

NOTES

SECTION 404(c) OF THE NATIONALITY ACT OF 1940: RESIDENCE ABROAD AS AUTOMATIC EXPATRIATION OF THE NATURALIZED AMERICAN*

CONGRESSIONAL power to differentiate between the naturalized and native-born American citizen has never been clearly defined by the Supreme Court. Although the Court has upheld two statutes providing for loss of naturalized citizenship, neither created a significant distinction between the naturalized and native-born American. The first, providing for denaturalization because of fraud or illegality in the naturalization proceedings, acted on the rationale that the person affected had not become a citizen in the first place.¹ The second statute created a presumption of loss of naturalized citizenship upon residence in a foreign state.² Because this presumption was easily overcome by

* *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949).

1. Nationality Act of 1906 §§ 15, 23, 34 STAT. 601, 603 (1906). These provisions were substantially reenacted in the Nationality Act of 1940 § 338, 54 STAT. 1158 (1940), 8 U.S.C. § 738 (1946). They provide for cancellation of a certificate of citizenship on grounds of fraud or illegal procurement. Additional provision is made for cancellation of the certificate of a naturalized American who, within five years after his naturalization, returns to the country of his habitation or goes to another foreign country and takes permanent residence there. This is considered "prima facie evidence of a lack of intention on the part of such person to become a permanent citizen . . . , and, in the absence of counter-vailing evidence, it . . . [is] . . . sufficient in the proper proceeding to authorize the revocation . . . of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained through fraud."

For the Court's view that the statute was not discriminatory, see *Luria v. United States*, 231 U.S. 9, 24 (1913); *Johannessen v. United States*, 225 U.S. 227, 242 (1912). But see Mr. Justice Rutledge, concurring in *Klapprott v. United States*, 335 U.S. 601, 616 (1949); dissenting in *Knauer v. United States*, 328 U.S. 654, 675 (1946); concurring in *Schneiderman v. United States*, 320 U.S. 118, 165 (1943).

See, generally, CABLE, LOSS OF CITIZENSHIP, DENATURALIZATION, THE ALIEN IN WARTIME (1943); Krichesky, *Loss of United States Nationality: Revocation of Naturalization*, 4 IMMIGRATION AND NATURALIZATION SERVICE MONTHLY REVIEW 41 (1946) (hereafter IMM. & NAT. MON. REV.); Note, *Recent Trends in Denaturalization*, 44 COL. L. REV. 736 (1944).

2. 34 STAT. 1228 (1907), repealed by § 504 of the Nationality Act of 1940, 54 STAT. 1172 (1940), 8 U.S.C. § 904 (1946).

The statute declared, in part, that a naturalized citizen who resided for two years in the foreign state from which he came, or for five years in any other foreign state, should be presumed to have ceased to be an American citizen: "Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe. . . ." For background of the 1907 Act see H.R. Doc. No. 326, 59th Cong., 2d Sess. (1906).

Before 1907 the State Department had established certain criteria for expatriation. The naturalized American who returned to his native land and assumed political duties, travelled under its passport, or voluntarily enlisted in its military or naval service was deemed to have abandoned American citizenship. These same acts committed in a non-

proof of intent to retain citizenship, in effect it led only to loss of diplomatic protection while abroad.³

Recent legislation makes a substantial distinction between the two classes of citizens.⁴ Section 404(c) of the Nationality Act of 1940⁵ provides for auto-

native foreign state, and under circumstances not indicating a definite intent to abandon citizenship, merely led to loss of diplomatic protection while abroad. Generally, mere residence abroad, no matter how protracted, never led to loss of citizenship. TSIANG, *EXPATRIATION IN AMERICA PRIOR TO 1907* at 98 (1942).

Following the Act of 1907, which established authoritatively some of the criteria that had already been recognized by the State Department, Secretary of State Root issued a series of diplomatic instructions based upon it which provided for overcoming the presumption of expatriation by presentation of evidence that the naturalized citizen resided abroad as a representative of American business, or for reasons of health or education, or that some unforeseen exigency prevented his return. 1 U.S. FOREIGN REL.: 1907 at 3 (Dep't State 1910).

In addition to the excellent history of expatriation in TSIANG, *supra*, see Flournoy, *Naturalization and Expatriation*, 31 YALE L.J. 702, 848 (1922); Morrow, *The Early American Attitude Toward The Doctrine of Expatriation*, 26 AM. J. INT'L L. 552 (1932). For more extensive sources consult 3 MOORE, *INTERNATIONAL LAW DIGEST* §§ 431-83 (1906); BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD*, §§ 315-36 (1922).

3. Congressional history of H.R. 24122, 59th Cong., 2d Sess. (1907), later the Act of 1907, demonstrates that the expatriation provisions were enacted to relieve the State Department from granting diplomatic protection to those citizens who remained abroad for the periods designated. See statement of Mr. Perkins, 41 CONG. REC. 1464 (1907); H.R. Doc. No. 326, 59th Cong., 2d Sess. 26 (1906). (The original recommendation would have had the presumption apply to all American citizens. *Id.* at 23.)

In *United States v. Gay*, 264 U.S. 353, 358 (1924), the only Supreme Court interpretation of the statute, Justice McKenna stated that the presumption was "easy to preclude, and easy to overcome."

