THE EXPATRIATION ACT OF 1954

THE Expatriation Act of 1954 [1] is the newest addition to the growing list of statutes by which Congress has sought to equip the government with sanctions to combat internal communism.[2] The Act defines no new crimes, but provides for the automatic loss of United States nationality [3] by persons convicted of certain existing crimes, including rebellion and insurrection, seditious conspiracy, and advocating the overthrow of the government in the manner proscribed by the Smith Act.[4] Since a court has recently held that membership in the Communist Party, along with cognizance of its subversive aims, is sufficient in itself to constitute a violation of the Smith Act,[5] the Expatria-

1. Expatriation Act of 1954, 68 STAT. 1146, Pub. L. No. 772, 83d Cong., 2d Sess. (Sept. 3, 1954).

The Expatriation Act amended § 349(a)(9) of the Immigration and Nationality Act to read:

> "(a) a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by
>
> . . . .
>
> "(9) committing any act of treason against, or attempting by force to overthrow, or bearing arms against the United States, *violating or conspiring to violate any of the provisions of section 2383 of title 18, United States Code, or wilfully performing any act in violation of section 2385 of title 18, United States Code, or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them,* if and when he is convicted thereof by a court martial or by a court of competent jurisdiction . . . ."

66 STAT. 268 (1952), as amended, 8 U.S.C.A. § 1481(a)(9) (Supp. 1954). (Portions added by the Expatriation Act are italicized.)

2. *E.g.*, Communist Control Act of 1954, 68 STAT. 775, 50 U.S.C.A. §§ 841-44 (Supp. 1954); Internal Security Act of 1950, 64 STAT. 987, 50 U.S.C. §§ 781-826 (1952); 68 STAT. 745 (1954), 18 U.S.C.A. § 3486 (Supp. 1954) (witnesses; immunity from prosecution); Immigration and Nationality Act, 66 STAT. 166, 8 U.S.C. § 1101 (1952), especially §§ 1182, 1251, 1252.

The views of President Eisenhower, expressed in his State of the Union message of January 7, 1954, were highly influential in bringing about the passage of the Expatriation Act. See 100 CONG. REC. 80 (1954).

3. The terms "citizenship" and "nationality" will be used interchangeably throughout this Comment.

On the meaning of citizenship and nationality see, generally, GETTYS, CITIZENSHIP IN THE UNITED STATES (1934); HUDSON, INTERNATIONAL LAW c. 4 (3d ed. 1951); MAXON, CITIZENSHIP (1930); 1 OPPENHEIM, INTERNATIONAL LAW §§ 293-96a (7th ed., Lauterpacht 1948); Nielsen, *Some Vexatious Questions Relating to Nationality*, 20 COLUM. L. REV. 840 (1920).

4. These acts are defined as crimes by 18 U.S.C. §§ 2383-85 (1952) respectively.

5. United States v. Lightfoot, Criminal No. 54-CR-262, N.D. Ill., Jan. 26, 1955. See N.Y. Times, Jan. 27, 1955, p. 1, col. 2; Feb. 16, 1955, p. 15, col. 6. All previous convictions of communists had been under that section of the Smith Act which prohibits conspiracy to teach or advocate the overthrow of the government. N.Y. Times, Jan. 27, 1955, p. 1, col. 2. Since the decision in *Lightfoot*, the government has indicted three more communist leaders on membership grounds.

tion Act is potentially applicable to more than 22,000 American communists.[6] But a decision that the Expatriation Act is constitutional might well affect more than these 22,000 unpopular citizens: it would probably establish the proposition that expatriation may validly be imposed as punishment for crime.[7] Deprivation of all the rights of citizenship within the United States—including the right to remain in it—and the rights of nationality abroad, could then become a standard feature of federal criminal law.

Deprivation of American nationality has been used before by the United States as a sanction against criminal conduct,[8] but the constitutionality of such provisions has never been tested or even satisfactorily discussed.[9] Moreover, decisions on the constitutional status of expatriation in general have been few, and have encumbered the law with an imprecise and unrealistic terminology that leaves obscure the extent of congressional power over citizenship in any context. There is, therefore, not even a settled body of law from which to proceed by way of reason and analogy. The commentator must state the cases, speculate as to their meaning, and take his stand on policy.

6. *Testimony of J. Edgar Hoover, Director, Federal Bureau of Investigation, before the House Subcommittee on Appropriations on February 24, 1955*, 84th Cong., 1st Sess., reprinted in U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, 1956 APPROPRIATION 51 (1955).

7. See text at notes 100, 111-23 *infra* and accompanying text.

8. In 1940 loss of nationality was made a consequence of conviction of treason, desertion or attempted overthrow of the government by force. 54 STAT. 1168 (1940), 8 U.S.C. §§ 1481(a) (8), (9) (1952). In 1944 draft avoidance in time of war was added to the list of expatriating crimes. 58 STAT. 746 (1944), 8 U.S.C. § 1481(a)(10) (1952). See also 13 STAT. 501 (1865) (deprivation of the "rights of citizenship" for desertion or draft evasion). For a discussion of the use of denationalization as a penal sanction, see text at notes 76-99 *infra*.

9. The dearth of reported court cases involving penal expatriation is surprising, since over 2% of all persons expatriated between 1945 and 1953 lost their citizenship on such grounds. Of 47,011 persons expatriated during that period, 1281 lost their nationality because of draft avoidance, 11 because of desertion, and 146 on other grounds. No persons were expatriated for treason or conviction of conspiracy to overthrow the government by force and violence. See I. & N. ANN. REP. 67 (1953); *id.* 73 (1951); statistical summary for the years 1945 to 1949 included with Letter from L. Paul Winings, General Counsel, Immigration and Naturalization Service, to the *Yale Law Journal*, April 1, 1955, on file in Yale Law Library. See also Krichefsky, *Loss of United States Nationality: Expatriation*, 4 IMM. AND NAT. MO. REV. 9 (1946).

The Supreme Court did have occasion to state that no citizenship "rights" could be denied under the 1865 Act, see note 8 *supra*, until the accused had been convicted by a military court martial, but it did not discuss constitutional problems. Kurtz v. Moffitt, 115 U.S. 487, 501 (1885). Only one modern case has been found in which the penal sections of the expatriation statutes were involved. Ponce v. McGrath, 91 F. Supp. 23 (S.D. Cal. 1950). A few other cases on penal expatriation have been heard by the Board of Immigration Appeals, *e.g.*, In Matter of H—VP—448327, 4 I. & N. DEC. 540 (1952) (desertion); In Matter of G—R—A-6732816, 3 I. & N. DEC. 141 (1948) (draft avoidance); In Matter of C—56175/45, 2 I. & N. DEC. 276 (1945) (desertion), but neither the district court nor the Board have reached constitutional questions. See also Citizenship Status of Grover Cleveland Bergdoll, 39 OPS. ATT'Y GEN. 303 (1939) (convicted deserter).

WHAT THE EXPATRIATION ACT DOES

Upon conviction of any of the crimes it specifies, the Expatriation Act operates automatically to divest American nationality: it transfers the individual affected from the legal category of "citizen," or "national," to that of "non-citizen," or "alien."[10] The shift from one legal category to another—to the extent that it may constitutionally be accomplished—amounts to a loss of those rights under federal and state statutes and constitutions, and under international law, which are enjoyed by the citizen but not by the stateless alien.[11]

While the rights of aliens under the Federal Constitution are substantial,

10. 66 STAT. 272, 8 U.S.C. § 1488 (1952). See note 1 *supra*; S. REP. No. 2198, 83d Cong., 2d Sess. 3 (1954). See also Note, *Federal Anti-Subversive Legislation of 1954*, 55 COLUM. L. REV. 631, 664 n.247 (1955). Actual deprivations such as deportation, or loss or denial of employment, are not directly imposed by the Expatriation Act. These deprivations must be accomplished by operation of other statutes or constitutional provisions. The Act purports only to extinguish defenses against such deprivations should they ever be attempted.

Section 101(a)(3) of the Immigration and Nationality Act defines the term "alien" as "any person not a citizen or national of the United States." 66 STAT. 166, 8 U.S.C. § 1101 (a)(3) (1952).

Some question may arise whether the Expatriation Act brings individuals subject to its operation within the purview of statutes applicable to "aliens." For while Congress unquestionably intended to impose alien status, see, *e.g.*, 100 CONG. REC. 11281 (1954) (Reps. Graham and Robsion); *id.* at 14981 (Sen. Watkins); Roche, *The Loss of Nationality*, 99 U. PA. L. REV. 25, 38-40 (1950), it did so by imposing loss of "nationality." See notes 1, 2 *supra*. And since the term "alien" generally connotes "foreigner" in constitutional practice, see notes 138, 144-45 *infra*, it may be urged that expatriated native Americans are "non-citizens" rather than "aliens." They would thus have no recourse to the privileges granted exclusively to citizens, but would nevertheless not be subject to the constitutional disabilities of "aliens." Such an interpretation would alter or avoid the most serious constitutional problems posed by the Act, see note 18 *infra*, and the possibility of its adoption cannot be wholly discounted. *Cf.* United States v. CIO, 335 U.S. 106 (1948); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936) (concurring opinion of Justice Brandeis); SUTHERLAND, STATUTORY CONSTRUCTION § 83 (3d ed., Lewis 1904). However, since Congress clearly intended to impose alien status, it is assumed hereafter that the statute will be held to accomplish that result.

11. On the status of aliens in the United States, see, generally, KONVITZ, THE ALIEN AND ASIATIC IN AMERICAN LAW (1946); Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547 (1953); Kohler, *Legal Disabilities of Aliens in the United States*, 16 A.B.A.J. 113 (1930). For discussion of the status of aliens under international law, see BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916); HUDSON, INTERNATIONAL LAW c. 11 (3d ed. 1951).

