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THE CITIZENSHIP OF DRAFT EVADERS AFTER THE PARDON

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I. INTRODUCTION

ON JANUARY 21, 1977, PRESIDENT CARTER PARDONED those who removed themselves from the United States to avoid induction for military service during the Vietnam era.¹ The pardon restored full rights with certain exceptions. The accompanying executive order directed the admission of aliens barred from entry into the United States because they "have departed from or . . . remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency."² Neither the pardon itself nor the executive order says anything about citizenship. Nevertheless, it was widely reported at the time that any pardoned person who had become a citizen of another country would continue to be an alien.³ It was reported that such people could visit the United States, and might even become citizens, but in both respects they would be treated as were other aliens. The *New York Times*, on the other hand, reported that only those draft evaders who had been "legally declared to be 'undesirable aliens'" would be forced to recover their citizenship as immigrants.⁴ Both interpretations purported to report

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1. Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977); Proc. No. 4483, 42 Fed. Reg. 4391 (1977). The presidential proclamation and its accompanying executive order are reprinted in the *New York Times*. N.Y. Times, Jan. 22, 1977, at 10, col. 2.

2. 8 U.S.C. § 1182(a)(22) (1970); see Exec. Order No. 11,967, § 3, 42 Fed. Reg. 4393 (1977). Although the executive order refers to any person, this statute covers aliens exclusively.

3. See, e.g., Phila. Inquirer, Jan. 22, 1977, at 5, col. 3. The *Inquirer* quoted Jody Powell, the White House Press Secretary, as saying: "[D]raft evaders who have become citizens of another country are free to come home to visit their families. If they wish to regain their citizenship, however, they will have to apply under the same terms as any other alien. . . ." *Id.*; see NBC Nightly News for Jan. 21, 1977; Trumbull, *Evaders in Canada Call Action a Sham*, N.Y. Times, Jan. 22, 1977, at 11, col. 1.

4. Mohr, *Carter Pardons Draft Evaders, Orders a Study of Deserters*, N.Y. Times, Jan. 22, 1977, at 1, col. 6 & at 10, col. 2. This statement was also attributed to Jody Powell and contradicted another *Times* report on the facing page. See Trumbull, *supra*, note 3.

the words of White House Press Secretary Jody Powell. Presumably Mr. Powell was announcing the "official" interpretation of the pardon's effect. Whichever version was the accurate report, however, is immaterial, as both statements are wrong. Equally wrong is the view espoused by the Foundation of Law and Society, seeking a declaratory judgment that those who fled the country to avoid the draft lost their citizenship.⁵ Under the law regarding loss of citizenship, the determination of loss does not depend on the acceptance of citizenship elsewhere, nor on some "legal declaration" of undesirable alienage, nor on leaving the country to evade the draft. The first criterion sweeps too broadly: it includes many who have not lost their citizenship. The second criterion is too narrow: evaders other than those whose status has already been tested in court will find that they have lost their citizenship. The third criterion is simply irrelevant. The true criterion by which loss of citizenship is tested for most citizens⁶ is the determination of whether there has been a "voluntary renunciation" of such citizenship.⁷

This article will consider the manner of proving voluntary renunciation and attempt to relate this criterion to draft evaders. This article seeks not to advocate what ought to be, but to discover what is. It examines the several categories of draft evaders, for many of whom citizenship status is clearly determined. However, it will be shown that the citizenship of some draft evaders is so uncertain that it may only be established finally by a decision of the Supreme Court of the United States. This category includes individuals who have neither elected to take other citizenship nor expressly renounced their United States citizenship. In order to determine which evaders fit into each category, and to appraise the prospects of those evaders whose citizenship is uncertain, this article will explore the parameters of voluntary renunciation. Before developing a meaning of voluntary renunciation and ascertaining the required proof for such renunciation, one must understand how

5. *Daughtrey v. Carter*, No. 77-0187 (D.D.C., filed Feb. 2, 1977); see *Phila. Inquirer*, Feb. 3, 1977, at 5-D, col. 5. Apparently, the Foundation of Law and Society's suit is based on 8 U.S.C. § 1481(a)(10) (1970). Apart from standing problems, plaintiffs will have serious difficulties on the merits, as this section was held unconstitutional in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). See note 27 *infra*.

6. The fourteenth amendment defines citizens as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof. . . ." U.S. CONST. amend. XIV, § 1. Persons who are naturalized outside the United States are not protected in their citizenship by this amendment. *Rogers v. Bellei*, 401 U.S. 815 (1971). Hereinafter, unless otherwise indicated, the word "citizen" in this article refers only to citizens as defined and protected by the fourteenth amendment. The special problems of non-fourteenth amendment citizens will be considered only at the end of the article. See text accompanying notes 131-36 *infra*.

7. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

this came to be the only manner in which fourteenth amendment citizens could lose their citizenship.

II. A LITTLE MATTER OF VOTING

Great constitutional principles often begin as small events. In our system, they often emerge from contests over rather ordinary acts. If the actors involved refuse to accept the asserted consequences of their acts, the opportunity arises for these acts to become very important if the Supreme Court seizes the chance to test a great issue. The principle that constitutionally protected citizens cannot be involuntarily expatriated emerged from such an ordinary event as voting. To understand the principle, one must understand the stories of two men: Clemente Perez and Beys Afroyim.

Clemente Perez was born in Texas of Mexican parents in 1909. Therefore, he was a United States citizen. Apparently, he was also a Mexican citizen. In any event, when he was ten years old, he and his parents moved to Mexico. Mr. Perez knew of his United States citizenship but preferred to stay in Mexico. When in 1941 certain complications in the Pacific and Europe encompassed the United States, he preferred not to become involved in the unpleasantness. Thus, he did not register for the draft. In 1943, however, he applied for admission into the United States as an alien railroad laborer, stating in his application that he was a native-born citizen of Mexico. He remained in the United States for about one year, earning a good living because of the then existing labor shortage, without risking involvement in the war. Mr. Perez returned to Mexico and remained there from 1944 to 1947. In 1947, he applied to enter the United States as a United States citizen. Unfortunately, he had voted in Mexico in 1946. For this reason,⁸ as well as for having remained outside the United States to avoid military service during time of war,⁹ the Board of Immigration Appeals found that he had lost his citizenship.¹⁰ In 1953, Mr. Perez was discovered in the United States, and proceedings were brought alleging illegal entry. When the earlier rulings by the Board of Immigration Appeals were reaffirmed,¹¹ Mr. Perez sued to challenge these rulings and eventually found himself before the United States Supreme Court.

The Court took the occasion of Mr. Perez's appeal to consider the question of whether Congress had the power to deprive citizens of their citizenship as the consequence of their having done some

8. 8 U.S.C. § 1481(a)(5) (1970).

9. *Id.* § 1481 (a)(10).

10. *Perez v. Brownell*, 356 U.S. 44, 46 (1958).