One line of authorities has held that presumption applied only while foreign residence continued and that it ceased upon the citizen's return to the United States. *Camardo v. Tilinghast*, 29 F.2d 527 (1st Cir. 1928); 28 OPS. ATT'Y GEN. 504 (1912). A second group of cases has held that an intent to return and to retain citizenship must have been maintained at all times in order to rebut the presumption, and that mere return was not itself sufficient to rebut the presumption. *Miller v. Sinjen*, 289 Fed. 388 (8th Cir. 1923); *United States ex rel. Anderson v. Howe*, 231 Fed. 546 (S.D.N.Y. 1916). Recent decisions of the Board of Immigration Appeals illustrate its adherence to the second view. G—, 56127/9 (1943), 1 I. & N. Decisions 398 (1947); K—, 56143/464 (1943), 1 I. & N. Decisions 587 (1947). See BORCHARD, *op. cit. supra* note 2, §§ 330, 15; TSIANG, *op. cit. supra* note 2, at 108.

4. Other than those cited in notes 1 and 2 *supra*, the only statutory restriction limited in its terms to naturalized persons was an 1804 act which prohibited United States registry to ships owned by "any person naturalized in the United States" and residing for more than two years abroad. 2 STAT. 296 (1804), repealed 29 STAT. 691 (1897). It appears that this statute, like the denaturalization statutes, was aimed at persons who had fraudulently obtained naturalization papers; for in Jefferson's 1801 message to Congress which preceded the enactment of the statute (First Annual Message to Congress, 1 MESSAGES AND PAPERS OF THE PRESIDENTS 314, 319 (1897)) he recommended the imposition of "restrictions [on citizenship] . . . to guard against the fraudulent usurpation of our flag, an abuse which brings so much embarrassment and loss on the genuine citizen. . . ." Brief for American Civil Liberties Union as *Amicus Curiae*, p. 16, n.23, *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949). The statute was never presented for judicial review.

5. 54 STAT. 1170 (1940), 8 U.S.C. § 804 (1946). The statute reads as follows:

"A person who has become a national by naturalization shall lose his nationality by:

matic loss of naturalized citizenship upon five years' residence in a foreign state.⁶ In *Lapides v. Clark* the Court of Appeals of the District of Columbia, Judge Edgerton dissenting, upheld the constitutionality of Section 404(c).⁷ Certiorari was denied.⁸

"(a) Residing for at least two years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, if he acquires through such residence the nationality of such foreign state by operation of the law thereof; or

"(b) Residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 406 hereof.

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

Section 406 excepts from loss of citizenship persons temporarily residing abroad to represent American educational, scientific, philanthropic, religious, commercial, financial, or business organizations, and persons residing abroad as a result of ill health and for certain educational purposes. There are other exceptions of limited application. See Nationality Act of 1940 §§ 405, 406, 54 STAT. 1170 (1940), 8 U.S.C. §§ 805, 806 (1946).

By provision of the Act and a series of amendments thereafter loss of nationality under § 404(c) was postponed until 1946. 8 U.S.C.A. § 809 (Supp. 1948).

6. By Executive Order No. 6115, April 25, 1933, the President designated the Secretary of State, the Attorney General, and the Secretary of Labor to review the nationality laws, recommend revisions, and to codify the laws. See *Dos Reis v. Nicolls*, 161 F.2d 860, 863 (1st Cir. 1947). The codifiers found the provisions of the Act of 1907 inadequate. "In general the right to protection should be coexistent with citizenship, and a law under which persons residing abroad are denied the protection of this Government, although they remain citizens of the United States and transmit citizenship to children born abroad, is deemed inconsistent and unreasonable." *Letter of Submittal to the President, NATIONALITY LAWS OF THE UNITED STATES, PROPOSED CODE WITH EXPLANATORY COMMENTS VII* (1939) (hereafter PROPOSED CODE), also found in *Hearings before Committee on Immigration and Naturalization on H. R. 6127 superseded by H. R. 9980, 76th Cong., 1st Sess. 409* (1940) (hereafter *Committee Hearings*). They proposed what are now §§ 404(a) and (b). 1 PROPOSED CODE 69; *Committee Hearings* 493.

Section 404(c) was added to the proposed code during Congressional hearings, *Committee Hearings* 140-41 (1940), although the codifiers had concluded that the expatriating provisions should be limited to naturalized citizens who returned to the states of their origin, *i.e.* where they were born or were formerly nationals. Reports from diplomatic and consular officers showed that, in the vast majority of cases of naturalized citizens residing abroad, they had their residence in native foreign states, and identification with the native population was much more likely to occur than in cases of naturalized citizens who resided in foreign countries other than those from which they came. 1 PROPOSED CODE 70-76; *Committee Hearings* 494-501.

7. 176 F.2d 619 (D.C. Cir. 1949). Joined as defendants are the Attorney General of the United States and the Commissioner of Immigration.