On the meaning of statelessness, see ARENDT, THE ORIGINS OF TOTALITARIANISM 266-98 (1951); 1 OPPENHEIM, INTERNATIONAL LAW §§ 308-313a (7th ed., Lauterpacht 1948). In the event the convicted American were a dual national he would not, of course, be rendered stateless by the loss of his United States citizenship. For a discussion of the different methods by which citizenship is obtained with special reference to dual nationality, see Flournoy, *Dual Nationality and Election*, 30 YALE L.J. 545, 693 (1921); Naujoks, *Power of the National State in International Law to Determine the Nationality of an Individual*, 6 TEMP. L.Q. 451 (1932), 7 *id.* 176, 182-85 (1933).

they are inferior in important respects to those of the citizen.[12] Thus, aliens do not enjoy the "privileges and immunities" of federal citizenship secured by article four of the Constitution and by the fourteenth amendment.[13] Perhaps more important is the fact that aliens receive diminished protection under the equal protection clause of the fourteenth and the due process clauses of the fifth and fourteenth amendments.[14] Both federal and state governments may discriminate against aliens without violating those constitutional provisions. While the more severe economic deprivations have been increasingly disfavored by the courts in recent years, they are still countenanced when they meet a standard centered about the reasonableness of the discrimination made between citizen and alien.[15] Thus, legislation currently in effect in many states excludes aliens from employment, housing, land ownership, admission into professions, and voting.[16] Also, the alien receives less protection under the Federal Civil Rights Act, part of which applies only to citizens.[17]

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12. See Harisiades v. Shaughnessy, 342 U.S. 580, 586 & nn.9-10 (1952); Klapprott v. United States, 335 U.S. 601, 616, 617 (1949) (concurrence of Justices Rutledge and Murphy); Bridges v. Wixon, 326 U.S. 135, 157, 160 (1945) (concurrence of Justice Murphy). See also authorities cited note 11 *supra*; BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 63 (1916).

13. These rights have been held to include, among others, the right to demand the protection of the federal government at sea and abroad, to become a citizen of any state by bona fide residence therein, to have free access to the seaports and navigable waters of the United States, to travel from state to state; and the right "to come to the seat of the government, to assert any claim he may have upon [it], . . . to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions." Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79-80 (1872); Corfield v. Coryell, 6 Fed. Cas. 546, No. 3230 (C.C.E.D. Pa. 1823). On the right to travel from state to state see Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 43, 48 (1867).

14. Certain discriminations against aliens are permitted despite the fact that the fifth and fourteenth amendments are not limited in their application to citizens, but apply generally to all "persons." For discussion of permissible distinctions and citation of pertinent cases see Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 633 (1948); KONVITZ, *op. cit. supra* note 11, at 46-219; Comment, 20 U. CHI. L. REV. 547 (1953).

15. See, *e.g.*, cases cited note 14 *supra*; Comment, 20 U. CHI. L. REV. 547, 566 (1953) (reasonable discrimination permitted).

16. KONVITZ, *op. cit. supra* note 11, at cc. 1-10, treats all aspects of the status of aliens in the United States and cites landmark cases and articles in the field. See cc. 6-7 for restrictions on the alien's right to employment and to enter into the professions; c. 5 on land ownership with its resulting limitation on the availability of adequate housing. States which limit the right to own land to citizens or persons eligible for citizenship are listed in 5 VERNIER, AMERICAN FAMILY LAWS §§ 288-92 (1938). For further discussion of the right of aliens to own land, see 5 TIFFANY, REAL PROPERTY § 1377 (3d ed. 1939). Limitation of alien suffrage is discussed in KONVITZ, *op. cit. supra*, at 1; Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931). Furthermore, restricted job opportunities result from federal legislation such as the Federal Maritime Act, 1 STAT. 287 (1792), as amended, 46 U.S.C. § 221 (1952); 49 STAT. 1935 (1936), 46 U.S.C. § 672a (1952). Under this Act, seventy-five per cent of the crew of each American vessel must be United States citizens unless a special permit is issued by the Secretary of the Treasury. *Ibid.*

17. 16 STAT. 144 (1870), 42 U.S.C. § 1981 (1952); 14 STAT. 27 (1866), 42 U.S.C.

By far the most important right which the Expatriation Act attempts to take from the citizen is the right to remain in the United States. Aliens, unlike citizens, are subject to the plenary congressional power of deportation.[18] This vulnerability to deportation undercuts the inviolability of all rights nominally granted to the alien, since Congress may make the free exercise of any of those rights a cause for deportation.[19] Furthermore, when deportation of the alien is sought, he enjoys only very limited procedural rights.[20] While he is guaranteed a fair hearing and procedural due process on the issue of his deport-

§ 1982 (1952); 17 STAT. 13 (1871), 42 U.S.C. § 1983 (1952). Sections 1981 and 1983 preserve certain rights for all persons within the jurisdiction of the United States. However, § 1982 guarantees only to citizens the right to inherit, purchase, lease, sell, hold, and convey real estate and personal property.

18. "The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate." Judge Learned Hand, in United States *ex rel.* Kaloudis v. Shaughnessy, 180 F.2d 489, 490 (2d Cir. 1950). See also Galvan v. Press, 347 U.S. 522 (1954); Fong Yue Ting v. United States, 149 U.S. 698 (1893); KONVITZ, *op. cit. supra* note 11, at 46-78; *cf.* 1 OPPENHEIM, INTERNATIONAL LAW §§ 323-26 (7th ed., Lauterpacht 1948).

The sponsors of the Expatriation Act in both houses of Congress emphasized that the Act would make citizens deportable. See, *e.g.*, 100 CONG. REC. 14981 (1954) (Sen. Watkins); *id.* at 11281 (Rep. Robsion). Representative Graham stated that an expatriate "would not per se become deportable unless such person, following the loss of United States nationality, brings himself within the purview of [the Immigration and Nationality Act, 66 STAT. 163, 204, 208, 8 U.S.C. §§ 1251, 1252 (1952)] . . . ." 100 CONG. REC. 11281 (1954). See, however, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (retroactive deportation statute constitutional); United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950) (denaturalized citizen deportable for acts done while a citizen, without regard to the "void *ab initio*" doctrine). For statutory obstacles to the deportation of expatriates under existing law, see note 137 *infra*.

The holding that expatriates are made "non-citizens," as distinguished from "aliens," by the Expatriation Act, see note 10 *supra*, could shift the ground for constitutional argument in a deportation proceeding. The Immigration and Nationality Act defines "alien" as "any person not a citizen or national of the United States." 66 STAT. 166, 8 U.S.C. § 1101 (a)(3) (1952). This definition would be attacked as an unreasonable classification denying equal protection of the laws. U.S. CONST. amend. XIV; Skinner v. Oklahoma, 316 U.S. 535 (1942); Yick Wo v. Hopkins, 118 U.S. 356 (1886). For authorities indicating that the term "alien" has always had a factual reference, *i.e.*, a person born outside the United States, see notes 138, 144-45 *infra*.

19. Aliens remain in the United States only so long as their presence is not deemed hurtful. Ng Fung Ho v. White, 259 U.S. 276, 280 (1922); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Moncado v. Ramsey, 167 F.2d 191 (8th Cir. 1948). Even conduct protected by the first amendment, for example, may be the cause for an alien's deportation. Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Note, 51 YALE L.J. 1215, 1222 (1942). *But cf.* Bridges v. Wixon, 326 U.S. 135 (1945).

20. Carlson v. Landon, 342 U.S. 524 (1952); *cf.* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). For general discussion of the alien's limited constitutional rights when facing deportation, see Note, 60 YALE L.J. 152 (1951).

ability, he has no claim to a jury trial on that question.[21] Moreover, since deportation is a civil sanction, many other rights normally granted to a criminal defendant are denied the alien.[22] Thus, the alien may be compelled to testify against himself.[23] He may not complain of illegal searches or seizures carried out by the government.[24] Nor may he argue that deportation is unconstitutional as a cruel and unusual punishment.[25] Finally, the alien may be held without bail in the sole discretion of the Attorney General pending an administrative determination of his deportability.[26] In the event he is found deportable, this detention may continue for up to six months, if necessary, until his departure can be arranged.[27]

Unless the American subject to the Expatriation Act is a dual national, loss of nationality amounts to the loss of all rights under contemporary international law. States are traditionally considered to be the sole right and duty bearing units under international law; the individual's rights and duties derive from his connection with a State.[28] Protests by individual States or by the

21. Bridges v. Wixon, 326 U.S. 135 (1945) (fair hearing and due process); Carlson v. Landon, *supra* note 20, at 537 & n.28 (no right to a jury trial).

22. Carlson v. Landon, *supra* note 21; Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Bridges v. Wixon, 326 U.S. 135 (1945); Mahler v. Eby, 264 U.S. 32 (1923). *But see* Jordan v. DeGeorge, 341 U.S. 223 (1951). See, generally, Note, 60 YALE L.J. 152 & n.2 (1951), and cases cited therein.

23. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); United States *ex rel.* Circella v. Sahl, 216 F.2d 33 (7th Cir. 1954).

24. Li Sing v. United States, 180 U.S. 486, 495 (1901); Wong Wing v. United States, 163 U.S. 228, 236 (1896); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). *But see* Bilokumsky v. Tod, *supra* note 23. In the *Fong Yue Ting* case the Supreme Court stated that an alien who has been ordered deported "has not . . . been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application." Fong Yue Ting v. United States, *supra.*

25. Wong Wing v. United States, *supra* note 24; Fong Yue Ting v. United States, *supra* note 24; *accord,* Klapprott v. United States, 335 U.S. 601, 617 (1949) (concurrences of Justices Rutledge and Murphy).

26. Carlson v. Landon, 342 U.S. 524 (1952) (Attorney General's "reasonable" apprehension of "hurt" to United States from release of prisoner sufficient grounds for refusal of bail).

27. 66 STAT. 208, 8 U.S.C. § 1252(c) (1952). The deportee regains only a portion of his freedom when released at the end of six months, since he remains under supervised parole. While no attempt is presently made to imprison undeportable deportees indefinitely, precedent for such action may exist. Thus, in Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953), the Court upheld the continued detention without bail of an *entering* alien who was undeportable because no nation would accept him. The Court has often equated the government's exclusionary power with the power of expulsion, although resident aliens facing deportation are guaranteed a greater measure of procedural due process than are entering aliens. *Id.* at 210-13. Such distinctions might not prevent the permanent detention of alien residents ordered deported and unable to comply.

28. 1 OPPENHEIM, INTERNATIONAL LAW §§ 291-94 (7th ed., Lauterpacht 1948). See notes 158-72 *infra.*

United Nations against outrages involving stateless persons are likely to be met successfully with the defense of "domestic jurisdiction."[29] A stateless person, having no parent State to make representations or take action in his behalf, is almost entirely at the mercy of the State in which he resides.[30]

CONSTITUTIONALITY OF THE EXPATRIATION ACT

The Expatriation Act of 1954 amends section 349 of the Immigration and Nationality Act, which is entitled: "Loss of nationality by native-born or naturalized citizen; voluntary action."[31] By choosing this section for amendment, Congress attempted to suggest the legal conclusion that the Act did no more than recognize a new method for *voluntary* expatriation.[32] Viewed as Congress suggests, loss of nationality would follow conviction of a subversive crime not as a penalty, but rather as a result of the prior statutory definition of the crime as an act of expatriation.[33] No inquiry would be made as to whether the citizen actually desired to give up his nationality.[34] Conviction of performance of the act would furnish conclusive proof that he chose voluntarily to renounce his citizenship.[35]

If the Expatriation Act of 1954 is considered to be no more than creation by Congress of an additional method by which a citizen can exercise his right

29. See note 165 *infra.*

30. For detailed discussion of the plight of the stateless individual under international law see notes 139-43 *infra* and accompanying text.