11. *Id.* at 47.

forbidden act. In the case of *Perez v. Brownell*,¹² five members of the Court held that Congress had this power.¹³ For some undisclosed reason, the Court chose to rule upon the matter of voting in Mexico rather than upon the draft evasion or the possible voluntary renunciation. The majority held that to sanction voting abroad with expatriation was reasonably related to permissible goals in the exercise of the foreign affairs power.¹⁴ The majority further ruled that, while the act that results in the loss of citizenship must have been done voluntarily, no proof of intent to lose citizenship was necessary.¹⁵ Thus Mr. Perez became Sr. Perez.

Four members of the Court disagreed with the majority's holding. Although the *Perez* case was hardly a sympathetic one, and a court could reasonable have held him to have renounced his citizenship through his wartime statements, Chief Justice Warren¹⁶ and Justice Douglas¹⁷ wrote vigorous dissents, joined by Justice Black, arguing that Congress had no power to deprive a citizen of citizenship without that citizen's consent. Justice Whittaker, in a separate dissent, was willing to accept the fact that Congress had the power to deprive one of citizenship without consent, but he thought the prescription of such loss for mere voting to be unreasonable.¹⁸

Perez v. Brownell was the first case to face squarely the question of whether Congress had the power to revoke citizenship,¹⁹ and to address the limitations of this power. *Perez* would appear to have resolved this question. However, two other cases were argued with *Perez*, and their decisions were announced on the same day.²⁰ In both of these other cases, the four dissenters from *Perez* were joined by another justice to reverse lower court decisions in favor of the Government. In *Trop v. Dulles*,²¹ Justice Whittaker even appeared to

12. *Id.* at 44.

13. *Id.* at 62.

14. *Id.* at 57-61.

15. *Id.* at 61-62.

16. *Id.* at 62-78 (joined by Justices Black and Douglas).

17. *Id.* at 79-84 (joined by Justice Black).

18. *Id.* at 84-85.

19. *But see* *MacKenzie v. Hare*, 239 U.S. 299 (1915). The *MacKenzie* case upheld the constitutionality of the Act of March 2, 1907, § 6, 34 Stat. 1229, which revoked the citizenship of a woman who married an alien, but this statute could be read as merely suspending the citizenship. *See* *Perez v. Brownell*, 356 U.S. 44, 69-73 (1958); *Rocha v. INS*, 450 F.2d 946 (1st Cir. 1971).

Another earlier case, *Savorgnan v. United States*, is sometimes cited as sustaining nonconsensual expatriation. *Savorgnan v. United States*, 338 U.S. 491 (1950). In this case, the petitioner, who had expressly renounced her United States citizenship and lived abroad for four years, was unable to regain the citizenship by showing that it was not her intent to lose it. The issue of constitutionality was not raised.

20. *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Trop v. Dulles*, 356 U.S. 86 (1958).

21. 356 U.S. 86 (1958).

join his brother dissenters on *Perez* in concluding that the government had no general power to divest citizenship. However, in neither case did the fifth Justice agree with this premise. In *Trop v. Dulles*, Justice Brennan concurred in the reversal, because the provision in question²² — expatriation because of wartime desertion — had no “rational relation” to the exercise of the war power nor to any other power of Congress.²³ In *Nishikawa v. Dulles*,²⁴ some members of the Court again argued lack of governmental power to impose expatriation,²⁵ while others concluded that the Government in fact had relied upon a voluntary expatriation but had failed to prove it adequately.²⁶

In light of the uncertainty after these cases as to the scope or the very existence of Congress’ power to impose expatriation as an unintended consequence of doing certain forbidden acts, one could hope that the Court would expeditiously review challenges to various expatriation provisions to settle the controversy. In the next six years, three more expatriation cases reached the Supreme Court. In two of these cases, the challenged expatriation provision was held to be unconstitutional.²⁷ In the third case, the provision was upheld by an evenly divided court.²⁸ Thus, of five cases decided in light of *Perez*, four struck down the specific clause in issue as unconstitutional. Four justices emerged firmly committed to the theory that the government had no power to divest citizens of their citizenship without the citizens’ consent. One or more justices found these deprivations of citizenship deficient on various other grounds. At best, the government only achieved an even split on the Court with its arguments. Still, *Perez* settled the effect of voting abroad. But not everyone agreed. Therefore, the Supreme Court decided to reconsider *Perez* and voting abroad in the case of *Afroyim v. Rusk*.²⁹

Beys Afroyim happened to become involved in problems with the State Department over his passport. Born in Poland, Mr.

22. See 8 U.S.C. § 1481(a)(8) (1970).

23. 356 U.S. at 114.

24. 356 U.S. 129 (1958).

25. *Id.* at 138.

26. *Id.* at 136-37.

27. The *Kennedy* case struck down section 1481(a)(10) of title 8 as cruel and unusual punishment and lacking in the due process and procedural safeguards mandated by the fifth and sixth amendments. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); 8 U.S.C. § 1481(a)(10) (1970) (providing for expatriation for departing or remaining outside the country to avoid the draft in time of national emergency). The *Schneider* case held involuntary expatriation of naturalized citizens by residence abroad to be a denial of due process, striking down section 1484 of title 8. *Schneider v. Rusk*, 377 U.S. 163 (1964); 8 U.S.C. § 1484 (1970).

28. *Marks v. Esperdy*, 377 U.S. 214 (1964). This case involved section 1481(a)(3), imposing expatriation for service in the armed forces of a foreign state. See 8 U.S.C. § 1481(a)(3) (1970).

29. 387 U.S. 253 (1967).

Afroyim came to the United States in 1912 and became a citizen in 1926. In 1950 he went to Israel and began to vote there in 1951. His application for renewal of his United States passport in 1960³⁰ was refused because he had voted in Israel. Mr. Afroyim did not give up despite *Perez*. Perhaps he was encouraged by the confusion in the Court's opinions or perhaps he drew encouragement from other sources. In any event, he sued, and he won. In *Afroyim* five members of the Court held that Congress has no power to take away citizenship without the citizen's assent,³⁰ expressly overruling *Perez*. In the course of his opinion for the majority, Mr. Justice Black wrote:

First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. *The Constitution of course, grants Congress no express power to strip people of their citizenship*, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. . . .

Because the legislative history of the Fourteenth Amendment and the expatriation proposals which preceded and followed it, like most other legislative history, contains many statements from which conflicting inferences can be drawn, our holding might be unwarranted if it rested entirely or principally upon that legislative history. But it does not. Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee. Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world — as a man without a country. Citizenship in this Nation is a part of a cooperative affair. Its

30. *Id.* at 268.

citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. *Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.*³¹

The foregoing language would seem to leave little doubt that laws purporting to deprive a citizen of citizenship, other than those recognizing a voluntary relinquishment, would be unconstitutional. However, four justices — Harlan, Clark, Stewart, and White — vigorously dissented.³² Furthermore, one could argue that only the narrow issue of the effect of voting abroad was decided by the Court. Under that view, only the validity of section 1481(a)(5) of title eight of the U.S. Code (section 1481), which dealt with voting in foreign elections,³³ was resolved by the Court, and any broader language was mere dictum.³⁴ However, former Attorney General Clark ruled that *Afroyim* should be followed literally,³⁵ and applied to every law which was designed to divest citizenship without the consent of the citizen. Finally, in *Rogers v. Bellei*,³⁶ all nine justices also read *Afroyim* literally, although they disagreed over the issue of whether some few citizens were entitled to constitutional protection of their citizenship.³⁷

Mr. Afroyim thus provided the occasion for the enunciation of a new constitutional principle — a citizen can voluntarily relinquish citizenship, but the government can never deprive a person of citizenship without the consent of that citizen. In other words, people may abandon the government, but the government cannot abandon them. The serious question remains as to how one determines whether citizenship has been voluntarily renounced. This question has not been faced by the Supreme Court since *Afroyim*, although it

31. *Id.* at 257, 267-68 (emphasis added).