Prior to the present declaratory judgment action, see note 11 *infra*, *Lapides* applied for a writ of habeas corpus in the United States District Court for the Southern District of New York, alleging that the District Director of the Immigration Service in New York had no authority to detain him pending a judicial determination of his right to enter the United States as a citizen. Dismissal of the habeas corpus petition was affirmed by the Court of Appeals of the Second Circuit. *United States ex rel. Lapides v. Watkins*, 165 F.2d 1017 (2d Cir. 1948). On appeal before that court, *Lapides* contended that he was entitled to have initial determination of his status by a judicial tribunal

Lapides, a former Austrian naturalized in America, resided in Palestine for six years after the passage of the Nationality Act.⁹ His attempted return to the United States was opposed on the ground that he had expatriated himself under Section 404(c).¹⁰ In a suit for judgment declaring him a citizen of the United States,¹¹ Lapides and three *amici curiae*¹² attacked the section on two grounds: first, that Congress possesses no power to abrogate citizenship unless the citizen voluntarily expatriates himself; second, should Congress possess such power, it may not, in exercising it, differentiate between the naturalized and native-born American.

The court of appeals rejected the first contention, relying upon the Supreme Court's decision in *Mackenzie v. Hare*.¹³ In the *Mackenzie* case, decided in 1915, the Supreme Court upheld a statute providing that any American woman who married a foreigner should take her husband's nationality.¹⁴ The denationalized plaintiff argued that Congress' power to terminate her citizenship was dependent upon her expressed intent. Holding this contention inapplicable, the Supreme Court declared that the statute did not arbitrarily impose loss of citizenship because the plaintiff had in fact concurred in the loss by voluntarily entering into the foreign marriage with notice of the conse-

not bound by the findings of the immigration authorities. The circuit court, however, held that on the conceded facts Lapides had lost his citizenship, and that since no additional evidence was offered it was unnecessary to consider whether he was entitled to a trial de novo in the habeas corpus action.

8. *Sub nom.* Lapides v. McGrath, 18 U.S.L. WEEK 3129 (U.S. Oct. 25, 1949).

9. Lapides entered the United States in 1922, and was naturalized in 1928. Except for three temporary absences he remained in the United States from the time of his entry until 1934. In that year he left for Palestine where he remained until 1947. Complaint filed in the District Court, Joint Appendix, Court of Appeals, pp. 1, 2.

10. On July 8, 1947, a Board of Special Inquiry of the Immigration and Naturalization Service ordered Lapides excluded from the United States on the grounds that he had expatriated himself under § 404 and that he was an alien, not in possession of a valid quota immigration visa. This decision was affirmed by the Commissioner of Immigration and later by the Board of Immigration Appeals, acting for the Attorney General. Complaint filed in the District Court, Joint Appendix, Court of Appeals, p. 2.

11. The Nationality Act of 1940 § 503, 54 STAT. 1171 (1940), 8 U.S.C. § 903 (1946) provides for declaratory judgment suit against the head of any Department or agency by "any person who claims a right or privilege as a national of the United States . . . [and is] . . . denied such right or privilege . . . [by the Department or agency] . . . upon the ground that he is not a national of the United States. . . ."

Lapides filed his complaint under § 503 in the District Court of the District of Columbia, in 1947, requesting judgment declaring that § 404 is unconstitutional, that it is inapplicable to him, and that he is a citizen of the United States. Joint Appendix, Court of Appeals, pp. 1, 5. The District Court sustained the defendant's motion that the complaint be dismissed because "it shows on its face that the plaintiff has expatriated himself under the Nationality Act of 1940 and is therefore not entitled to the relief demanded." The Court denied Lapides' cross motion for summary judgment. No written opinion was rendered and appeal was taken from the decision on these motions.

12. Amicus briefs were submitted by the American Civil Liberties Union, the American Jewish Committee, and the American Jewish Congress.

13. 239 U.S. 299 (1915).

14. 34 STAT. 1228 (1907), repealed 42 STAT. 1022 (1922).

quences.¹⁵ The court of appeals in the *Lapides* case found a similar concurrence by assuming that *Lapides* voluntarily resided abroad with notice of the resulting loss of citizenship.¹⁶

Lapides' second contention was likewise dismissed. The court of appeals declared that in exercising its power to divest citizenship, Congress could differentiate between the naturalized and native-born citizen if the distinction were not arbitrary, capricious, or unreasonable. Study of the background of Section 404(c) convinced the court that the section was enacted to lessen friction with foreign governments engendered by disputes over the nationality of naturalized Americans and their offspring. The Court considered this a reasonable enough basis for the section. Here it again relied upon the *Mackenzie* case, which in effect gave constitutional approval to a statutory distinction between female citizens who married Americans and those who married foreigners. The distinction sanctioned in that case was supposedly dictated by a policy aimed at avoiding international embarrassment,¹⁷ and the court of appeals found a similar purpose to support Section 404(c)'s differentiation between naturalized and native-born Americans.

In a strong dissent, Judge Edgerton expressed his belief that the Constitution prohibited all distinctions between the two classes of citizens. But even assuming that Congress may make some distinction, he was convinced that the one made by Section 404(c) contravened the Fifth Amendment's due process clause.¹⁸

Dismissal of *Lapides*' first contention was not surprising.¹⁹ The Court in

15. The Court pointed out that the legislation was "urged by conditions of national moment," and that "this is the answer to apprehension of counsel that our construction of the legislation will make every act, though lawful . . . a renunciation of citizenship." *Mackenzie v. Hare*, 239 U.S. 299, 312 (1915).