When a nation maltreats the citizens of a foreign State who are inside its borders, the parent State may complain and in time obtain damages in behalf of the injured person. See, *e.g.,* United States (Chattin) v. Mexico, U.S.-Mexico Gen. Claims Comm'n Opinions 422 (1927); FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE *passim* (1938). The stateless person is unable to claim such protection and consequently may be the subject of more frequent discrimination and maltreatment by the State in which he resides. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 8 (1916); 1 OPPENHEIM, *op. cit. supra* note 28, §§ 291-92, 312.

31. See note 1 *supra.*

32. In a statement made before the House, Representative Graham referred to the Act's operation as similar to "voluntary renunciation." 100 CONG. REC. 11280 (1954). Senator Watkins of Utah told the Senate that the commission and conviction of the crimes defined in H.R. 7130 amounted to "an overt act of expatriation . . . tantamount to the transfer of allegiance to [a] foreign power." 100 CONG. REC. 14981 (1954). See note 2 *supra.*

The denationalization of convicted subversives could have been accomplished by an amendment to the anti-sedition statutes or the Smith Act, 18 U.S.C. §§ 2383-2385 (1952), adding loss of nationality to the penalties already prescribed. See text at notes 3-4 *supra.* However, such action would have denied the proponents of denationalization their best argument for the constitutionality of the sanction, an argument based on the voluntary expatriation doctrine. See text at notes 45-64 *infra.* During the course of debate Senator McCarran stated that he had serious doubts "about the constitutional right of Congress to deprive a man of his citizenship as a criminal penalty." 100 CONG. REC. 14983 (1954).

33. See note 39 *infra.*

34. See, *e.g.,* Savorgnan v. United States, 338 U.S. 491 (1950); Revedin v. Acheson, 194 F.2d 482, 484 (2d Cir. 1952).

35. For judicial recognition of a presumption of voluntariness, see Savorgnan v.

to expatriate himself voluntarily, no constitutional problems can arise. Determination of whether Congress has succeeded in so avoiding constitutional problems must await consideration of the development and present status of the concept of voluntary expatriation, which has been the central pivot of expatriation law in the United States from the beginning.

History of Voluntary Expatriation

At its inception, the doctrine of voluntary expatriation was permissive rather than restrictive and required the exercise of no governmental powers. Motivated by the desire to free recently naturalized Americans from claims to allegiance advanced by states from which they had emigrated, Congress in 1868 recognized voluntary expatriation as a "natural and inherent right of all people."[36] The Act of 1868 declared the willingness of the United States to permit its nationals to renounce American citizenship, and served notice that it would unalterably oppose governmental interference with any individual's right to change his nationality.[37]

Beginning in 1907 with the first expatriation statute and continuing to date,[38] voluntary expatriation has taken on a markedly different meaning. In various

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United States, *supra* note 34; Mackenzie v. Hare, 239 U.S. 299 (1915); Acheson v. Wohlmuth, 196 F.2d 866, 871 n.10 (D.C. Cir. 1952) (collecting citations).

The presumption of voluntary performance can be rebutted only by proof of duress. *E.g.*, Mandoli v. Acheson, 344 U.S. 133 (1952). See Notes, *"Voluntary": A Concept in Expatriation Law*, 54 COLUM. L. REV. 932 (1954), *Expatriation—Requirement that Expatriation Be Voluntary*, 22 GEO. WASH. L. REV. 493 (1954).

36. 15 STAT. 223 (1868). For review of the factors responsible for passage of the Proclamation of 1868, see MOORE, PRINCIPLES OF AMERICAN DIPLOMACY 285-89 (1918); Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312 (1931). An opinion of Attorney General Black entitled "Right of Expatriation," 9 OPS. ATT'Y GEN. 356 (1859), was extremely influential in bringing the United States Congress to repudiate the conventional doctrine of perpetual allegiance, as to which see Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830); 3 KENT, COMMENTARIES 49 (14th ed. 1896).

37. See 15 STAT. 223 (1868).

38. 34 STAT. 1228 (1907). See Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 26 (1950).

In 1865 Congress passed an "Act . . . to provide for enrolling and calling out the National Forces" by which persons convicted of desertion and draft evasion were "deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship . . . ." 13 STAT. 487, 490 (1865). This statute was interpreted as having imposed loss of civil rights rather than loss of nationality. Deserters were to remain Americans, *i.e.*, *not* "aliens." See Roche, *supra*, at 26, 61. Whether statutory expatriation commenced in 1865 or 1907 does not seem important for the purposes of this paper. The date 1907 has been adopted because the use of the term "expatriation" rather than "rights of citizenship" leaves no doubt about the congressional intent to deprive the American of nationality itself.

For a general review of the history of the law of expatriation in the United States, see GETTYS, CITIZENSHIP IN THE UNITED STATES 160-174 (1934); MAXON, CITIZENSHIP 132-147 (1930); MOORE, PRINCIPLES OF AMERICAN DIPLOMACY 270-305 (1918); Borchard, *Decadence of the American Doctrine of Voluntary Expatriation*, 25 AM. J. INT'L L. 312 (1931).

expatriation statutes Congress has designated certain acts which a citizen could not voluntarily perform without losing his nationality, whether or not renunciation of nationality was intended or desired.[39] Analysis of these statutes is facilitated if it is recognized that expatriation legislation has been enacted with three quite different objectives:[40] (1) to create formal procedures for exercise of the right of expatriation, in order to implement the right and to insure that the Government receives adequate notice of its exercise; (2) to reduce the number of dual nationals among United States citizens, and thereby to lessen the opportunities for conflict with other nations over such persons; (3) to punish American citizens who engage in criminal activities and thereby to enforce the federal criminal law.[41]

Voluntary Expatriation Statutes: Facilitation of a Right

The expression "voluntary expatriation," and the fact that expatriation originated in American law as a "natural and inherent right,"[42] suggest that expatriation statutes would be enacted primarily to implement the right, to

39. Prior to the passage of the Expatriation Act, there were ten acts by which a U.S. citizen might "voluntarily" relinquish his nationality:

(1) Obtaining naturalization in a foreign state.
(2) Taking an oath of allegiance to a foreign state.
(3) Entering, or serving in, the armed forces of a foreign state.
(4) a. Accepting employment under the government of a foreign state where the citizen has or acquires the nationality of such foreign state.
b. Accepting employment under the government of a foreign state for which employment an oath of allegiance is required.
(5) Voting in a political election in a foreign state.
(6) Making a formal renunciation of nationality before a diplomatic officer of the United States in a foreign state.
(7) Making in the United States a formal written renunciation of nationality.
(8) Deserting the armed forces in time of war.
(9) Committing treason against, or attempting by force to overthrow, or bearing arms against, the United States.
(10) Departing from or remaining outside of the United States in time of war for the purpose of evading training and service in the armed forces.

66 STAT. 267, 8 U.S.C. § 1481(a) (1952). For an excellent review of expatriation under these ten subsections, see Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25 (1950).

For prior expatriation statutes see 58 STAT. 746 (1944); 54 STAT. 1168 (1940); 34 STAT. 1228 (1907); *cf.* 13 STAT. 490 (1865). See also *Hearings Before the Committee on Immigration and Naturalization of the House on a Bill to Revise the Nationality Laws*, 76th Cong., 1st Sess., 489-92 (1940).

40. For the view that voluntary expatriation statutes might be rationalized into two groups, those concerned with dual nationality and those dealing with "dual allegiance," see Note, *"Voluntary": A Concept in Expatriation Law*, 54 COLUM. L. REV. 932 (1954).

41. Subsections (8)-(10) of § 349(a) of the Immigration and Nationality Act, 66 STAT. 267, 8 U.S.C. § 1481(a) (1952), are considered to impose *penal* expatriation. For text of subsections, see note 39 *supra*. See also Note, 54 COLUM. L. REV. 932, 935 & n.13 (1954). This classification is discussed in notes 76-100 *infra* and accompanying text.

42. See notes 36-37 *supra* and accompanying text.

provide formal procedures for its exercise, and to enable the government to keep adequate records. There is, in fact, only one such statute. Thus, formal renunciation of citizenship, in writing, before a diplomatic or consular officer of the United States abroad, was made an expatriating act in 1940.[43] This type of expatriation is "voluntary" in every sense of the word, since as a practical matter the expatriating act will not be performed unless the citizen specifically intends to renounce his citizenship. It raises no substantial question as to the constitutional power of Congress to withdraw American citizenship. Indeed, the only restriction on freedom imposed by such a statute is that it *limits* the means by which the right of expatriation can be exercised to performance of the prescribed formalities. There seems no doubt, however, that the government may impose reasonable administrative restrictions on the exercise of rights which may affect its operations and functions, as for example those relating to protection of citizens abroad.[44] This forthright and uncontroversial concept of "voluntary" is, however, to be found only in the Proclamation of 1868 and the Act of 1940. From the beginning, statutory expatriation has been based on a significantly different usage of that term.

Regulatory Expatriation: Dual Nationality

Early expatriation legislation was designed to deal with the newly emerging problem of dual nationality.[45] The increased movement of people between nations, liberalized procedures for naturalization, and conflicting systems utilized by nations to confer citizenship on individuals at birth had created a

43. See 54 STAT. 1168 (1940), 8 U.S.C. § 1481(a)(6) (1952).

44. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916). The United States has the responsibility to protect its nationals abroad. *Id.* §§ 7, 13, 133-34. Protection often means dispute with other States over their treatment of American citizens. *Id.* §§ 183-97. *Cf.* note 30 *supra*. The formal procedures required to effect renunciation inform the government that particular individuals can no longer claim its diplomatic protection, and thus prevent it from becoming unnecessarily embroiled in disputes with foreign nations in behalf of such persons. Furthermore, without a notification requirement no treason prosecution would stand much chance of success. See Kawakita v. United States, 343 U.S. 717 (1952).

45. Subsections (1)-(5), (7) of § 349(a) of the Immigration and Nationality Act, 66 STAT. 267 (1940), 8 U.S.C. § 1481(a) (1952), impose expatriation on dual nationality grounds. See note 39 *supra* for text of subsections. See Savorgnan v. United States, 338 U.S. 491, 500 n.17 (1950); Mackenzie v. Hare, 239 U.S. 299, 311 (1915); Notes, 54 COLUM. L. REV. 932, 938 (1954), 2 STAN. L. REV. 582, 585 (1950).