32. *Id.* at 268-93.

33. 8 U.S.C. § 1481(a)(5) (1970).

34. For such an interpretation of *Afroyim*, see W. BISHOP, INTERNATIONAL LAW 527 n.88 (3d ed. 1971).

35. 42 OP. ATT'Y GEN. NO. 34 (Jan. 18, 1969); see also *United State v. Matheson*, 532 F.2d 809, 813 (2d Cir. 1976); *Rocha v. INS*, 450 F.2d 946 (1st Cir. 1971); *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972).

36. 401 U.S. 815 (1971).

37. These unprotected citizens are those who acquire citizenship at birth, although they are born in a foreign country. See 8 U.S.C. § 1401 (1970).

has been treated by lower courts.³⁸ The following section examines the alternative answers to this question, depending upon various relevant factors which are likely to be present in the case of those who departed from, or remained outside, the United States to avoid military service during the period covered by President Carter's pardon.

III. EXPATRIATION OF THE DRAFT EVADERS

A. *Definite Losses of Citizenship*

1. *Adjudication*

As the *New York Times* reported,³⁹ those who have been legally declared "undesirable aliens" have lost their citizenship, presumably because of the *res judicata* effect of a final judgment, at least after all appeals have been exhausted, or the time for appeal has lapsed. The truth of this statement needs no elaboration, but it does not exhaust the possibilities of expatriation. One can voluntarily expatriate oneself without going through a court.

2. *Formal Renunciation*

Section 1481(a)(6) provides for formal written renunciation of citizenship before diplomatic or consular officers abroad on forms prescribed by the Secretary of State.⁴⁰ Section 1481(a)(7) provides for formal written renunciation in the United States on forms prescribed by the Attorney General before officers designated by him during time of war, subject to the Attorney General's decision that such renunciation is not contrary to national defense needs.⁴¹ Since *Afroyim* recognized the constitutionality of voluntary renunciation, these procedures appear to lie beyond constitutional challenge. Nevertheless, important constitutional rights such as citizenship can be waived only if the waiver is knowing and intelligent.⁴² Thus, several questions regarding the effectiveness of a formal renunciation could arise as to the voluntariness of the renunciation, the lack of an intent to renounce, and the lack of capacity to renounce.

The first two questions are relatively easy to resolve. The law was settled before *Afroyim* that formal renunciations must be

38. See *United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976); *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972); *Jolley v. INS*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971); *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972); *Baker v. Rusk*, 296 F. Supp. 1244 (C.D. Cal. 1969).

39. Mohr, *supra* note 4, at 1, col. 6.

40. 8 U.S.C. § 1481(a)(6) (1970).

41. *Id.* § 1481(a)(7).

42. *United States v. Matheson*, 532 F.2d 809, 814 (2d Cir. 1976):

voluntary.⁴³ Given the Court's insistence on voluntariness in *Afroyim*, one cannot expect this conclusion to be challenged successfully now.⁴⁴ In the only case since *Afroyim* to raise the argument of involuntariness,⁴⁵ a draft resister went to Canada and there renounced his citizenship.⁴⁶ When he was later found in the United States, he was deported. He argued that he was coerced into his renunciation by the threat of prosecution for violation of the selective service laws. This argument was rejected on the ground that he had the power to choose compliance or renunciation.⁴⁷ Merely acting out of conscience did not make the choice involuntary.⁴⁸

The question of the effect of a secret intent to retain citizenship despite the execution of a formal renunciation has not been directly decided by the Supreme Court. The case of *Savorgnan v. United States*,⁴⁹ does provide a close analogy, however. Mrs. Savorgnan had become a naturalized Italian citizen at a time when such an act was considered to be grounds for loss of United States citizenship. The Court ruled that her intent to retain United States citizenship was immaterial, stating that the acts mandating loss of citizenship were "stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them."⁵⁰ This reasoning presumably applies to formal renunciations today.⁵¹

43. Several cases arose out of numerous renunciations (4315) of citizenship by Japanese-Americans interred at Tule Lake Relocation Center during World War II. Three cases held that involuntary renunciations were ineffective, and given the circumstances, these were all presumptively involuntary. *McGrath v. Abo*, 186 F.2d 766, 773 (9th Cir.), cert. denied, 342 U.S. 832 (1951) (class action); *Acheson v. Murakami*, 176 F.2d 953 (9th Cir. 1949); *Inouye v. Clark*, 73 F. Supp. 1000 (S.D. Cal. 1947). As to voluntariness problems in related contexts, see Annot., 2 L. Ed. 2d 1917 (1958).

44. Sections 1481(b) and (c) also appear to presume that the loss of citizenship must be through a voluntary act because these subsections create presumptions of voluntariness as to the acts listed in section 1481(a). 8 U.S.C. § 1481(b), (c) (1970). The constitutionality of these sections was questioned in *United States v. Matheson*, 532 F.2d 809, 818 n.5 (2d Cir. 1976).

45. *Jolley v. INS*, 441 F.2d 1245 (5th Cir.), cert. denied, 404 U.S. 946 (1971).

46. There is no indication that the renunciation complied with the formalities of section 1481(a)(6). 8 U.S.C. § 1481(a)(6) (1970).

47. The existence of a choice distinguishes the *Jolley* case from *Nishikawa v. United States*, 356 U.S. 129 (1958), where a Japanese-American was inducted into the Japanese army without any opportunity to avoid service. See *Jolley v. INS*, 441 F.2d 1245, 1250 (5th Cir.), cert. denied, 404 U.S. 946 (1971).

48. *Id.* at 1251.

49. 338 U.S. 491 (1950).

50. *Id.* at 499-500.