16. 176 F.2d 619, 621 (D.C. Cir. 1949): "The Act does not arbitrarily impose a loss of citizenship. It deals with a condition voluntarily brought about by one's own acts, with notice of the consequences. In that sense there is concurrence by the citizen."

17. See note 15 *supra*, and page 149 *infra*.

18. 176 F.2d 619, 622 (D.C. Cir. 1949).

19. Both the majority and dissenting opinions in the *Lapides* case accepted the *Mackenzie* rationale. But even if the *Mackenzie* decision is accepted, and voluntary residence deemed conclusive of intent to abandon citizenship, § 404(c) may be considered unconstitutional because it applies as well to persons who involuntarily reside abroad. Unlike the exceptions outlined in *Root's* instructions to diplomatic officials, note 2 *supra*, the Nationality Act makes no exception for certain exigencies, note 5 *supra*, and in some cases seems to apply to persons who remained abroad for reasons beyond their control.

However, it is plausible that the word "reside," as used in the statute, be interpreted to mean voluntary residence only. This interpretation seems to be in accord with Congressional intent. See 86 CONG. REC. 11950 (1940); 88 CONG. REC. 300 (1942).

This is also the interpretation given by the lower courts to other provisions for loss of citizenship. *Doreau v. Marshall*, 170 F.2d 721 (3d Cir. 1948) (American citizen applied for Certificate of French Nationality for purposes of health; *held*, duress excuses application of § 401 of Act, 54 STAR. 1168 (1940), 8 U.S.C. 801 (1946)); *Dos Reis v. Nicolls*, 161 F.2d 860 (1st Cir. 1947) (citizen forcibly drafted into foreign army does not lose citizenship under § 401 of Act); *Inouye v. Clark*, 73 F. Supp. 1000 (S.D. Cal. 1947) (Japanese-American citizens who renounced citizenship while confined in relocation

the *Mackenzie* case, in affirming loss of citizenship on the basis of a fictitious consent,²⁰ was presumably motivated by a fear of infringing power which

center because of threats and fear of disloyal Japanese have not expatriated themselves under § 401). This same view has been taken by the Board of Immigration Appeals. *Matter of Alvarado* (1945), 4 IMM. & NAT. MON. REV. 26 (1946). *Contra*: *Savorgnan v. United States*, 171 F.2d 155 (7th Cir. 1948) (citizen who unknowingly signed paper renouncing United States citizenship has expatriated herself under § 401 regardless of subjective intent).

20. Not only did the Court in the *Mackenzie* case disregard the actual intent of the petitioner with regard to her citizenship, but it conclusively presumed knowledge of the statute and its consequences.

It is clear that there must be some limitation on employment of the concurrence rationale as a means of finding intent to abandon citizenship, naturalized or native-born. If not, virtually any act could be declared an act of expatriation, and could be prevented or compelled by the use of the fictitious concurrence. In the *Mackenzie* case, the court calmed the fears of counsel by impliedly restricting the application of the concurrence rationale to legislation made necessary by considerations of national moment. No similar considerations were offered in support of § 404(c). See note 43 *infra*.

Judicial review of expatriating legislation is essential. Loss of citizenship seems no less important than loss of those political freedoms protected by the First Amendment. With respect to the latter freedoms the Supreme Court has rejected the usual presumption of constitutionality and has demanded proof of a "clear and present danger" before tolerating Congressional infringement. See Emerson & Helfeld, *Loyalty Among Government Employees*, 58 YALE L.J. 1, 83-6 (1948). An analogous test should be applied under the due process clause of the Fifth Amendment to legislation divesting citizenship. By creating a presumption against expatriating legislation, such a test would demand more positive support and justification in public policy before allowing divestment of citizenship.

Treaty Power. Whether Congress can divest citizenship by use of the treaty power remains an open question. Some cases have suggested that it could. *United States v. Reid*, 73 F.2d 153, 155 (9th Cir. 1934). "It is suggested that the treaty, in so far as it takes away the citizenship of a minor child without her consent, is violative of the Constitution of the United States. It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a *causus [sic] belli* to the other contracting power." *Cf. Missouri v. Holland*, 252 U.S. 416 (1920); see *Perkins v. Elg*, 307 U.S. 325, 329, 334 (1939). *But see The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889): "The treaties were of no greater legal obligation than the act of Congress. . . . If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress." See Comment, 58 YALE L.J. 1142, 1152-3 (1949).

Criminal Statutes. It seems clear that citizenship could not be divested under the guise of a criminal sanction unless perhaps the crime were one directed at the heart of citizenship itself, *e.g.*, treason, desertion, draft avoidance. Present statutes do provide for civil loss of citizenship in these instances. REV. STAT. §§ 1996-8 (1875), repealed, 54 STAT. 1172 (1940), 8 U.S.C. § 904 (1946), presently 54 STAT. 1168, 8 U.S.C. § 801 (1946), as amended 58 STAT. 746 (1944), 8 U. S. C. A. § 801 (Supp. 1948). See generally *United States v. Metzendorf*, 252 Fed. 933, 936 (D. Mont. 1918) (federal power to impose criminal sanctions); *Kurtz v. Moffit*, 115 U.S. 487 (1885) (desertion); Mr. Justice Rutledge, concurring in *Klapprott v. United States*, 335 U.S. 601, 617 (1949). *Cf. In re Look Tin Sing*, 21 Fed. 905, 910 (C.C.D. Cal. 1884). See also Sharon, *Loss of Citizenship by Draft Dodgers*, 5 IMM. & NAT. MON. REV. 97 (1948).