Dual nationality has long been a cause of international friction and its elimination has been a much desired aim of all nations. For a few of the articles which deal with the problems of dual nationality in general, see Nielsen, *Some Vexatious Questions Relating to Nationality*, 20 COLUM. L. REV. 840 (1920); Orfield, *The Legal Effects of Dual Nationality*, 17 GEO. WASH. L. REV. 427 (1949); Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L. J. 250 (1934); Sandifer, *A Comparative Study of the Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 AM. J. INT'L L. 248 (1935); Wigmore, *Domicile, Double Allegiance, and World Citizenship*, 21 ILL. L. REV. 761 (1927).

large group of persons who were nationals of more than one State.[46] These persons served as a constant source of friction among nations, since each parent State demanded performance of the duties of citizenship, especially military service.[47] In order to lessen such conflicts, Congress declared that the voluntary performance of certain acts by dual nationals would result in expatriation.[48] Typical of these were acts such as service in a foreign army, or accepting employment under the government of a foreign State. Performance of such acts indicated that the individual had elected to perform duties of citizenship for the State of his foreign allegiance,[49] and in addition frequently put him in a position where it was virtually impossible for the United States to provide the diplomatic protection normally available to its citizens.[50] Acts by which a foreign nationality was obtained, such as naturalization, or marriage by an American woman to a national of another State, were also declared acts of voluntary expatriation in order to prevent the creation of more dual citizens.[51]

46. For a comprehensive review of the nationality laws of most nations, and bibliography, see LAWS CONCERNING NATIONALITY, U.N. Doc. No. ST/LEG/SER.B/4 (1954); FLOURNOY AND HUDSON, NATIONALITY LAWS xix-xx & *passim* (1929); HARVARD RESEARCH IN INTERNATIONAL LAW, NATIONALITY 14, 38, 40, 41 (1929) (hereinafter cited as HARVARD RESEARCH). Comparison between the various laws will reveal the wide divergencies in the methods of granting citizenship at birth and by naturalization.

47. See HARVARD RESEARCH 38, 40-41; GETTYS, CITIZENSHIP IN THE UNITED STATES 186 (1934); Finch, *Dual Nationality and Military Service*, 25 AM. J. INT'L L. 119 (1931); authorities cited note 45 *supra*.

48. See Savorgnan v. United States, 338 U.S. 491, 500 & n.17 (1950).

49. Acquisition of the nationality of a foreign state was usually, under foreign nationality laws, either a prerequisite to or consequence of performance of such acts. See, *e.g.*, LAWS CONCERNING NATIONALITY, U.N. Doc. No. ST/LEG/SER.B/4 at 71 (1954); Mackenzie v. Hare, 239 U.S. 299 (1915). Where foreign nationality was not in fact acquired, it could ordinarily be acquired with particular ease by any person who had performed an expatriating act in the "dual nationality" category. Thus, many nations accord uniquely favorable treatment under naturalization laws to members of their armed forces. LAWS CONCERNING NATIONALITY, *op. cit. supra*, at 73, 109 (1955).

50. See BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD §§ 324-25, 379-80 (1916). Borchard states that the true meaning of expatriation with reference to a native-born citizen is to denote forfeiture of the right to diplomatic protection. *Id.* § 324. Clearly the United States is in no position to extend diplomatic protection to one of its citizens who is a member of a foreign army.

51. See the provisions of the expatriation statutes cited at note 39 *supra*. The first general expatriation statute, 34 STAT. 1228 (1907), provided for the expatriation of Americans who became naturalized in a foreign state or who took an oath of allegiance to a foreign state. The same Act also declared a marriage between an American woman and a foreigner to be an act of expatriation. The latter provision is a vivid illustration of the congressional effort to reduce the conflicts between nations over dual nationals. Since most states automatically granted nationality to a foreign woman upon her marriage to one of their citizens—it was generally said that a woman's nationality followed that of her husband, GETTYS, CITIZENSHIP IN THE UNITED STATES 136-39 (1934)—the occasion of such a marriage provided an excellent signal for expatriation. As these old doctrines began to be abandoned and women no longer took the nationality of their spouses, the United States repealed this expatriation provision since it was no longer necessary to forestall conflicts over dual nationals. 42 STAT. 1022 (1922) (the Cable Act).

Dual nationality legislation undoubtedly was cast originally in terms of "voluntary" expatriation because Congress doubted the constitutionality of a more direct formulation,[52] and sought to utilize the 1868 Proclamation [53] as a supporting precedent.[54] But effective use of voluntary expatriation to reduce conflicts over dual nationals required a profound change in the meaning of "voluntary."[55] If nationality could not be divested except by deliberate renunciation, few persons would ever lose their United States citizenship, for most would elect to retain the double benefits and protections of dual citizenship. Congress therefore attempted to dispense with the requirement of subjective intent to renounce nationality by indicating that mere performance of one of the designated acts should operate automatically to divest American citizenship.[56] When such laws were challenged on the ground that they deprived the citizen of nationality without his consent, and were therefore void for want of constitutional power, the courts upheld Congress. Voluntary expatriation required only an objective standard of intent, they held, and this standard was satisfied by a showing that performance of the designated act was voluntary.[57]

In *Mackenzie v. Hare*,[58] an American woman who had married a British national sought to compel her registration as a qualified voter. Registration

52. See the remarks of Senator McCarran made during the Senate debate on the Expatriation Act. 100 CONG. REC. 14983 (1954). These statements, casting doubt upon the constitutionality of the use of denationalization as a punishment for crime, were probably fostered by the Supreme Court's early decisions on the congressional power over citizenship. See notes 106-11 *infra* and accompanying text. See also Mackenzie v. Hare, 239 U.S. 299 (1915); United States v. Wong Kim Ark, 169 U.S. 649 (1898); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

53. 15 STAT. 223 (1868).

54. See Savorgnan v. United States, 338 U.S. 491, 499 n.11 (1950).

55. *Compare* notes 36-37 *supra* and accompanying text, *with* notes 38-39, 49-51 *supra* and accompanying text. See Notes, 54 COLUM. L. REV. 932, 934-35 (1954), 55 COLUM. L. REV. 631, 663-66 (1955).

56. From the inception of statutory expatriation Congress has never made subjective intent a necessary element of the government's case. In part this may have been due to the fact that the particular act which was designated as expatriatory was in itself indicative of the desire to renounce United States nationality. Actually, Congress was determined to implement its policy and did not want to dilute the effectiveness of its enactments by making an exception for persons who, being oblivious of the consequences of their actions, blundered into losing their citizenship. An example of the result which was achieved may be seen in Kazdy-Reich v. Marshall, 88 F. Supp. 787 (D.D.C. 1950), where an American woman lost her nationality because she had voted in a Hungarian election. The court was unable to preserve her citizenship even though it found that her voting was motivated by a desire to aid American policies and defeat the communists. See also Bisceglia v. Acheson, 196 F.2d 865 (D.C. Cir. 1952).

57. *E.g.*, Mackenzie v. Hare, 239 U.S. 299 (1915); Savorgnan v. United States, 338 U.S. 491 (1950); Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953); Acheson v. Wohlmuth, 196 F.2d 866 (D.C. Cir. 1952); Revidin v. Acheson, 194 F.2d 482 (2d Cir. 1952); Dos Reis *ex rel.* Camara v. Nicolis, 161 F.2d 860 (1st Cir. 1947).

58. 239 U.S. 299 (1915), 2 IOWA L. BULL. 137, 14 MICH. L. REV. 233 (1916). See Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 27, 45-46 (1950).

had been denied on the ground that she had lost her citizenship under the statute of 1907 which made such a marriage an expatriating act.[59] Mrs. Mackenzie challenged the constitutionality of the statute, urging that Congress had no power to withdraw citizenship without the concurrence of the citizen, and that she had never intended or desired to renounce her citizenship.[60] The Court replied that "conditions of national moment," particularly "international aspects," warranted upholding the legislation.[61] The United States was a government invested with "all the attributes of sovereignty," and therefore necessarily possessed "the powers of nationality, especially those which concern its relations and intercourse with other countries."[62] It might be conceded, the Court added, that Congress could not impose a change of citizenship "arbitrarily"—"without the concurrence of the citizen."[63] But the case before it involved "a condition voluntarily entered into, with notice of the consequences," and the legislation under attack was therefore constitutional.[64]

It seems essential to rational discussion of constitutional issues to recognize that in the expatriation legislation considered in *Mackenzie*, Congress was not merely facilitating exercise of the citizen's right to renounce citizenship voluntarily. It was using its power over foreign affairs to accomplish an affirmative policy purpose.[65] The concept of "voluntary" expatriation utilized by the court in *Mackenzie* was totally different from the right to renounce citizenship proclaimed in 1868. The new concept served the modest function performed by the requirement of "a voluntary act" in tort and criminal law: it established only that where an act is performed under duress—where there is, in effect, "no act"—no legal responsibility for the act is incurred.[66]

What the Court in *Mackenzie* correctly held, notwithstanding its use of the "voluntary" label, was that Congress had power to take away citizenship,

59. Mackenzie v. Hare, 239 U.S. 299, 307 (1915). The legislation challenged in *Mackenzie* was eventually repealed, see note 51 *supra*, but the reasoning by which the Court upheld it has been accepted as precedent by almost every court which has adjudicated a voluntary expatriation question. See Savorgnan v. United States, 338 U.S. 491 (1950).

60. Mackenzie v. Hare, 239 U.S. 299, 307-08 (1915). For recent acceptance of a virtually identical argument, notwithstanding the Supreme Court's holding in *Mackenzie*, see Terada v. Dulles, 121 F. Supp. 6 (D. Hawaii 1954).

61. Mackenzie v. Hare, 239 U.S. 299, 312 (1915). Other portions of the Court's decision make clear that the "conditions of national moment" which urged passage of the legislation were the international frictions created by the conflict of claims to the allegiance of dual nationals. *Id.* at 311-12. See note 45 *supra*.

62. Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

63. *Ibid.*

64. *Id.* at 312.

65. *Id.* at 311-12. See note 67 *infra*.

66. For discussion of the requirement of volition in tort and criminal law respectively, see PROSSER, TORTS § 29 (1941); DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 434-36 (1948). Compare the sense in which expatriation was said to be "voluntary" in Mackenzie v. Hare, 239 U.S. 299, 311-12 (1915).