51. Former Attorney General Clark concluded that manifestation of intent controls, not a secret subjective intent. 42 OP. ATT'Y GEN. No. 34, at 4-5 (Jan. 18, 1969). Two courts which considered the problem assumed that a specific subjective intent was necessary to accomplish a voluntary expatriation, but both allowed this subjective intent to be proved by outward manifestations. Thus, both of these cases

Capacity to make an effective renunciation may be a more difficult matter to resolve. Lack of mental capacity through insanity, or similar conditions, presents no problem different from the usual factual ones.⁵² The special incapacity arising from being a minor does present problems in this context. At least one court has held that no minor born in the United States can validly renounce citizenship.⁵³ A more recent case construed the Nationality Act of 1940⁵⁴ as permitting renunciation at the age of eighteen,⁵⁵ since several of its provisions made loss of nationality contingent on doing the prohibited act after attaining the age of eighteen. Five provisions of the current act refer to the age of eighteen,⁵⁶ while several other provisions refer to older ages.⁵⁷ Nonetheless, the rule as to capacity for expatriation purposes should be uniform. It should no longer depend on variant state laws regarding the age of majority. Given the lowering of the voting age to eighteen, the general trend to drop the age of majority, and the fact that eighteen is the minimum age at which Congress recognized any capacity to affect one's citizenship, strong arguments exist for choosing this age as the general line separating capacity from incapacity. Although this outcome is not certain without litigation, Congress has provided for capacity at eighteen for formal renunciations abroad.⁵⁸ Congress also limited the right to elect against the formal renunciation for six

disregard a secret, unexpressed intent. *United States v. Matheson*, 532 U.S. 809 (2d Cir. 1976); *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972).

52. Issues could also arise as to the nature of the mental limitation necessary, just as in contractual capacity cases. *See, e.g., Cundick v. Broadbent*, 383 F.2d 157 (10th Cir. 1967), *cert. denied*, 390 U.S. 948 (1968); *Smalley v. Baker*, 262 Cal. App. 2d 824, 69 Cal. Rptr. 521 (1968); *Star Realty, Inc. v. Bower*, 17 Mich. App. 248, 169 N.W.2d 194 (1969); *Faber v. Sweet Style Mfg. Corp.*, 40 Misc. 2d 212, 242 N.Y.S.2d 763 (1963).

53. *United States ex rel. Baglivo v. Day*, 28 F.2d 44 (S.D.N.Y. 1928). At the time this case was decided, the age of majority was 21, and the court held that a native-born citizen under 21 could not validly renounce citizenship. The Supreme Court later held that there could be no imputation of renunciation to a native-born minor. *Perkins v. Elg*, 307 U.S. 325 (1939). Today's minors who acquired citizenship by naturalization in the United States would be afforded the same protection as native-born citizen minors. *See Schneider v. Rusk*, 377 U.S. 163 (1964); *Rogers v. Bellei*, 401 U.S. 815 (1971).

54. Act of Oct. 14, 1940, ch. 876, §§ 101-505, 54 Stat. 1137 (repealed 1952).

55. *McGrath v. Abo*, 186 F.2d 766, 772 (9th Cir. 1959).

56. 8 U.S.C. §§ 1481(a)(3), 1483(b) (1970) (§ 1483(b) cross refers to § 1481(a)(2), (4), (5), (6)).

57. *Id.* § 1481(a)(1) (naturalization in a foreign state through application of parent or guardian deemed ineffective if under 21); *id.* § 1482 (in case of dual nationals, return to state of birth for more than three years deemed ineffective to divest United States citizenship if under 22); *id.* § 1487 (parental expatriation deemed ineffective as to their children if they are under 21). Of course, all of these provisions are invalid under *Afroyim v. Rusk*, 387 U.S. 253 (1967), but they are at least some evidence of congressional intent as to capacity. *Cf. Sweeney Gasoline & Oil Co. v. Toledo, P. & W.R.R.*, 42 Ill. 2d 265, 269-70, 247 N.E.2d 603, 606 (1969) (Schaefer, J., dissenting) (invalid statute evidence of legislative intent).

58. 8 U.S.C. § 1483(b) (1970).

months after the eighteenth birthday.⁵⁹ Assuming the reasonableness of this regulation under *Afroyim*, those who formally renounced citizenship abroad could not successfully argue lack of capacity due to age. Formal renunciation within the United States would probably be treated similarly, although the statute does not expressly so provide. Two provisions of the Act permit election against expatriation until age twenty-five,⁶⁰ creating at least some room for argument. Both sections involve involuntary acts,⁶¹ however, while formal renunciation within the United States would be voluntary, thereby undermining this potential argument.

3. *Informal Express Renunciations*

At common law, one could not expatriate oneself without the consent of the government whose citizenship one was surrendering.⁶² For many years the United States championed citizens' rights to control their own expatriation, even enacting a statute proclaiming this to be a natural and inherent right, denial of which was inconsistent with the fundamental principles of the Republic.⁶³ The Immigration and Nationality Act of 1952, however, included provisions which might have repealed this grand principle.⁶⁴ Nonetheless, the Supreme Court in *Afroyim*⁶⁵ and former Attorney General Clark⁶⁶ both assumed, without discussion, that voluntary expatriation is possible without compliance with the formalities of section 1481(a)(6) and (7).⁶⁷ Since the statutes in question are

59. *Id.*

60. *Id.* §§ 1481(a)(1), 1487.

61. *Id.* Both involve expatriation of a minor through acts of a parent or guardian.

62. *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830).

63. Expatriation Act of July 27, 1868, ch. 186, 15 Stat. 223. This section was formerly codified at 8 U.S.C. § 800 of the 1946 version of the United States Code. Although 8 U.S.C. § 800 (1970) is not formally classified as repealed, it now appears only as a historical note to 8 U.S.C. § 1481 (1970).

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

Id.

64. 8 U.S.C. §§ 1483(a), 1488 (1970). Both sections declare that there can be no expatriation "under this part" except as provided therein.

65. 387 U.S. at 268.

66. 42 OP. ATT'Y GEN. NO. 34, at 4-5 (Jan. 18, 1969).

67. *But see* Petition of Bautista, 183 F. Supp. 271 (D. Guam 1960) (renunciation of citizenship before notary public in Philippines ineffective in view of noncompliance

ambiguous,⁶⁸ these provisions should be read as they have consistently been interpreted, at least until some authoritative body rules otherwise.⁶⁹ Thus, informal express renunciations are probably effective.

If formal defects defeated an attempted formal renunciation, the renunciation might qualify as an effective informal express renunciation.⁷⁰ If these two classes receive different treatment as to voluntariness, intent, or capacity, important consequences could turn on this point. These problems probably would be resolved in the same ways for both classes if only because litigation over formal renunciations provides the only analogy available to guide resolution. On the other hand, the statutory provisions which determine decisions with regard to formal renunciations do not directly apply to informal renunciations. A court could modify somewhat the outcome of litigation should a strong showing of injustice be demonstrated.

B. *Implied Renunciations*

1. *General Considerations*

If there is substantial doubt as to the validity of informal express renunciations, one would expect even more theoretical difficulty with the idea that conduct alone could manifest a voluntary renunciation apart from any express renunciation. Nevertheless, former Attorney General Clark⁷¹ and several federal

with statutory formalities for express renunciation); *Furuno v. Acheson*, 106 F. Supp. 775 (S.D. Cal. 1952) (insufficient evidence to show petitioner voluntarily expatriated himself by performing services in another country open only to nationals of that country). These cases can be central to this issue if read broadly, but confined to their facts, they are unpersuasive. See *Jolley v. INS*, 441 F.2d 1245, 1247 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971). The *Jolley* case expressly upheld an informal explicit renunciation shown by petitioner's acts. *Id.*; *accord*, *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972).