Borchard points out that banishment "is . . . inconsistent with the nature of a

Congress might need to avoid international conflicts. Similar considerations may have applied here.

The more significant question, however, is whether Congress may differentiate between the naturalized and native-born American. The court of appeals, probably reluctant to deny unconditionally a power which Congress may sometime need, refused to prohibit categorically all distinction between the two classes of citizens.²¹ But even a most tolerant court should balk at 404(c), which tells the naturalized American that he alone travels and resides abroad at the risk of losing his citizenship.²²

The danger of branding naturalized citizenship "second class" has already been recognized by the Supreme Court.²³ If Congress is permitted to discrimi-

sovereign state and opposed to the basis of the modern political system, inasmuch as this form of penalty depends for its execution on the goodwill of neighboring states." BONDCHARD, *op. cit. supra* note 2, § 334. The result of the expatriating statutes is generally banishment. Note also that the UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 15 (1948) provides that "[e]veryone has the right to a nationality. No one shall be arbitrarily deprived of his nationality. . . ." U. N. Doc. A/811 (Dec. 16, 1948).

21. Although the Supreme Court has surrounded the denaturalization proceedings with stringent safeguards, see note 36 *infra*, it has nonetheless upheld statutory provisions authorizing denaturalization for fraud. *Knauer v. United States*, 328 U.S. 654 (1946). These provisions, logically distinguishable from expatriation legislation, see note 1 *supra*, are not far different in spirit. Both are means employed by Congress to police the activities of the naturalized citizens. For discussion of the latest denaturalization cases consult Gordon, *Denaturalization in the Supreme Court*, 4 INT. & NAT. MON. REV. 111 (1947).

22. It is well settled that the states may not impair freedom of motion from state to state. Some courts have considered freedom of movement from state to state an incident of state citizenship protected by Art. IV, § 2 of the Federal Constitution. *Corfield v. Coryell*, 6 Fed. Cas. No. 3,230, at 552 (C.C.E.D. Pa. 1823). Other courts have considered it an aspect of national citizenship, protected from state infringement by the "privileges and immunities" clause of the Fourteenth Amendment. See Mr. Justice Douglas, concurring in *Edwards v. California*, 314 U.S. 160, 177 (1941). Whether the freedom is protected under the Fifth Amendment, and whether it is a freedom of motion not only from state to state, but from country to country has not yet been decided. Note that the UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 13, § 2 declares that "[e]veryone has the right to leave any country, including his own, and to return to his country."

23. See *Schneiderman v. United States*, 320 U.S. 118, 120 (1943). In *Knauer v. United States*, 328 U.S. 654, 658 (1946) the Court declared: "Citizenship obtained through naturalization is not a second class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country save that of eligibility to the Presidency. . . . There are other exceptions of a limited character." (In a footnote to this last remark the Court mentioned §§ 404-6 of the Nationality Act, but this seems more an enumeration of statutory differences, than a conclusion as to the constitutionality of those sections.) See also Mr. Justice Rutledge, concurring in *Klapprott v. United States*, 335 U.S. 601, 616 (1949).

In his dissenting opinion in *Knauer v. United States*, 328 U.S. 654, 675, 677 (1946), Mr. Justice Rutledge declared: "If therefore in any case a naturalized citizen's right and status can be revoked, by the procedure followed here or perhaps at all, it would be in such a case as this. But if one man's citizenship can thus be taken away, so can that of any other. . . . Not merely Knauer's rights, but those of millions of naturalized citizens in their status and all that it implies of security and freedom, are affected by what is done

nate against the naturalized citizen, his security will fluctuate with the political temper of majority thought. During periods of international unrest, distrust of the naturalized citizen has often led to attempted abridgment of his freedom.²⁴ Any distinction permitted now may be precedent for even more destructive discrimination.

Although the Constitution itself does not expressly enjoin statutory distinctions between naturalized and native-born Americans,²⁵ early English²⁶ and state²⁷ law—which probably influenced the instrument's framers²⁸—made

in this case. By the outcome they are made either second-class citizens or citizens having equal rights and equal security with others.

"To say that Congress can disregard this fact and create inequalities of status as between native and foreign-born citizens by attaching conditions to their admission, to be applied retroactively after that event, is only to say in other words that Congress by using that method can create different, and inferior, classes of citizens. We have . . . pointed out why citizens with strings attached to their citizenship, for its revocation, can be neither free nor secure in their status."

24. See Preus, *Denaturalization on the Ground of Disloyalty*, 36 AM. POL. SCI. REV. 701 (1942); Hays, *Civil Liberties in War Time*, 2 BILL OF RIGHTS REV. 170 (1942). For further sources, see Note, 44 COL. L. REV. 736, 741 (1944).