On the doctrine of duress in expatriation law, see Notes, 54 COLUM. L. REV. 932, 22 GEO. WASH. L. REV. 493 (1954). For an extreme example of use of this concept to achieve an equitable result, see Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949).

with or without the dual citizen's consent, as a "necessary and proper" incident to its "sovereign" power in the area of foreign affairs.[67] Dual nationals have been a perennial source of international friction, and their nationality is itself the cause of the difficulty.[68] For Congress to forbid dual nationals to perform acts which would tend to breed external problems, on pain of deprivation of nationality, or to impose loss of nationality when a second citizenship is acquired, seems neither arbitrary nor unreasonable. It is in fact the only practicable legislative means of dealing with the problem. Imposition of criminal penalties would aggravate external difficulties, since foreign States would feel obliged to act to protect their nationals.[69]

Legislation enacted to deal with dual nationality problems falls within the category of reasonable regulation.[70] It is immaterial that the safeguards with

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67. While the Court in *Mackenzie* was not explicit, and did not repudiate the "voluntary expatriation" rationale, commentators have uniformly agreed that the Court was relying entirely on the government's "sovereign" power to conduct the nation's foreign relations. See Roche, *supra* note 58, at 27; Note, 14 MICH. L. REV. 233 (1916); 60 HARV. L. REV. 977, 978 (1947). One commentator summarized the holding in these terms:

> "The decision in effect recognizes the power of Congress to denationalize a person without his consent, although the Constitution contains no express grant to Congress of such a power .... This is, of course, distinguished from the doctrine of voluntary expatriation now recognized in the United States."

Note, 2 IOWA L. BULL. 137 & n.3 (1916).

This view has apparently not been accepted by Congress. Expatriation legislation has continued to be labeled "voluntary." And see, *e.g.*, the remarks of the late Senator McCarran of Nevada, expressing his doubts concerning the constitutionality of the Expatriation Act. 100 CONG. REC. 14983 (1954). However, a review of expatriation provisions now in effect makes questionable the extent to which Congress believes that its powers over citizenship are limited.

68. See notes 45-48 *supra* and accompanying text.

69. *Cf.* Right of Expatriation, 9 OPS. ATT'Y GEN. 356 (1859); BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD §§ 127-29, 169-70, 183-97 (1916). The United States has made continuing efforts to prevent conflict over dual nationals by concluding specific citizenship treaties requiring each nation to drop its claim for citizenship duties when the dual national performs certain acts in the other State. See, generally, LAWS CONCERNING NATIONALITY, U.N. Doc. No. ST/LEG/SER.B/4 (1954); FLOURNOY AND HUDSON, NATIONALITY LAWS (1929). On United States participation in international conferences and programs directed toward reducing the incidence of dual nationality, see HARVARD RESEARCH 13-129.

70. Legislation expatriating Americans for acts by which a foreign citizenship is acquired, and legislation applicable only to dual nationals which makes expatriation a consequence of acts likely to create international friction, seem clearly to fall within this category. Expatriation may also be warranted in the case of Americans who perform such acts as voting in a foreign election or serving in a foreign army; such acts not only breed diplomatic problems, but are evidence that the individual already has, or may easily acquire, a foreign citizenship. *Cf.* note 49 *supra*. Some reasonable connection between the expatriating act and dual nationality problems seems necessary, or the legislation ceases to be regulatory and becomes penal. Perhaps a preferable means of dealing with persons who perform acts which breed international friction, but do not result in acquisition of foreign citizenship, would be to deny such persons the diplomatic protection normally due to citizens, without, however, withdrawing citizenship itself. This course of action was in

which the Constitution surrounds the criminal defendant are not afforded, since this legislation is not penal. Its objective is not to deter or punish commission of expatriating acts but to prevent the international tensions which follow their commission; Congress had no penal intent.[71] The regulations are reasonable not only because of the absence of a legislative alternative, but also because the acts enumerated almost invariably result in acquisition of foreign citizenship, and are unlikely to be performed without awareness that they import a close relationship with the foreign State.[72] And the status of statelessness is not imposed: the individual is deprived rather of the uniquely privileged status of dual citizenship.[73] Most relevant to the constitutionality of the Expatriation Act of 1954 is the fact that in every expatriation case thus far considered by the Supreme Court the petitioner has either previously been a dual national,[74] or has actually acquired a foreign citizenship by performing the act which expatriated him under American law.[75] On the facts of the cases, it might well be contended that for the Supreme Court it is an open question whether present dual nationality legislation may constitutionally operate to divest an American of nationality where, under the laws of the foreign State concerned, a second nationality was not acquired by performance of the expatriating act. But whatever the constitutional status of dual nationality legislation under present case law, a fortiori no Supreme Court decision establishes the constitutionality of the legislation hereafter discussed, which utilizes expatriation solely as a sanction, for its deterrent effect, and has no connection with problems of dual citizenship or the foreign affairs of the United States.

Expatriation As Punishment for Crime

In the Nationality Act of 1940,[76] Congress first used expatriation for purposes unrelated either to facilitation of the right of expatriation or to external problems of dual nationality.[77] In the Nationality Act treason, desertion in

fact utilized before expatriation statutes were enacted. See Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 40, 43 (1950); Letter from the Secretary of State to the Minister of France, [1873] 1 FOREIGN REL. U.S. 256, 259. See also BORCHARD, *op. cit. supra* note 69, §§ 315-80.

71. See notes 45-51 *supra* and accompanying text for a discussion of the factual background which motivated congressional enactment of dual nationality expatriation legislation. For discussion of the criteria of "penal" legislation and citation of authority, see notes 89-92 *infra* and accompanying text.

72. See notes 39, 45 *supra*.

73. See note 45 *supra* and authorities there cited for discussion of dual nationality, its privileges and drawbacks.

74. Mandoli v. Acheson, 344 U.S. 133 (1952); Kawakita v. United States, 343 U.S. 717 (1952); Perkins v. Elg, 307 U.S. 325 (1939). In all three of these cases the Court held, on statutory rather than constitutional grounds, that American citizenship had not been divested.

75. Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915). See also cases cited note 74 *supra*.

76. 54 STAT. 1168 (1940).

77. The Act of 1865, 13 STAT. 490, which deprived convicted deserters and draft

time of war, and attempting by force to overthrow the government were made acts of "voluntary" expatriation.[78] In 1944, the act of departing from or remaining outside the United States for the purpose of evading military service in time of war or national emergency was similarly designated.[79] The Expatriation Act of 1954 adds rebellion, insurrection, seditious conspiracy and violation of the Smith Act to the list of criminal expatriating acts.[80] Except in the case of draft avoidance, expatriation is incurred under these statutes only when the individual is convicted of committing the expatriating act by a court-martial or a court of competent jurisdiction.

Despite its "voluntary" label, it seems clear that the Expatriation Act and similar legislation cannot fairly be pictured for constitutional purposes as a mere establishment of means by which the individual can exercise his right of voluntary expatriation.[81] State and federal penal codes have long imposed upon a convicted felon the loss of certain important civil rights, in addition to imprisonment, in much the same way as the Act of 1954.[82] It has never been suggested that a convict relinquished these rights voluntarily, nor that he voluntarily chose to reside within the prison for the period of his sentence. These are penal sanctions imposed by society for its own reasons without regard to the wishes of the convicted criminal. To apply the label "voluntary incarceration" to the imprisonment which follows conviction of a subversive crime would not alter its nature as a criminal punishment. "Voluntary expatriation" is an equally inappropriate label for the loss of nationality which now results from the same conviction.

Neither can the Expatriation Act and its prototypes qualify for the category of reasonable regulation. No problems of nationality, such as those arising

evaders of the "rights of citizenship" may have been a model for congressional action in 1940. The hearings on the Nationality Act indicate, however, that Congress meant to add loss of nationality to the penalties provided by the 1865 statute. Congress apparently believed that the 1865 Act dealt only with the "rights of citizenship" although there was authority to the contrary. See Roche, *supra* note 70, at 62; cases cited note 89 *infra*.

78. Nationality Act of 1940 §§ 401(g), (h), 54 STAT. 1168, 8 U.S.C. §§ 1481 (a)(8), (9) (1952).

79. 58 STAT. 746 (1944), 8 U.S.C. § 1481(a)(10) (1952).

80. See note 4 *supra*. See also 1 OPPENHEIM, INTERNATIONAL LAW § 313a (7th ed., Lauterpacht 1948); Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 70 (1950); Note, *"Voluntary": A Concept in Expatriation Law*, 54 COLUM. L. REV. 932, 935 n.13 (1954).

81. See notes 89-96 *infra* and accompanying text.

82. Most state laws render an ex-convict ineligible to vote, to run for elective office, or to sit on a jury. Certain states make conviction of a felony an automatic ground for divorce. One-third of the states impose "civil death" for conviction of certain serious crimes. In addition, the practice of certain professions may be closed to the ex-convict. For fuller exposition of the civil right status of the convicted felon both during and after imprisonment, and citation of pertinent laws and cases, see, Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949); Holtzoff, *Loss of Civil Rights by Conviction of Crime*, 6 FED. PROBATION 18 (Apl.-June 1942); Comment, *The Legal Status of Convicts During and After Incarceration*, 37 VA. L. REV. 105 (1951); Note, *Convicts—Legal Status*, 34 VA. L. REV. 463 (1948).

from the phenomenon of dual citizenship, are attacked by these statutes.[83] Indeed, by rendering individuals stateless these statutes may operate to create new and vexing problems of nationality when denationalized individuals go or are sent abroad.[84] Nor is the power over foreign affairs here involved. While dual nationality expatriation is addressed to the reduction of external frictions,[85] penal expatriation operates internally to discourage violation of the law and to punish crimes already committed.[86] And with respect to penal expatriation, the Government may not plead an absence of alternatives. While dual nationality problems could only be attacked through the instrumentality of expatriation,[87] other criminal sanctions such as fines, imprisonment, and even death were readily available to Congress to combat criminal behavior within the United States.[88]

It seems certain that expatriation as imposed by the Act of 1954 is "punishment" within the constitutional definition of that term.[89] The distinction be-

83. Reference is made only to those subsections of § 349(a) of the Immigration and Nationality Act listed at note 41 *supra*, and summarized at note 39 *supra*. It is evident from the text of these subsections that Congress was completely oblivious of the problems created by dual nationality when it declared these acts expatriatory. For affirmative evidence of the intent of Congress in enacting these subsections, see notes 32 *supra*, 94 *infra*.

84. See notes 163-66 *infra* and accompanying text. Laws which create stateless persons have been universally condemned by international law conferences and commentators as inhumane and also productive of international problems. See Protocol Concerning Statelessness, Hague Conference for the Codification of International Law (1930), reprinted in 5 HUDSON, INTERNATIONAL LEGISLATION 387 (1936); United Nations Universal Declaration of Human Rights art. 15, U.N. Doc. A/810, pp. 71, 74 (1948) (adopted by the U.N. General Assembly on Dec. 10, 1948), reprinted in UNESCO, HUMAN RIGHTS, A SYMPOSIUM app. III (1949) (hereinafter cited as United Nations Universal Declaration of Human Rights); HUDSON, INTERNATIONAL LAW c. 11 (3rd ed. 1951); 1 OPPENHEIM, INTERNATIONAL LAW §§ 311-313a (7th ed., Lauterpacht 1948).