68. See 8 U.S.C. §§ 1483(a), 1488 (1970). Since both prohibit expatriation "under this part" except according to the forms therein provided, one can argue that the statutes contemplate expatriations which are not "under this part." The question was raised, but not decided, in *Kawakita v. United States*, 343 U.S. 717, 730-32 (1952).

69. One can also construct a due process argument to this effect. For other pronouncements supporting this principle, see International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316, at 2, art. 3 1(1), 12(2) (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316, at 49, art. 1(1) (1966); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71, art. 13(2), 15(2) (1948); President Carter announced on March 17, 1977, his intention to seek United States ratification of the covenants. N.Y. Times, Mar. 18, 1977, at A-10, col. 6.

70. The issue was not raised in *Petition of Bautista*, 183 F. Supp. 271 (D. Guam 1960), where the court assumed formal defects nullified the attempted formal renunciation.

71. 42 OP. ATT'Y GEN. NO. 34, at 4-5 (Jan. 18, 1969).

courts⁷² have assumed that such implicit renunciations are possible.⁷³ If this assumption is correct,⁷⁴ the burden and degree of proof necessary to show an implied voluntary renunciation remains unclear. Section 1481(c) apparently provides a clear answer. The party asserting the loss of nationality must establish the claimed loss by a preponderance of the evidence. In deportation proceedings, on the other hand, the evidence before the administrative board must be "clear, unequivocal, and convincing."⁷⁵ The Supreme Court in dictum in fact endorsed this latter standard of proof for any attempt by the government to strip one of one's citizenship.⁷⁶ The Court, however, cited only pre-1961 cases, leaving the precedential value of this dictum in doubt, even if the issue arises in deportation proceedings, rather than where an allegedly expatriated former citizen seeks admission.⁷⁷ If the retention of citizenship involves fundamental rights,⁷⁸ the Court might conclude that section 1481(c) is unconstitutional⁷⁹ and that "clear, unequivocal and convincing" evidence is required. Since preponderance of the evidence would more easily result in an inference of renunciation where none was intended, the higher measure of proof is more consistent with the Court's emphasis on actual voluntary renunciation announced in *Afroyim*. One cannot be certain of the proper resolution of this issue until the Court squarely confronts it, but considering the interests at stake, some prediction is possible.

72. *United States v. Matheson*, 532 F.2d 809, 815 (2d Cir. 1976); *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972); *Peter v. Secretary of State*, 347 F. Supp. 1035, 1039 (D.D.C. 1972); *Baker v. Rusk*, 296 F. Supp. 1244, 1246 (C.D. Cal. 1969).

73. Several members of the Supreme Court also adopted this position in separate opinions at the time *Perez* was decided. See *Perez v. Brownell*, 356 U.S. 44, 68-69 (Warren, C.J., dissenting, with Black and Douglas, J.J., joining the opinion); *Nishikawa v. United States*, 356 U.S. 129, 139 (1958) (Black, J., concurring, with Douglas, J., joining).

74. A conclusion that implicit renunciations are possible could be based either on a finding that 8 U.S.C. § 800 (1946) has not been implicitly repealed by 8 U.S.C. §§ 1483(a), 1488 (1970), or on the theory that such a "natural and inherent right" cannot be overridden by mere statutes. See text accompanying notes 64, 68 & 69 *supra*. See also *United States v. Matheson*, 532 F.2d 809, 818 n.5 (2d Cir. 1976).

75. *Woodby v. INS*, 385 U.S. 276, 286 (1966).

76. *Berenyi v. INS*, 385 U.S. 630, 636 (1967); *accord*, *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972).

77. Section 1481(c) was enacted as Public Law 87-301 in 1961. The Court in *Woodby* cites this section without discussing it, while apparently recognizing that it contradicts its conclusions. 385 U.S. at 285 n.17.

78. See, e.g., the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, art. 15 (1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316, art. 24(3) (1966). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61 (1963); *Knauer v. United States*, 328 U.S. 654, 657-60 (1946); *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944); *Schneiderman v. United States*, 320 U.S. 118, 122 (1943); *United States v. Matheson*, 532 F.2d 809, 818 (2d Cir. 1976).

79. The *Matheson* court suggested that it might be unconstitutional. *United States v. Matheson*, 532 F.2d 809, 818 n.5 (2d Cir. 1976).

So long as the degree of proof is uncertain, it cannot definitely be determined whether the implication of intent to renounce must be the only reasonable implication from the act or acts in question. If the evidence must not only be clear and convincing, but also "unequivocal," the government would be put to the difficult task of amassing sufficient evidence so that the only reasonable inference would be that of an intended voluntary renunciation. This situation occurs rarely and since *Afroyim* was decided, no case has found a renunciation without at least an informal express renunciation. One case expressly required "clear, convincing, and unequivocal evidence,"⁸⁰ and the other cases⁸¹ have at least required a stronger showing than mere preponderance of the evidence. Since loss of citizenship is a substantial deprivation, particularly if one thereby becomes stateless,⁸² the most reasonable approach, as the cases discussed below will show, would be to demand at least clear and convincing evidence, perhaps even requiring that the proof be unequivocal as well. Even without the latter requirement, the government would seldom be able to prove renunciation without an explicit statement to that effect, since acts of disloyalty, even treason, have not suggested clearly and convincingly a renunciation of citizenship to the Supreme Court.⁸³ Furthermore, this standard of proof would not preclude a court from handling the general issues of voluntariness, hidden intent, and capacity in the same manner as in situations of express renunciation.⁸⁴

There remains a possible argument that the doing of various unlawful acts which Congress has sanctioned by the loss of citizenship should be treated as raising a presumption of voluntary renunciation. Thus far no court has accepted this argument.⁸⁵ Former Attorney General Clark ruled substantially similarly when he asserted that these acts could raise such a presumption, but that the individual shifts the burden of proof back to the government by merely raising the issue of intent.⁸⁶ This must be one of the most easily rebutted presumptions in our law. In any event, no other conclusion as to the burden of proof seems likely, without reversal of

80. *Peter v. Secretary of State*, 347 F. Supp. 1035, 1038 (D.D.C. 1972).

81. See cases cited at note 72 *supra*.

82. Fear of creating stateless persons was prominent in the majority's deliberations in *Afroyim*. See *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61 (1963). As to the general consequences of statelessness, see 1 L. OPPENHEIM, *INTERNATIONAL LAW* 640 (8th ed. W. Lauterpacht 1955).

83. See *Kawakita v. United States*, 343 U.S. 717 (1952).

84. See text accompanying notes 43-61 *supra*.

85. See cases cited at note 72 *supra*.

86. 42 OP. ATT'Y GEN. NO. 34, at 4 (Jan. 18, 1969). The former Attorney General apparently relied on 8 U.S.C. § 1481(c) (1970) for this interpretation.

Afroyim in substance, since the citizen would often be hard pressed to produce other than self-serving declarations as evidence to rebut any stronger presumption. A further issue for discussion involves the probative strength of the various proscribed acts. These acts will be grouped according to certain common facts shared by several of the acts: assumption of the burdens and benefits of foreign citizenship; avoidance of certain duties of United States citizenship; or prolonged residence abroad.