25. Applicable provisions of the United States Constitution are: "The Congress shall have power. . . . To establish a uniform Rule of Naturalization. . . ." Art. I, § 8; "No person shall be a Representative who shall not have . . . been seven years a Citizen of the United States. . . ." Art. I, § 2; "No person shall be a Senator who shall not have . . . been nine years a Citizen of the United States. . . ." Art. I, § 3; "No person except a natural born Citizen . . . shall be eligible to the Office of President. . . ." Art. II, § 1; "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." AMEND. XIV, § 1.

26. In 1628 Lord Coke stated that "if he [the alien] be naturalized by act of parliament . . . he is not accounted in law *alienigena*, but *indigena*," and "*indigena*" means one "borne within the king's liegeance . . . for *ligeus* is ever taken for a naturall borne subject." The "alien naturalized to all intents and purposes is as is a naturall borne subject." Co. LIT. ff. 8a, 129a. Shortly thereafter Baron Hale affirmed that naturalization "put them [the aliens] in the condition as if they had been born in England." Collingwood and Pace, 1 Vent. 413, 420, 429, 86 Eng. Rep. 262, 266-7, 272 (Ex. Ch. 1664); See also Regina v. Manning, 2 Car & K. 891, 900, 175 Eng. Rep. 374, 378 (Ex. Ch. 1849).

The only exception to complete equality countenanced in English law was that relating to eligibility for certain public offices, which was preserved to a very limited extent in the provisions of the constitution. 1 BL. COMM. *374. Brief for American Civil Liberties Union as *Amicus Curiae*, p. 7, *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir. 1949).

27. A typical statute reads:

"Whereas nothing can tend more to the advancement of a new plantation either to its defence or prosperity, nor nothing more add to the glory of a prince then being a gracious master of many subjects, nor any better way to produce those effects then the inviteing of people of other nations to reside amonge us, by communication of priviledges, *Be it therefore enacted* . . . that any stranger . . . be admitted to a naturalization, and by act thereof to them granted be capable of . . . all such liberties, priviledges, immunities whatsoever, as a naturall borne Englishman is capable of . . ." 7 LAWS OF VIRGINIA (1671), 2 Henning 289 (1823). This motif is recurrent in the various naturalization acts of Virginia. 2 Henning 302, 308, 339, 464 (1823). See also 6 LAWS OF MARYLAND 2, 5 (1779), Herty 377 (1799); 8 STATS AT LARGE OF PENNSYLVANIA 337 (1773); 1 PRIVATE AND SPECIAL STAT-

no distinction between the two classes of citizens. Moreover, the Fourteenth Amendment, by declaring that both naturalized and native-born persons are citizens of the United States, and by expressly prohibiting any state infringement of the privileges or immunities that are attributes of such citizenship,²⁹ implies that both classes of citizens have the same privileges and immunities and hence must be accorded equal protection.³⁰ Judge Edgerton's opinion that the Constitution prohibits any distinction between the naturalized and native-born American finds support in early statements of the Supreme Court³¹—statements which have been given recent approval.³²

UTES OF THE COMMONWEALTH OF MASSACHUSETTS 1780-1805, 205 (1805); H. R. Doc. No. 326, 59th Cong., 2d Sess. 8-11 (1906).

28. In the early period of United States history immigration was encouraged. DEP'T LABOR, HISTORICAL SKETCH OF NATURALIZATION IN THE UNITED STATES (1926). The Declaration of Independence cited as a grievance against George III that "[h]e has endeavored to prevent the Population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither. . . ."

There was manifested early in American history a distrust of persons who resided in America long enough to be naturalized and immediately returned to the country from which they came with the intention of evading both American laws and those of their native states. 1 ANNALS OF CONG. 1149 (1790). Nevertheless, when the question of granting Congress power over naturalization arose, the delegates to the Convention rejected a broader provision granting power to "regulate" naturalization in favor of the present more limited grant. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 144, 167, 235 (1937 ed.); 4 *id.* at 45.

29. See note 25 *supra*.

30. In the Fourteenth Amendment, the first comprehensive definition of United States citizenship, Slaughter-House Cases, 16 Wall. 36, 72 (U.S. 1873), no differentiation was made between the naturalized and native-born citizen. "So profoundly convinced are we of the right of these immigrants from other countries to change their residence and allegiance, that, as soon as they are naturalized, they are deemed entitled with the native-born to all the protection which the government can extend to them" *In re Look Tin Sing*, 21 Fed. 905, 907 (C.C.D. Cal. 1884).

For a suggestion that the Fourteenth Amendment prohibits Congressional deprivation of citizenship-by-birth see *United States v. Wong Kim Ark*, 169 U.S. 649, 653, 702 (1893).

31. The earliest judicial statement of equality of citizenship was made by Chief Justice Marshall in *Osborn v. United States Bank*, 9 Wheat. 738, 827 (U.S. 1824). See *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898): "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. . . .'" To the same effect see *Baumgartner v. United States*, 322 U.S. 665, 673 (1944); *United States v. Macintosh*, 283 U.S. 605, 623-4 (1931), *overruled on other grounds*, *Girouard v. United States*, 328 U.S. 61, 69 (1946); *United States v. Schwimmer*, 279 U.S. 644, 649 (1929), *overruled on other grounds*, *Girouard v. United States*, *supra*; *Luria v. United States*, 231 U.S. 9, 22 (1913); *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 162 (1892); *In re Look Tin Sing*, 21 Fed. 905, 907 (C.C.D. Cal. 1884).