85. See notes 45-51 *supra* and accompanying text.

86. See notes 76-80 *supra* and accompanying text. Each of these acts is separately designated and punished as a crime by other sections of the U.S. Code.

87. See note 69 *supra* and accompanying text.

88. The maximum punishment presently provided for persons convicted of violating the Smith Act, 54 STAT. 670 (1940), 18 U.S.C. § 2385 (1952), is ten years in prison, $10,000 fine, and exclusion from government employment for five years. Rebellion or insurrection, 62 STAT. 808 (1948), 18 U.S.C. § 2383 (1952), carries a maximum penalty of $10,000 fine and ten years' imprisonment, and renders the individual ineligible for any federal office. Seditious conspiracy, 62 STAT. 808 (1948), 18 U.S.C. § 2384 (1952), carries maximum penalties of six years in prison or a $5,000 fine or both.

Attorney General Brownell has requested Congress to increase the maximum penalties for these three crimes to twenty years imprisonment or a $20,000 fine or both, and a bill implementing this request was passed by the House of Representatives on July 5, 1955 and referred to the Senate Committee on the Judiciary. H.R. 2854, 84th Cong., 1st Sess. (1955). See N.Y. Times, Jan. 18, 1955, p. 12, cols. 4-5.

89. The deprivation of the "rights of citizenship" imposed by the Act of 1865, 13 STAT. 490, has been classed as penal by both the State Department and the courts. *Hearings Before the Committee on Immigration and Naturalization of the House to revise the*

tween punishment, in the constitutional sense, and non-penal, civil deprivations has never been made entirely clear by the courts.[90] Several commentators have suggested, however, that the crucial element is penal intent on the part of Congress.[91] Probably the severity of the deprivation is also relevant in determining this question.[92] By both criteria, the Expatriation Act is penal.[93] The debates on the Act indicate that the functions of denationalization were to be those usually associated with criminal sanctions: deterrence and punishment.[94] The sanction is imposed, like any punishment, upon conviction by a court.[95] And the Act does not, as dual citizenship statutes do, merely remit the individual to one of two citizenships. Rather, it imposes upon him the

Nationality Laws, 76th Cong., 1st Sess. 492 (1940). Because of its classification as a criminal punishment, the Supreme Court would not permit an individual to be refused the rights of a citizen under the 1865 Act until he had been convicted of one of the right-forfeiting crimes by a court of competent jurisdiction. Kurtz v. Moffitt, 115 U.S. 487 (1885); see also Holt v. Holt, 59 Me. 464 (1871); Huber v. Reily, 53 Pa. 112 (1866). If deprivation of the individual rights of citizenship is held a criminal punishment, then surely withdrawal of nationality itself—the entire bundle of rights which the citizen possesses and the alien does not—must be a penal sanction. And *cf.* United States v. Lovett, 328 U.S. 303 (1946); Bailey v. Richardson, 182 F.2d 46, 54-55 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

90. *Compare, e.g.*, United States v. Lovett, 328 U.S. 303, 316 (1946), *with* Hawker v. New York, 170 U.S. 189 (1898). See also Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603 (1951); Comment, 64 YALE L.J. 712 (1955).

91. See Wormuth, *supra* note 90, at 603, 608-10; Comment, 64 YALE L.J. 712, 722-24 & nn. 62-68 (1955).

92. *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Klapprott v. United States, 335 U.S. 601, 611-12 (1949). In these cases the Supreme Court acknowledged that the sanction of deportation was as severe as most sanctions classified as penal. The Court indicated that this severity would ordinarily qualify the deprivation as a penal one but for other special considerations concerned with the government's power over aliens. See also United States v. Lovett, 328 U.S. 303, 316 (1946) (severity of proscription from government employment influential in Court's decision that statute imposed "punishment").

93. The Supreme Court has stated that "[deprivation] of . . . American citzenship is an extraordinarily severe penalty," carrying consequences which "may be more grave than consequences that flow from conviction for crimes." Klapprott v. United States, 335 U.S. 601, 611-612 (1949). In numerous other cases the Supreme Court has emphasized the harshness of deprivation of citizenship. *E.g.*, Knauer v. United States, 328 U.S. 654, 658 (1946) (loss of "cherished status"); Schneiderman v. United States, 320 U.S. 118, 159 (1943). While the Court has never classified this deprivation as penal, its refusal to recognize removal of citizenship as a criminal punishment has always been in cases where the government sought to *denaturalize* Americans who were alleged to have obtained their citizenship by fraudulent oaths or representations. Klapprott v. United States, *supra*; Knauer v. United States, *supra* (discussion of the "void *ab initio*" doctrine of denaturalization). *Cf.* note 145 *infra*.

94. See pertinent portions of *Congressional Record* cited note 32 *supra*. The congressional debates on the amendment to the Nationality Act of 1940, 58 STAT. 746 (1944), which made draft avoidance an expatriating act, indicate that Congress was intent on punishment and deterrence at that time also. 90 CONG. REC. 7629 (1944).

95. Expatriation Act of 1954, 68 STAT. 1146, 8 U.S.C.A. § 148(a)(9) (Supp. 1954). Loss of the rights of citizenship, imposed by the Act of 1865, 13 STAT. 490, could not be

status of statelessness, in which he has few effective rights and no inalienable rights under international law or under the laws of any nation.[96] And from a policy point of view, this sanction seems sufficiently severe that Congress should not be permitted to impose it without conforming to all the constitutional provisions which are applicable to penal legislation. For only a determination that expatriation is a penal sanction would bring into operation the constitutional protections afforded by the fourth, fifth, sixth, and eighth amendments.[97]

The Expatriation Act would not be rendered unconstitutional per se by a holding that its sanction is penal in nature, since its draftsmen made conviction a prerequisite to expatriation. But the Act of 1944, which made draft evasion an expatriating act without requiring conviction, would be invalid under this rationale.[98] And with respect to the Act of 1954, a determination that it is penal in character would have a bearing on the fundamental question whether the Constitution grants to Congress the power to use expatriation as a punishment. It would in addition open the statute to attack as a "cruel and unusual punishment" proscribed by the eighth amendment.[99]

It is clear at the least that the constitutional problems raised by penal expatriation are quite different from those which have previously arisen in connection with dual nationality expatriation, and accordingly that *Mackenzie* and subsequent cases can by no means be automatically applied. By carrying the concept of "voluntary" to final meaninglessness, the Expatriation Act of 1954 makes it virtually certain that the courts will at last disregard it, turn afresh to the Constitution itself, and make the new analysis for which penal expatriation seems to call.[100]

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effected without conviction by a court. See note 89 *supra*; Kurtz v. Moffitt, 115 U.S. 487, 501 (1885); *cf.* People v. Frontczek, 286 Mich. 51, 281 N.W. 534 (1938).

96. See notes 139-43 *infra* and accompanying text for a discussion of the extreme severity of the disabilities of statelessness.

97. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); notes 20-25 *supra* and accompanying text.

98. 58 STAT. 746 (1944). If withdrawal of citizenship is a penal sanction, then the imposition of denationalization upon persons charged with draft avoidance by leaving the United States or remaining outside its boundaries in time of war would appear to be unconstitutional unless such persons were first convicted of that crime by a competent court. The congressional debates during consideration of the expatriation for draft evasion measure indicate that Congress levied the sanction with penal intent. 90 CONG. REC. 7629 (1944); *cf.* Kurtz v. Moffitt, 115 U.S. 487 (1885); McCafferty v. Guyer, 59 Pa. 109 (1868); Huber v. Reily, 53 Pa. 112 (1866).

99. The protections afforded by U.S. CONST. amend. VIII apply only where infliction of criminal punishment is attempted. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

100. Unless the Expatriation Act is seen as an exercise of the power to punish, the Act would apparently be void either for lack of (foreign affairs) power, or as a denial of substantive due process of law. The due process clause requires a reasonable relation to the relief sought; statutes may not be arbitrary and discriminatory. *E.g.*, Wieman v. Updegraff, 344 U.S. 183 (1952); American Communications Ass'n v. Douds, 339 U.S. 382, 391-92 (1950); Olsen v. Nebraska, 313 U.S. 236 (1941); Nebbia v. New York,

CONGRESSIONAL POWER TO TAKE AWAY NATIONALITY

Supreme Court dicta,[101] the fourteenth amendment's unequivocal grant of citizenship at birth,[102] and the long-continued congressional practice of phrasing expatriation legislation in terms of "voluntary" expatriation [103] have produced the belief that the Constitution grants to Congress no power to effect denationalization without the consent of the citizen.[104] It seems likely, there-

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291 U.S. 502 (1934). Since the legitimate purpose of the power to impose expatriation by regulatory legislation is mitigation of external problems created by dual nationality, the required relationship between problem and sanction would seem not to exist. Particularly since Congress itself apparently believed it could not constitutionally impose expatriation as punishment for crime, a court might content itself with determining whether the Act is constitutional as a non-penal regulation. However, it would seem that Congress should be deemed to have used whatever power it had available to enact a valid statute. It is therefore assumed hereafter that when and if the courts hold the Act an impermissible use of the regulatory power, they will proceed to consider the question whether it constitutes a permissible punishment.

The standard of substantive due process with respect to punishments would seem satisfied if a sanction might reasonably be considered to serve any of the usual objectives of punishment, *e.g.*, deterrence. See note 149 *infra*. The courts have apparently rejected any extension of the "shocks the conscience" test of Rochin v. California, 342 U.S. 165 (1952) (procedural due process), to substantive due process cases. See Irvine v. California, 347 U.S. 128, 133, 142 (1954). The latter standard would in any event seem substantially indistinguishable from that demanded by the eighth amendment prohibition of cruel and unusual punishments, discussed in notes 124-57 *infra* and accompanying text. See Note, 4 VAND. L. REV. 680 (1951), and cases there cited.

101. See notes 106-10 *infra* and accompanying text.

102. "[A]ll persons born or naturalized in the United States . . . are citizens." U.S. CONST. amend. XIV, § 1. This amendment has not been construed to enlarge the power of Congress in order to permit the withdrawal of citizenship. Mackenzie v. Hare, 239 U.S. 299, 310 (1915); United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898); Minoru Yasui v. United States, 320 U.S. 115 (1943) (by implication).