2. *Acts Demonstrating the Acceptance of the Burdens and Benefits of Foreign Citizenship*

Congress has prescribed expatriation for the doing of a number of acts which to varying degrees indicate that the individual has chosen to act in ways which normally could only be performed by, or would result in that individual becoming, a citizen of another country. These acts include becoming naturalized under the laws of another country,⁸⁷ giving an oath of allegiance to a foreign government,⁸⁸ serving in foreign armed forces without prior written authorization by the Secretaries of State and Defense,⁸⁹ accepting any position which results in naturalization or requires an oath of allegiance,⁹⁰ and voting in a foreign election.⁹¹ Jody Powell apparently referred to this grouping of activities when he asserted that draft evaders who had become foreign citizens were no longer United States citizens.⁹² If *Afroyim* stands for anything, it must certainly announce that these provisions do not result in expatriation unless they manifest the intent of the citizen to expatriate himself.

The United States Supreme Court has long recognized dual nationality as a genuine status under United States law.⁹³ Although Congress attempted to discourage dual nationality in several

87. 8 U.S.C. §§ 1481(a)(1), 1487 (1970).

88. *Id.* § 1481(a)(2).

89. *Id.* § 1481(a)(3).

90. *Id.* § 1481(a)(4). This section overlaps with 8 U.S.C. §§ 1481(a)(1), (2) (1970). Historically, section 1481(a)(4) derived from prohibitions of employment reserved to foreign citizens. See generally H.R. Rep. No. 1365, 82d Cong., 2d Sess., reprinted in [1952] U.S. CODE CONG. & AD. NEWS 1653.

91. 8 U.S.C. § 1481(a)(5) (1970).

92. See note 3 *supra*.

93. *Afroyim* resulted in a dual (Israeli/American) national. For Supreme Court cases recognizing dual nationality, see *Perkins v. Elg*, 307 U.S. 325 (1939); *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242 (1830). For international proceedings which resulted in recognition of dual nationality involving the United States, see *Mergé Case* (United States v. Italy), [1955] I.L.R. 443, 6 R. Int'l Arb. Awards 236; *Tellech Case* (United States v. Austria & Hungary), Dec. Tripartite Cl. Comm. 71, 6 R. Int'l Arb. Awards 248 (1928); *Alexander Case* (United Kingdom v. United States), 3 Moore, Arb. 2529 (1898).

enactments,⁹⁴ these provisions are clearly unconstitutional today.⁹⁵ Dual nationality is a real possibility under our law. Given this possibility, it is difficult to see how becoming a citizen of a foreign country, or acting in ways which indicate allegiance to a foreign country, may be interpreted as evidence of an intent to renounce United States citizenship. The possibility of an intent to become a dual national is strong enough to preclude a statutory presumption or even a simple inference of voluntary renunciation. Consequently, courts faced with these specific acts have refused to find a voluntary renunciation from the doing of any of these acts. The *Afroyim* case itself involved voting in a foreign election, which was deemed not to have resulted in expatriation.⁹⁶ In *Peter v. Secretary of State*,⁹⁷ working on Hungarian (State) Radio and traveling on a Hungarian passport did not result in expatriation. In *Baker v. Rusk*,⁹⁸ swearing allegiance to the Queen, in order for a dual Canadian/American citizen to become a member of the Alberta bar, did not result in expatriation. If these acts separately are insufficient, combining them adds little weight, unless the result yields a pattern so inconsistent with retention of United States citizenship as to clearly convince the court of this intent.⁹⁹

The most recent case involving a claim of expatriation from the doing of acts showing allegiance to a foreign state is *United States v. Matheson*.¹⁰⁰ In 1944 Dorothy Gould Burns married a Mexican citizen in Mexico, thereby becoming a Mexican national herself. In order to obtain a certificate of her Mexican nationality, she swore an oath abjuring her right to any protection from the government of her nationality of origin.¹⁰¹ Mrs. Burns subsequently behaved in many respects as a United States citizen. She traveled on United States

94. In addition to sections 1481(a)(2), (3), (4), and (5), all of which could trip up unwary dual nationals, section 1482 specifically expatriates dual nationals who reside in a foreign country where they are citizens by birth unless they swear an oath of allegiance to the United States, or unless they meet the exceptions under sections 1485 and 1486. 8 U.S.C. §§ 1481(a)(2), (3), (4), (5), 1482, 1485, 1486 (1970).

95. The provisions are unconstitutional not only in light of *Afroyim*, but also on due process grounds under the rationale of *Schneider v. Rusk*, 377 U.S. 163 (1964). An important exception to this unconstitutionality would exist where the dual national was born abroad and acquired his nationality through an American parent. See *Rogers v. Bellei*, 401 U.S. 815 (1971).

96. 387 U.S. 253 (1967).

97. 347 F. Supp. 1035 (D.D.C. 1972).

98. 296 F. Supp. 1244 (C.D. Cal. 1969). The court observed that the oath might be evidence of expatriation, but not where the individual did not acquire a new citizenship.

99. *Perez v. Brownell*, 356 U.S. 44, 68 (1958) (Warren, C.J., dissenting).

100. 532 F.2d 809 (2d Cir. 1976).

101. The oath sworn by Mrs. Burns was as follows:

I herewith formally declare my allegiance, obedience, and submission to the laws and authorities of the Republic of Mexico; I expressly renounce all protection foreign to said laws and authorities and any right which treaties or international

passports, took tax benefits as a United States citizen, and registered with foreign governments as a United States citizen. She also made frequent private representations of her United States citizenship. On the other hand, she also acted as a Mexican citizen. She obtained a Mexican passport and traveled on it. She also gained expedited entry into Mexico for her daughter by a previous marriage. When Mrs. Burns died, her executor asserted that she had renounced her citizenship in 1944, and thereby owed no inheritance taxes in the United States. The court construed her oath as being merely a promise not to invoke United States protection against Mexico rather than an express renunciation of the United States citizenship.¹⁰² Thus, her oath became merely an express acknowledgement of the usual legal relationship of a dual national to each of the states of which that person is a national.¹⁰³ Each state is entitled to treat the dual national as its own citizen and need not respond to international claims by the other state.¹⁰⁴ Given the heavy burden of proof¹⁰⁵ necessary to hold a citizen to have expatriated himself, the court held that the other acts of Mrs. Burns coupled with this oath so completely failed to present a case of voluntary renunciation that a summary judgment in the Government's favor was upheld in the face of proffered oral testimony as to Mrs. Burns' understanding and intent.¹⁰⁶

All of the cases since *Afroyim* have concluded that the doing of acts evincing allegiance to another country does not demonstrate voluntary renunciation absent clear, independent proof of an intent

law grant to foreigners, expressly furthermore agreeing not to invoke with respect to the Government of the Republic any right inherent in my nationality of origin. *Id.* at 811.

102. *Id.* at 816.