32. *Knauer v. United States*, 328 U.S. 654, 658 (1946); *Schneiderman v. United States*, 320 U.S. 118, 120 (1943). See also Mr. Justice Murphy, concurring in *Baumgart-*

However, the crucial constitutional provision is the due process clause of the Fifth Amendment.³³ This clause has generally been applied in the field of economic legislation to nullify discrimination which was unreasonable, arbitrary or capricious.³⁴ It was this interpretation that the Court of Appeals applied to Section 404(c) and found satisfied.³⁵ But discrimination against the naturalized citizen presents an issue of civil liberties, and the court should have required more than merely the rational basis for discrimination demanded of economic legislation.³⁶ Oft-repeated judicial declarations of the preferred position of civil liberties³⁷ and strong policy arguments against any

ner v. United States, 322 U.S. 665, 678, 679 (1944); Mr. Justice Rutledge, concurring in *Klapprott v. United States*, 335 U.S. 601, 616 (1949); dissenting in *Knauer v. United States*, *supra*, at 675.

33. "In its consequences it [deprivation of citizenship] is more serious than a taking of one's property. . . . For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

34. Under this test the courts have upheld legislation so long as there was a rational connection between the remedy provided and the evil to be curbed. See, *e.g.*, *United States v. Petrillo*, 332 U.S. 1, 9 (1946); *Detroit Bank v. United States*, 317 U.S. 329, 338 (1943); *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937); *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Cf. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

35. 176 F.2d 619, 620 (D.C. Cir. 1949).

The Court relied upon *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Steward Machine Co. v. Davis*, 301 U.S. 548, 584 (1937); and *Nebbia v. New York*, 291 U.S. 502, 525 (1934). It stated: "The history of Section 804 accounts for its application to naturalized citizens only. It reveals a recognition by Congress of the need for legislation to lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens and their offspring. . . ." 176 F.2d 619, 621 (D.C. Cir. 1949).

Ancillary to this is the question whether the "equal protection" clause of the Fourteenth Amendment applies to federal legislation by incorporation into the Fifth Amendment. In *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943) it is pointed out that "[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress." See also *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). But see Mr. Justice Murphy's concurring opinion in *Hirabayashi v. United States*, *supra*, at 109, 111; *Steward Machine Co. v. Davis*, *supra*, at 584; *United States v. Petrillo*, *supra*, at 9; *Wilson v. New*, 243 U.S. 332, 354 (1917); *Welch v. Henry*, 305 U.S. 134, 145 (1938); *United States v. Yount*, 267 Fed. 861, 863 (W.D. Pa. 1920). These cases suggest that the court will view federal discriminatory legislation in the same light as state legislation, but the proposition is far from established.

36. In the denaturalization cases the Court has introduced a new standard of proof. *Schneiderman v. United States*, 320 U.S. 118, 158 (1943). It has demanded that charges of fraud in the naturalization proceedings be supported by "'clear, unequivocal and convincing' evidence which does not 'leave the issue in doubt.'" For the suggestion that this is equivalent to a clear and present danger test, see DOWLING, *CASES ON CONSTITUTIONAL LAW* 1033 (3rd ed. 1946); Note, 44 *Col. L. Rev.* 736, 745 (1944). This strict standard of proof, though mainly attributable to the Court's desire to protect freedom of thought and speech, *Schneiderman v. United States*, *supra*, at 120, was also deemed necessary to the protection of the naturalized American. *Id.* at 159.

37. See notes 31 and 32 *supra*.

distinction between the two classes of citizens³⁸ have in effect created a presumption against such discriminatory legislation—a presumption to be overcome only by clear proof of public necessity.

Section 404(c) does not appear to satisfy this requirement. The court of appeals found support for the statute in public policy designed to prevent international disputes over the nationality of naturalized citizens and their offspring. This was the very justification offered by Congress for Sections 404(a) and 404(b), which abrogated the citizenship of naturalized Americans who returned to their native lands. There it was reasonable: such citizens are very apt to become merged with the native population, and thus increase international friction.³⁹ Similarly, the justification made sense in *Mackenzie v. Hare*. The distinction in that case between women who married Americans and those who married foreigners may also have been a reasonable one. At that time many countries still adhered to the concept of husband and wife unity and considered the married woman a citizen of her husband's state.⁴⁰ The statute was enacted to prevent disagreements with those countries.⁴¹ But the policy of preventing international disputes does not justify discrimination against the naturalized American who resides in a non-native foreign state.⁴² While it was asserted during Congressional hearings that the Section would elimi-

38. See note 23 *supra*. The Charter of the United Nations declares that "[t]he purposes of the United Nations are: . . . To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race. . . ." (Art. 1, § 3), and that "All Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." (Art. 2, § 2). Query, whether this applies to discrimination predicated solely on place of origin.