103. Expatriation legislation from 1865 to 1954 has been cast in "voluntary" terms. See citation of statutes at note 39 *supra*. Even when Congress has sought to force an election by dual nationals, demanding the forfeiture of one of two citizenships, the statutes have been cast in terms of a conclusive presumption of "voluntary expatriation." 66 STAT. 268, 8 U.S.C. § 1481(b) (1952).

104. See notes 32, 94 *supra*. Senator McCarran, a strong advocate of bold anti-subversive legislation, apparently believed that Congress lacked the constitutional power to make loss of nationality a punishment for crime. He opposed the original version of the Expatriation Act in the belief that it was unconstitutional and only voted for the bill when Congress accepted his amendment recasting certain provisions of the act in "voluntary" terms. See 100 CONG. REC. 14983 (1954). The amendment eliminated the "status" of being a communist from the list of expatriating acts and required instead a conviction of a crime voluntarily performed by the communist before denationalization could be imposed. *Ibid.* This change was plainly unnecessary if Congress in fact possesses power to deprive the citizen of his nationality without his consent.

For cases and commentators which have accepted the "no power" conclusion, at least in part, see, *e.g.*, Perri v. Dulles, 206 F.2d 586 (3d Cir. 1953); Dos Reis *ex rel.* Camara v. Nicolis, 161 F.2d 860 (1st Cir. 1947); Terada v. Dulles, 121 F. Supp. 6 (D. Hawaii 1954); Kiyokuro Okimura v. Acheson, 99 F. Supp. 587 (D. Hawaii 1951), *remanded*, 342 U.S. 899 (1952), *aff'd*, 111 F. Supp. 303 (D. Hawaii 1953); Citizenship of

fore, that a primary line of argument against the constitutionality of the Expatriation Act will be that the "voluntary" concept as there used is an invalid fiction; that the Act is an attempt to impose denationalization without the citizen's consent; and that the Act is accordingly void for lack of express or implied constitutional power.[105]

The view that Congress lacks power to impose expatriation without the consent of the citizen appears to rest primarily on dicta which do not in fact support it. The widely cited statements in *Osborn v. Bank of the United States* [106] and *United States v. Wong Kim Ark* [107] appear to establish merely that the "power to establish a uniform rule of naturalization"[108] is not the power to impose loss of nationality,[109] not that no power exists under any clause of the Constitution. In *Mackenzie* the Court conceded, arguendo, that the Government might not remove citizenship "arbitrarily, that is to say, without the concurrence of the citizen."[110] But its holding is subject to a quite

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Mrs. Berryman, 30 Ops Att'y Gen. 412 (1919); Williams, *Denationalization*, 8 Brit. Y.B. Int'l L. 45, 48 (1927); Notes, 40 Corn. L.Q. 365 (1955), 25 So. Calif. L. Rev. 196 (1952). *But see* Roche, *The Loss of American Nationality*, 99 U. Pa. L. Rev. 25, 27 (1950) (power to provide for loss of nationality is inherent in sovereignty in the area of foreign relations). Were the Constitution being interpreted for the first time, the "Power to establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, might be construed to grant Congress a plenary power both to confer and withdraw citizenship. However, it has long been held that this clause of the Constitution is limited to a mere authorization to confer citizenship. United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824).

105. This was the major argument of petitioner in Mackenzie v. Hare, 239 U.S. 299, 307, 310 (1915). The dual nationality expatriation statute there contested was upheld by the Supreme Court, *semble*, as a legitimate exercise of Congress' foreign relations power, yet formally at least the Court preserved the "voluntary" rationale. See notes 58-66 *supra*. No penal expatriation statute has ever been tested by the courts.

106. 22 U.S. (9 Wheat.) 738, 827 (1824).

107. 169 U.S. 649, 703 (1898).

108. U.S. Const. art. I, § 8, cl. 4.

109. "A naturalized citizen . . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the 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."

Chief Justice Marshall in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 827 (1824). In 1898 Justice Gray, speaking for the Court, reiterated the Marshall view:

"The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away."

United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898). This case upheld a claim to citizenship by birth asserted by the American-born son of alien Chinese permanently domiciled in the United States. From the words of these two opinions it has apparently been inferred that Congress possesses no power to withdraw citizenship. In fact, the relevant dicta appear to refer only to power derived from the naturalization clause of the Constitution. See cases and articles cited note 67 *supra*.

110. Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

different interpretation, as has been seen,[111] and in any event was concerned exclusively with dual nationality expatriation and the power over foreign affairs.

The constitutional power question posed by the Expatriation Act is whether Congress has power, under the "necessary and proper" clause,[112] to impose denationalization as a sanction to enforce a criminal statute enacted pursuant to a granted power.[113] For the Constitution grants no explicit power to define and punish any crimes except treason, crimes against the law of nations, and several other crimes of relatively rare occurrence.[114] Nearly all federal criminal statutes stem from the power to enact legislation which is "necessary and proper" to carry expressly granted powers into execution.[115] Neither does the Constitution grant any express power to impose fines, imprisonment or any other particular type of punishment; these powers are implied as well. And since the decision in *McCulloch v. Maryland*,[116] the "necessary and proper" clause has been interpreted as a grant of power rather than a limitation upon power. The Supreme Court has never interpreted this clause to authorize review of the discretion of Congress in choosing the means by which to carry into execution the powers conferred by the Constitution.[117] The constitutional phrase "necessary and proper" means "necessary" only in the sense that a reasonable legislator might consider the means chosen necessary to implement

111. See text at notes 58-66 *supra*.

112. U.S. CONST. art. I, § 8, cl. 18. For general discussion and citation of leading cases concerned with the scope of the powers granted Congress by this clause of the Constitution, see CORWIN, THE CONSTITUTION 65-67 (8th ed. 1946); LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. Doc. No. 170, 82d Cong., 2d Sess. 307-11 (1953) (hereinafter cited as S. Doc. No. 170). See, especially, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); United States v. Darby, 312 U.S. 100 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Hall, 98 U.S. 343 (1878); United States v. Fox, 95 U.S. 670 (1877).

113. No court has ever considered this question. Terada v. Dulles, 121 F. Supp. 6, 10 (D. Hawaii 1954), considered the question whether power to take away citizenship might be implied as a necessary and proper aid to the exercise of the power to confer citizenship. The court emphatically decided that no such power could be implied. See also Notes, 40 CORN. L.Q. 365, 23 GEO. WASH. L. REV. 772 (1955), 48 AM. J. INT'L L. 663 (1954).

114. See U.S. CONST. art. III, § 3, cl. 2 (treason); art. I, § 8, cl. 10 (law of nations, piracies and felonies committed on the high seas); art. I, § 8, cl. 6 (counterfeiting).

115. See S. Doc. No. 170 at 308. See, *e.g.*, United States v. Fox, 95 U.S. 670 (1877); *Ex parte* Curtis, 106 U.S. 371 (1882); United States v. Hall, 98 U.S. 343 (1878).

116. 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall's authoritative statement set the tone for future decisions:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

117. CORWIN, THE CONSTITUTION 65-67 (8th ed. 1946). See Supreme Court cases interpreting the "necessary and proper" clause cited in S. Doc. No. 170 at 307-11. These ruling Supreme Court cases have without exception upheld exercises of governmental powers under this clause.

a granted power, and "proper" in the sense that no specific prohibition is violated.[118]

Even if the "voluntary" rationale is disregarded, as seems both likely and desirable,[119] it nevertheless seems certain that under present case law the "lack of power" argument is doomed to failure. The Expatriation Act is clearly a "necessary" means of enforcing the statutes against treason, rebellion and subversion since it will tend to deter violation of those statutes.[120] And the question whether it is "proper" legislation seems foreclosed by the decision in *Dennis v. United States*,[121] which held that the Smith Act was a legitimate exercise of the federal government's power of self-protection.[122] Unless the Supreme Court is willing to find in the necessary and proper clause a new limitation on congressional power,[123] arguments against the necessity and propriety of penal expatriation must be directed not to the courts but to the Congress. The constitutionality of the Expatriation Act would appear to depend ultimately upon whether use of denationalization as a punishment for crime violates explicit constitutional limitations on congressional power.

THE EXPATRIATION ACT AND CONSTITUTIONAL LIMITATIONS ON CONGRESSIONAL POWER

The conclusion that expatriation is imposed as a punishment for crime sharply limits the constitutional questions which the Act raises. All but one of the constitutional provisions relevant to criminal statutes regulate the types of conduct which Congress may make criminal, or the procedures it may prescribe for determining guilt. The only constitutional provision which explicitly restricts the congressional power to punish, once guilt has been ascertained, is the eighth amendment's prohibition of cruel and unusual punishments.[124] While some doubt may exist that the Expatriation Act is fully con-

118. *Compare* United States v. Darby, 312 U.S. 100, 121 (1941), *with* United States v. Fox, 95 U.S. 670 (1877).

119. See notes 76-100 *supra* and accompanying text.

120. See authorities cited note 117 *supra*.

121. 341 U.S. 494 (1951).

122. "That it is within the *power* of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion . . . ." Dennis v. United States, *supra* note 121, at 501. See Burroughs v. United States, 290 U.S. 534 (1934) (power of self-protection—Federal Corrupt Practices Act); United States v. Metzdorf, 252 Fed. 933 (D. Mo. 1918) (same—statute protecting the President). See also U.S. CONST. art. III, § 3, cl. 2 (treason).

123. The chance of success in advocating the unconstitutionality of the Expatriation Act on "lack of power" grounds will depend upon the Court's willingness to accept a new construction of the necessary and proper clause of the Constitution. Chief Justice Marshall's interpretation of the clause, see note 116 *supra*, would have to be altered to permit judicial review of the necessity and propriety, apart from other constitutional provisions, of the legislative means chosen by Congress for carrying into effect its granted powers.

124. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

sistent with other constitutional provisions,[125] the principal question raised by the Act is whether expatriation constitutes a cruel and unusual punishment within the meaning of that amendment.

Expatriation as a Cruel and Unusual Punishment

The Supreme Court has never had occasion to consider whether any punishment imposed by federal statute was "cruel and unusual," and its few opinions on the constitutionality of state and territorial punishments have added little gloss to the words of the amendment.[126] An "unusual" punishment is defined

125. Arguments against the Expatriation Act may exist under several procedural and substantive provisions of the Constitution. Each is hampered, if not defeated, by the conclusion that expatriation is a punishment, and the fact that it is imposed after conviction of crime in a constitutional trial.

