Such demands by other countries at times have been the source of some international friction.<sup>67</sup>

Conceivably, of course, one might intend to retain his American citizenship yet take no steps to insure that he does so—the *Savorgnan* situation. Intent would then have to be determined as a question of fact, as was petitioner's intent in *Savorgnan*. The presumption of loss

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<sup>66</sup> For example, 8 U.S.C. § 1481(a)(6) (1964) provides a means of formal renunciation of American citizenship while abroad.

<sup>67</sup> For example, Germany in World War I and Italy under Mussolini claimed the allegiance of German- and Italian-born Americans. See Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 ILL. L. REV. 761, 766-67 (1927).

of nationality, the availability of a means of showing intent to retain nationality, and the good judgment of the courts would seem sufficient to bar a claim of retention of American citizenship by a person who had become naturalized abroad, intending to renounce his citizenship, and later regretted his decision.<sup>68</sup>

The above proposals contrast sharply with what has long been the American legislative policy with regard to nationality. Far from being a radical departure, however, they represent a return to the concept of citizenship held by many at the time the fourteenth amendment was adopted.<sup>69</sup> What caused those concepts to be abandoned? The idea that expatriation was justified to prevent embarrassment in foreign affairs seems to have been little more than an excuse to permit Congress to meddle with citizenship under the foreign affairs power, a power which was held in *Afroyim* not to extend to citizenship. The idea that acts which are "inconsistent with undiluted allegiance"<sup>70</sup> should be grounds for expatriation has often been used to uphold the loss-of-nationality statutes, though even before *Afroyim* dicta in a number of cases had undermined this theory.<sup>71</sup> A reading of the statutes and their legislative histories suggests that most of the expatriation sections of the Immigration and Nationality Acts do nothing more than penalize, and penalize harshly, acts which do not conform to Congress' ideas of "good citizenship."<sup>72</sup>

Although little has been said above of the other expatriation provisions of the Immigration and Nationality Acts, the arguments

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<sup>68</sup> Such cases may soon arise, since many Americans have recently fled this country to avoid military service. Some of them will undoubtedly become naturalized elsewhere and may later wish to return to the United States.

<sup>69</sup> As recently as 1903 expatriation was defined as "the voluntary abandonment of, and the renunciation of allegiance to, one's native or adopted country, and becoming the citizen or subject of another country." Slaymaker, *The Right of the American Citizen to Expatriate*, 37 AM. L. REV. 191 (1903) (footnote omitted). Except for a Civil War statute concerning deserters, Act of March 3, 1865, 13 Stat. 490, a statute which provided for loss of the rights of citizenship and not for loss of citizenship itself, there was no statutory provision for involuntary expatriation until 1907. See Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 61-62 (1950); Note, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1171-72 (1955). See generally I-MIEN TSIANG, *THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907* (1942).

<sup>70</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 214 (1963) (Stewart, J., dissenting).

<sup>71</sup> See *Schneider v. Rusk*, 377 U.S. 163, 169 (1964) (living abroad for long periods is not indicative of lack of allegiance); *Trop v. Dulles*, 356 U.S. 86, 92 (1958): "[C]itizenship is not lost every time a duty of citizenship is shirked." For an analysis of the impact of these and other cases on the *Perez* holding see Kurland, *The Supreme Court, 1963 Term, Forward: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 169-75 (1964).

<sup>72</sup> Cf. Brief For Petitioner at 24, *Afroyim v. Rusk*, 387 U.S. 253 (1967).

against expatriation because of acquisition of foreign citizenship apply a fortiori to such acts as "serving in . . . the armed forces of a foreign state"<sup>73</sup> or accepting government employment in foreign countries under certain circumstances.<sup>74</sup> Such acts should no longer result in expatriation. If their commission harms the United States, the solution to the problem is the imposition of criminal penalties,<sup>75</sup> not deprivation of citizenship.

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<sup>73</sup> Immigration and Nationality Act of 1952, § 337(a)(3), 66 Stat. 258, 8 U.S.C. § 1481(a)(3) (1964). The Government seems not to have interpreted *Afroyim* as applicable to this section. See 1967 IMMIGRATION AND NATURALIZATION SERVICE ANN. REP. 28.

<sup>74</sup> 8 U.S.C. § 1481(a)(4) (1964).

<sup>75</sup> Although laws imposing such criminal penalties could not be enforced until the individual concerned returned to the United States, the situation would be no worse than the present expatriation provisions, since loss of citizenship becomes most important to the expatriate when he desires to return to this country.