103. See, e.g., *Tellech Case* (United States v. Austria & Hungary), Dec. Trip. Cl. Comm. 71, 6 R. Int'l Arb. Awards 248 (1928); *Canevaro Case* (Italy v. Peru), Hague Ct. Rep. (Scott) 284 (Perm. Ct. Arb. 1912). But see also *Mergé Case* (United States v. Italy), 6 R. Int'l Arb. Awards 236 (1955); *Grigoriou Case* (Greece v. Bulgaria), [1924] Ann. Dig. 243 (raising the possibility of a "dominant nationality").

104. The treatment of "Calvo" clauses as found in the Mexican Constitution is analogous. MEX. CONST. art. 27. The clause provides that foreign investors cannot seek the protection of their home government. See *El Oro Mining & Ry. Case* (United Kingdom v. Mexico), 5 R. Int'l Arb. Awards 191 (1931); *Mexican Union Ry. Case* (United Kingdom v. Mexico), 5 R. Int'l Arb. Awards 115 (1930); *North American Dredging Co. of Texas Case* (United States v. Mexico), 4 R. Int'l Arb. Awards 26 (1926). See generally W. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 792-816 (1915); 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 635-54 (1943); 2 C. HYDE, *INTERNATIONAL LAW* 994-98 (2d ed. 1945); Garcia-Mora, *The Calvo Clause in Latin-American Constitutions and International Law*, 33 MARQ. L. REV. 205 (1950).

105. In *Matheson*, this burden of proof was stated as "clear, convincing and unequivocal." *United States v. Matheson*, 532 F.2d 809, 818 (2d Cir. 1976).

106. *Id.* The Court gave an alternate basis for its holding, however, in the form of an estoppel against the estate since Mrs. Burns had sought and received the benefits of United States citizenship during her life. *Id.* at 819-20.

to renounce. The clearest proof of such intent would be an explicit renunciation of United States citizenship.¹⁰⁷ Some countries, including the United States,¹⁰⁸ do require such a renunciation as part of their naturalization process, but this required renunciation is not universal. It happens that Canada does not require an oath abjuring citizenship as part of its naturalization process.¹⁰⁹ Therefore, in the case of most draft evaders who became citizens of Canada, at least, the question of expatriation finally rests upon the determination of whether their acts of disloyalty to the United States demonstrate conclusively a voluntary renunciation.

3. *Avoidance of the Burdens of United States Citizenship*

Congress has also prescribed expatriation for several acts in derogation of United States citizenship: desertion from the military in time of war;¹¹⁰ treason, attempts to overthrow the government, or conspiracy to overthrow the government;¹¹¹ and departing or remaining outside the United States for the purpose of avoiding military service in time of war or national emergency.¹¹² Each of these provisions was involved in a case before the Supreme Court prior to the *Afroyim* decision, and each provision was denied application in the case before the Court. In *Trop v. Dulles*,¹¹³ the desertion provision was declared unconstitutional either because there was no rational relationship between the expatriation and congressional powers, including the war power,¹¹⁴ or because expatriation was cruel and unusual punishment.¹¹⁵ In *Kennedy v.*

107. See, e.g., *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972).

108. 8 U.S.C. § 1448(a)(2) (1970). This section perhaps is the source of the idea that an American naturalized abroad usually renounces his American citizenship, as assumed by Press Secretary Jody Powell, or as occasionally stated as dictum in cases. See, e.g., *Baker v. Rusk*, 296 F. Supp. 1244, 1247 (C.D. Cal. 1969).

109. The Canadian oath is:

OATH OF ALLEGIANCE

I, A. B., swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law, and that I will faithfully observe the laws of Canada and fulfill my duties as a Canadian citizen.

So help me God.

1 CAN. REV. STAT. ch. C-19, at 27 (1970). For the section specifying these oaths as the oaths required of new citizens, see 1 CAN. REV. STAT. ch. C-19, § 12 (1970).

110. 8 U.S.C. § 1481(a)(8) (1970).

111. *Id.* § 1481(a)(9).

112. *Id.* § 1481(a)(10).

113. 356 U.S. 86 (1958).

114. *Id.* at 105-14 (Justice Brennan's conclusion).

115. *Id.* at 93-104 (the conclusion of four justices, written by Warren, C.J.). These four justices also argued that Congress in any event had no power to deprive citizens of their citizenship. *Id.* at 87-93; see text accompanying notes 21-23 *supra*.

Mendoza-Martinez,¹¹⁶ the provision regarding departure to avoid military service was held an unconstitutional punishment because it was not imposed subject to the safeguards found in the fifth and sixth amendments.¹¹⁷ Neither holding precludes a subsequent conclusion that these acts are so inconsistent with an intent to remain a citizen as to be "clear, convincing and unequivocal" evidence of a voluntary renunciation. However, the outcome of *Kawakita v. United States*¹¹⁸ seems to preclude such a conclusion, perhaps suggesting that these acts, like acts of allegiance to a foreign state or even in combination with acts of allegiance to a foreign state, do not prove voluntary expatriation.

Tomoya Kawakita was born in 1921 in the United States of Japanese parents. In 1939 he went to Japan and entered a Japanese university. He was registered there as an United States citizen. Being unable to return to the United States when he finished his schooling in 1943, he registered as a Japanese citizen and took a job as an interpreter for a Japanese company. In this capacity he supervised Americans held as prisoners of war who were assigned to work for his employer. He repeatedly denounced the United States. After the war, Mr. Kawakita was accused of treason both for having contributed to the Japanese war effort, and for having mistreated American prisoners of war. The Court held that none of Mr. Kawakita's acts resulted in a loss of citizenship "as a matter of law"¹¹⁹ even though at that time the doing of the various expatriating acts was upheld as valid and effective in bringing about an involuntary expatriation. Despite the dissent's argument that he had "expatriated himself as well as that can be done,"¹²⁰ Mr. Kawakita's sentence of death was nevertheless affirmed.

If even treason is not so inconsistent with the retention of citizenship, even a treason coupled with acts expressing allegiance to a foreign government at war with the United States, as to clearly and convincingly prove a voluntary renunciation of citizenship, the less serious offenses of desertion or remaining out of the country to avoid military service in time of national emergency cannot be held to raise a presumption of renunciation. In *Kawakita*, the majority was persuaded at least in part that Mr. Kawakita was acting as a dual national, *i.e.*, in the exercise of his duties as a Japanese citizen,

116. 372 U.S. 144 (1963).

117. *Id.* at 167.

118. 343 U.S. 717 (1952) (4-3 decision).

119. *Id.* at 722-27. While Mr. Kawakita might have escaped punishment altogether had the decision been otherwise, he would have no different position than any other person who held only Japanese citizenship.