39. See notes 5 and 3 *supra*.

The major difficulty involved those States which, adhering to the doctrine of perpetual allegiance, attempted to press the duties of citizenship upon former natives, naturalized in America, who returned to reside. See references in note 3 *supra*; Morrow, *Early American Attitude toward Naturalized Americans Abroad*, 30 AM. J. INT'L L. 647, 650 (1936); FLOURNOY & HUDSON, NATIONALITY LAWS (1929); REPORT OF THE ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE (1869). (It was on the recommendation of this Commission that Parliament in 1872 finally abandoned the doctrine of perpetual allegiance which had caused bitter controversies between Great Britain and the United States.)

The return of the naturalized citizen to his native land and his residence there caused conflict even when the native country did not adhere to the doctrine of perpetual allegiance. See President Grant's Annual Message to the Congress of 1875, 10 MESSAGES AND PAPERS OF THE PRESIDENTS 4286, 4301 (1897); Letter from Secretary Fish to the President, 2 U. S. FOREIGN REL.: 1873, at 1186, 1190, 1191 (Dep't State 1873).

40. See FLOURNOY & HUDSON, *op. cit. supra* note 39, at 738, 744, 745. *Hearings before Committee on Immigration and Naturalization, Statement of Emma Wold on Effect of Marriage on Nationality*, 70th Cong., 1st Sess. (1928).

41. See H.R. Doc. No. 326, 59th Cong., 2d Sess. 33 (1906). The Act of 1907 has been repealed, 42 STAT. 1022 (1922). The present provisions are found in Nationality Act § 317, 54 STAT. 1146 (1940), 8 U.S.C. § 717 (1946). See Hover, *Citizenship of Women in the United States*, 26 AM. J. INT'L L. 700 (1932).

42. See note 6 *supra*, and note 45 *infra*.

nate "problems" created by naturalized American Zionists who resided in Palestine, the problems were never defined.⁴³ But even if American citizens abroad do cause international friction,⁴⁴ the friction results from the fact of American citizenship and is no less when the citizen is native-born than when he is naturalized.⁴⁵

Section 404(c) "makes it in effect a crime"⁴⁶ for some citizens, but not for others, to live five years abroad. Constitutional sanction for such a policy requires a more appealing rationale than has yet come to light. If one was

43. *Hearings before Committee on Immigration and Naturalization on H.R. 6127 superseded by H.R. 9980, 78th Cong., 1st Sess. 139-41 (1940).*

44. The only data available as to the number of American citizens residing abroad is limited to the number of citizens, naturalized and native-born, permanently departed from the United States by country of future residence.

NATIVE-BORN AND NATURALIZED UNITED STATES CITIZENS PERMANENTLY DEPARTED FROM
THE UNITED STATES BY COUNTRY OF FUTURE PERMANENT RESIDENCE:
YEARS ENDED JUNE 30, 1938-1947

[Incomplete]

Country of Future Permanent Residence		1938	1939	1940	1941	1942	1943	1944	1945	1946	1947
ALL COUNTRIES	Native-born	8,741	11,622	12,496	9,528	7,417	3,291	3,476	5,388	12,400	18,302
	Naturalized	1,297	1,617	1,082	720	478	273	422	799	3,030	3,587
EUROPE	Native-born	1,354	1,583	703	163	232	28	212	465	1,800	3,712
	Naturalized	539	672	267	27	18	6	51	119	1,100	1,628
ASIA	Native-born	896	1,307	2,128	1,086	198	31	196	1,272	2,246	1,066
	Naturalized	37	65	124	50	20	2	7	88	377	115
PALESTINE	Native-born	8	33	34	—	—	—	1	9	35	25
	Naturalized	4	12	18	—	—	1	—	3	53	1
CANADA	Native-born	2,768	2,496	2,399	3,062	3,160	1,802	1,956	1,831	3,768	4,291
	Naturalized	538	437	296	273	253	241	326	429	856	1,095

Communication to YALE LAW JOURNAL from Henry B. Hazard, Assistant Commissioner, Research and Education Division, Immigration and Naturalization Service, dated May 16, 1949, in Yale Law Library.

See also Krichesky, *Loss of United States Nationality: Expatriation*, 4 IMM. & NAT. MON. REV. 9 (1946).

45. This is true even if the object of expatriating provisions is said to be the prevention of dual nationality problems. For the same problems of dual nationality may arise in the case of native-born citizens and their offspring abroad as in the case of naturalized citizens and their offspring in a non-native foreign state. See Note, 25 MINN. L. REV. 348 (1941). See also PROPOSED CODE v (1939); SEN. REP. NO. 2150, 76th Cong., 3rd Sess. 4 (1940); 86 CONG. REC. 11948-9 (1940), which the Government cites in its brief. Brief for Appellees, p. 12, 13, 14.

46. 176 F.2d 619, 623 (D.C. Cir. 1949) (dissenting opinion).

"This court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty." *Klapprott v. United States*, 335 U.S. 601, 612 (1949). See also *Schneiderman v. United States*, 320 U.S. 118, 122 (1943); *In re Wildberger*, 214 Fed. 508, 509 (E.D. Pa. 1914); *Burkett v. McCarty*, 10 Bush 758, 760 (Ky. 1874); *Cummings v. Missouri*, 4 Wall. 277, 320, 321 (U.S. 1866); Mr. Justice Brewer, dissenting in *Fong Yue Ting v. United States*, 149 U.S. 698, 732, 740 (1893).