120. *Id.* at 746 (Vinson, C.J., Black & Burton, JJ., dissenting).

and not in derogation of his duties as an United States citizen.¹²¹ At the very least, this conclusion applies as well to draft evaders who sought to acquire foreign citizenship. Thus, the acquisition of foreign citizenship, far from weakening their claim to citizenship, might well strengthen it. Like the late Mr. Kawakita, draft evaders who acquired a foreign, *e.g.*, Canadian, citizenship have acted to fulfill themselves under their new citizenship, and not to derogate their United States citizenship. But should persons who never sought to give up their United States citizenship or to acquire another citizenship, be treated more harshly than those who did? Given the judicial abhorrence of the statelessness¹²² which would result if acts of disloyalty not coupled with the acquisition of a foreign citizenship were construed as renunciations, courts probably will not draw such inferences. It appears that these grounds, even in combination with other proscribed acts, would provide a weak basis for proving renunciation in the absence of such independent evidence as express renunciations of citizenship. Moreover, the burden of proof lies with the government since it is alleging the loss of citizenship.

4. *Prolonged Residence Abroad*

Congress has provided that prolonged residence abroad for certain classes of citizens results in expatriation. One statute provides that dual nationals at birth lose their United States citizenship by three years of continuous residence in the other state of their nationality after age twenty-two, unless they take an oath of allegiance to the United States within the three years.¹²³ Another statute states that naturalized citizens lose their citizenship for three years of continuous residence in the country of former nationality, or for five years of continuous residence in any foreign state.¹²⁴ Finally, Congress also provided that a citizen under the age of twenty-one who resides abroad also loses his United States nationality if he acquires the nationality of the foreign state wherein he resides, subject to election against the loss until age twenty-five.¹²⁵ In *Schneider v. Rusk*,¹²⁶ a naturalized woman, who was deemed expatriated for three years of continuous residence in the country of her birth, challenged the constitutionality of her expatriation. The Court found the classification scheme to be so discriminatory as to

121. *Id.* at 723-25, 732-36.

122. See note 82 *supra*.

123. 8 U.S.C. § 1482 (1970). Exceptions are found in *id.* § 1485.

124. *Id.* § 1484. Exceptions are found in *id.* §§ 1485, 1486.

125. *Id.* § 1487.

126. 377 U.S. 163 (1964).

violate the guarantee of due process in the fifth amendment.¹²⁷ This reasoning seems to apply as well to each provision relating to residence abroad. The provisions would be void not only for imposing involuntary expatriation upon citizens in violation of the holding of *Afroyim*, but also for treating citizens unequally which is not permitted as regards fourteenth amendment citizens.

Many citizens by birth or through naturalization reside abroad for many years for a wide variety of reasons with no intent to renounce their citizenship. The act of residing abroad is so ambiguous in itself that one can draw no reasonable inference of renunciation from that act alone. Nor would this ambiguity be clarified when coupled with other equally ambiguous acts. In this area as well, little short of an explicit renunciation of citizenship would suffice.

5. *Combined Acts of Expatriation*

Many draft evaders were, in fact, absent for prolonged periods for the purpose of avoiding their military service obligations while at the same time acquiring a foreign citizenship. If this occurred in Canada, there still may well have been no explicit renunciation.¹²⁸ Since such acts could be consistent with retention of United States citizenship, and since the intent could easily have been to become a dual national, there is certainly no unequivocal renunciation. Nor can these acts be a more clear and convincing renunciation than Tomoya Kawakita's registration as a Japanese citizen, service in the Japanese mining industry, and abuse of Americans held as prisoners of war.¹²⁹ According to Justice Douglas, Kawakita's acts were ambiguous,¹³⁰ a recognition of the foreign citizenship, instead of a derogation of the United States citizenship. If an implication of renunciation under his circumstances was not so much more reasonable than any other inference as to be clear and convincing proof of renunciation, the draft evader who has performed acts in each of the categories prescribed by Congress as expatriating acts, likewise would not have clearly and convincingly expatriated himself. The case against draft evaders becomes even weaker if any of these acts were omitted by the individual. Proof of expatriation in the absence of some explicit denial of citizenship appears to be virtually impossible.

127. *Id.* at 168.

128. See note 109 *supra*.

129. *Kawakita v. United States*, 343 U.S. 717 (1952).

130. *Id.* at 723-24.

C. *Non-Fourteenth Amendment Citizens*

The citizenship of a few of the draft evaders may not be protected by the fourteenth amendment.¹³¹ In *Rogers v. Bellei*,¹³² the Court held that a person who acquired citizenship at birth outside the United States¹³³ was not constitutionally protected in that citizenship. Congress could condition the citizenship on reasonable requirements. Where the citizenship is acquired at birth because only one of the child's parents is a qualifying United States citizen, the citizenship is lost if the child does not spend at least five continuous years in the United States between the ages of fourteen and twenty-eight.¹³⁴ This specific provision was upheld in *Rogers v. Bellei*. Whatever one thinks of the logic of this case, draft evaders who so acquired their citizenship, have lost it if they did not reside in the United States for five continuous years after the age of fourteen and before the age of twenty-eight.

One other possible group of non-fourteenth amendment citizens may be American Indians. The very old case of *Elk v. Wilkins*¹³⁵ held that Indians did not acquire United States citizenship under the fourteenth amendment. Congress in 1924 conferred citizenship on all Indians in the United States.¹³⁶ Today, this action might be viewed as a naturalization within the United States, and Indians born subsequent to the act might be considered fourteenth amendment citizens for birth in the United States. Nevertheless, *Elk v. Wilkins* did hold that the fourteenth amendment was not intended to reach Indians. Since the fourteenth amendment would also affect their relations with the state in which they live, this holding might be reaffirmed. Draft evaders within this class might also, then, have lost their citizenship.

IV. SUMMARY OF THE CITIZENSHIP STATUS OF DRAFT EVADERS

The following classes of draft evaders have lost their citizenship: those who have been formally adjudicated to have lost their citizenship; those who have formally renounced their citizenship; those who have informally expressly renounced their citizenship;

131. See note 6 *supra*.

132. 401 U.S. 815 (1971).

133. The citizenship may be acquired because one or both parents are citizens or nationals of the United States. 8 U.S.C. § 1401(a)(3), (4), (7) (1970).

134. *Id.* § 1401(b), (c).

135. 112 U.S. 94 (1884).

136. Citizenship Act of 1924, Pub. L. 175, 43 Stat. 253 (reprinted at 8 U.S.C. § 1401(a)(2) (1970)). An earlier act had granted citizenship to nonreservation Indians. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 390.

and those whose citizenship was not protected by the fourteenth amendment since they were neither born nor naturalized in the United States and subject to the jurisdiction thereof and who have failed to comply with conditions on their citizenship. As to any other draft evader, there is a heavy burden of proof on the government, and a consistent pattern of resolving all ambiguities in favor of the citizen. Given the possibility of dual allegiance, the various acts are necessarily ambiguous when not coupled with explicit denials of citizenship. Thus, nearly all other draft evaders — including those naturalized in Canada, which does not require explicit abjuration of foreign citizenship — would remain citizens of the United States unless the government can prove that the combination of their actions is so inconsistent with an intention not to renounce United States citizenship that one is compelled to infer that renunciation. Given the consistent treatment of the evidence adduced in cases up to now, this inference could very rarely, if ever, be drawn without proof of explicit denial or renunciation of the citizenship.