First Amendment. The Smith Act was declared not to restrict any constitutionally protected conduct in Dennis v. United States, 341 U.S. 494 (1950). However, in some cases the Court has stated that first amendment constitutionality is determined by a process of balancing the seriousness of the restraints imposed against the substantiality of the public interest involved. *E.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 399-400 (1950). Every criminal statute discourages borderline conduct not prohibited by it, to a degree which varies with the severity of the punishment imposed for violation. It might therefore be urged that addition of expatriation as a punishment for violation of the Smith Act would so increase the "seriousness of the restraint" on speech as to make the restraint unconstitutional. Presumably acceptance of this rationale would result in invalidation of the Expatriation Act rather than the Smith Act. However, the courts have never conceded that severity of punishment exerts any influence on determinations of substantive constitutionality. See CHAFEE, FREE SPEECH IN THE UNITED STATES 396, 480 (1941).

Ex post facto Clause. Since as a practical matter the civil deprivations imposed by statute against aliens are the "punishment" imposed by the Expatriation Act, these statutes may be deemed "penal" as applied to expatriates. For alternative rationales supporting such a conclusion, see notes 144-45 *infra*. Since the Expatriation Act would apparently authorize application of such statutes even when enacted subsequent to the crime—infliction of "punishment" not provided by law at the time of commission of the crime—it could be held to violate the *ex post facto* clause. U.S. CONST. art. II, § 9, cl. 3, Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798). Such a holding would seem justified, if at all, whether or not the particular statute then before the court was in effect at the time of commission of the crime. This argument would apparently be defeated by a holding that "punishment" is inflicted only once, in the form of a deprivation of "rights" by the Expatriation Act, and that subsequent deprivations are civil in character.

Void-for-vagueness. As an element of due process, criminal statutes must give fair notice of what conduct is proscribed. Winters v. New York, 333 U.S. 507 (1948); Lanzetta v. New Jersey, 306 U.S. 451 (1939). A persuasive argument might be made that notice must also be given of the penalty which will be imposed for violation. The concrete consequences of expatriation are highly uncertain. See notes 144-55 *infra* and accompanying text. However, no direct authority for this argument exists. *Cf.* People *ex rel.* Pirfenbrink, 96 Ill. 68, 70 (1879) (loss of rights imposed must be certain); *Ex parte* Jordan, 190 Cal. 416, 212 Pac. 913 (1923) (indeterminate sentence statutes permissible if the maximum punishment clearly appears); People v. Roche, 389 Ill. 361, 59 N.E.2d 866 (1945) (same); *Ex parte* Mote, 98 Kan. 804, 160 Pac. 223 (1916) (same).

126. The principal eighth amendment cases decided by the Supreme Court are Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910); Wilkerson v. Utah, 99 U.S. 130 (1878), discussed *infra*, text at

as one that was unknown at common law or has become obsolete in modern times.[127] Denationalization certainly falls within this definition, since it was never used by the United States as a punishment until 1940.[128]

It is more difficult to determine whether denationalization is "cruel" in the constitutional sense. The general policy goal of the eighth amendment seems to be the avoidance of unnecessary or disproportionate destruction of human values.[129] An unnecessarily cruel means of inflicting a permissible penalty, for example, is considered to violate this amendment.[130] It is also clear that punishments overly severe in relation to the seriousness of the offense are proscribed.[131] Finally, some punishments violate the eighth amendment in that the deprivation of human values inflicted is so great as to preclude the possibility of a net value gain to society from their application.[132] Physical torture is such a penalty, presumably because inviolability of the human person is considered more important than any benefit which might conceivably be secured by the State through use of this type of punishment.[133] It is not at all clear, however,

notes 130-33. For general discussion of the eighth amendment see S. Doc. No. 170 at 903-05; 1 SCHOFIELD, CONSTITUTIONAL LAW & EQUITY 421-40 (1921); Sutherland, *Due Process & Cruel Punishment*, 64 HARV. L. REV. 271 (1950); Notes, 4 VAND. L. REV. 680 (1951), 34 MINN. L. REV. 134 (1950). See also discussion in United States v. Rosenberg, 195 F.2d 583, 607-10 (2d Cir. 1952), and historical analysis in Weems v. United States, *supra*, at 366-80.

127. Mickle v. Henrichs, 262 Fed. 687, 690 (D. Nev. 1918); Hobbs v. State, 133 Ind. 404, 32 N.E. 1019 (1893); *cf.* Weems v. United States, 217 U.S. 349, 378 (1910); *In re* Kemmler, 136 U.S. 436, 443, 447 (1890); Territory v. Ketchum, 10 N.M. 718, 65 Pac. 169 (1901); 1 COOLEY, CONSTITUTIONAL LIMITATIONS 694 (8th ed., Carrington 1927).

128. See text at notes 76-80 *supra*. Compare the statute of 1865, 13 STAT. 490, which employed loss of the "rights of citizenship" as punishment for desertion in time of war, distinguished from denationalization statutes in Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25 (1950). The constitutionality of even this statute has apparently never been tested. *Cf., e.g.*, Kurtz v. Moffitt, 115 U.S. 487 (1885) (criminal trial and sentence required); Goetcheus v. Matthewson, 61 N.Y. 420 (1875) (same); Huber v. Reily, 53 Pa. 112 (1866) (same).

129. See authorities cited note 126 *supra*.

130. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (dictum); *In re* Kemmler, 136 U.S. 436, 447 (1890) (same).

131. Weems v. United States, 217 U.S. 349 (1910); O'Neil v. Vermont, 144 U.S. 323, 340 (1892); Mickle v. Henrichs, 262 Fed. 687, 689 (D. Nev. 1918); McDonald v. Commonwealth, 173 Mass. 322, 328, 53 N.E. 874, 875 (1899).

132. *Cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947); Weems v. United States, 217 U.S. 349, 381 (1910); Wilkerson v. Utah, 99 U.S. 130 (1878); Mickle v. Henrichs, 262 Fed. 687, 689 (D. Nev. 1918). See Note, 4 VAND. L. REV. 680 (1951).

133. See authorities cited notes 126, 132 *supra*.

The eighth amendment was originally intended to prohibit physical torture. See Wilkerson v. Utah, 99 U.S. 130, 136 (1878); Mickle v. Henrichs, 262 Fed. 687, 689 (D. Nev. 1918); Notes, 4 VAND. L. REV. 680, 685 n.48 (1951), 30 COLUM. L. REV. 1057 (1930). The Supreme Court has stated, however, that the amendment progressively incorporates contemporary standards for civilized treatment of criminal offenders. Weems v. United States, 217 U.S. 349, 378 (1910). See also Mickle v. Henrichs, *supra*; Davis v. Berry, 216 Fed. 413 (D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917); 2 STORY, THE CONSTITUTION § 1903 (3d ed. 1858).

what other aspects of human dignity are so fundamental as to impose an absolute limitation on the power to punish.

The Expatriation Act was intended to effect a permanent deprivation of all rights of nationality, and there is doubt whether even a pardon could restore citizenship once lost by operation of law.[134] By any standard, this deprivation is severe, for American citizenship is "one of the most valuable rights in the world today."[135] The individual who loses it loses many economic and political rights, including the right to engage in the professions and many other types of employment; he loses the right to vote and the right to hold public office.[136] And while the alien has such substantive rights as freedom of speech and press and the right to substantive due process of law, and is accorded full procedural rights in criminal cases, these rights are not applicable against deportation.[137] The alien may be expelled with few procedural safeguards for conduct in which citizens may engage with impunity.[138] His substantive and procedural rights are thus defective in an important respect, and *all* his rights under the Constitution may be effectively terminated by removing him from the area in which that document is operative.

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134. Representative Robsion, the Act's sponsor in the House, stated that only an act of Congress could restore citizenship, and that a presidential pardon could not. See 100 CONG. REC. 11281 (1954). *But see* GETTYS, CITIZENSHIP IN THE UNITED STATES 59, 164 (1934); Roche, *The Loss of American Nationality*, 99 U. PA. L. REV. 25, 61 (1950). See, generally, Note, 55 COLUM. L. REV. 631, 665 n.257 (1955).

Several courts have cited the absence of a possibility of rehabilitation as one index of eighth amendment cruelty. See Weems v. United States, 217 U.S. 349, 381 (1910); Mickle v. Henrichs, *supra* note 133, at 691 (penal sterilization); Davis v. Berry, *supra* note 133, at 416 (same); Note, 10 NEB. L. BULL. 164 (1931).

135. REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 235 (1953).

136. See notes 12-17 *supra* and accompanying text. The loss of these rights may be considered to have little constitutional significance, since persons affected by the Expatriation Act will necessarily be felons. And statutes now in effect in many jurisdictions subject all felons to many of the same political and economic disabilities as aliens. See Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949); Holtzoff, *Loss of Civil Rights by Conviction of Crime*, 6 FED. PROBATION 18 (Apr.-June 1942); Comment, 37 VA. L. REV. 105 (1951); Note, 34 VA. L. REV. 463 (1948).

137. See notes 18-26 *supra* and accompanying text. On the substantive and procedural rights of aliens outside the context of deportation, see authorities cited notes 11, 12 *supra*.

Considerable question exists as to whether expatriated native-born Americans could be deported under existing statutes, since they have never "entered" the United States as aliens. Present statutes authorize deportation of aliens who, "after entry," fall within described classes. 66 STAT. 204, 8 U.S.C. § 1251 (1952). And "entry" is defined as "any coming of an alien into the United States, from a foreign port or place. . . ." 66 STAT. 166, 8 U.S.C. § 1101(a)(13) (1952). However, this requirement might be disregarded as intended merely to differentiate deportation statutes from exclusion statutes, or the date of expatriation might be considered the date of "entry" as an alien. The latter construction is suggested by the legislative history of the Expatriation Act. See note 18 *supra*.

138. See notes 18-26 *supra* and accompanying text. Several deportation provisions, *e.g.*, 66 STAT. 204, 8 U.S.C. §§ 1251(a)(6)(B)-(H) (1952) (innocent membership in the Communist Party, *inter alia*), would apparently violate the first amendment if they were

But no description of expatriation as the loss of particular rights is adequate. For expatriation represents a loss of the right to have rights—loss of membership in an organized community capable of guaranteeing any rights at all.[139] The individual becomes a stateless person, with no right to stay anywhere on the face of the earth. Every "sovereign" State has the right to expel aliens from its borders, and modern States including the United States do so freely.[140] Neither has he a right to leave any country; no State is obliged to issue a pass-

used against citizens. *Compare* Harisiades v. United States, 342 U.S. 580 (1952), *with* Dennis v. United States, 341 U.S. 494, 516 (1950). See Comment, 20 U. CHI. L. REV. 547, 553 (1953). Others, *e.g.*, 66 STAT. 166, 8 U.S.C. § 1101(e)(2) (1952), might deny substantive due process of law. Compare Tot v. United States, 319 U.S. 463 (1943). Moreover, deportation of a citizen would constitute "punishment" in the constitutional sense. See United States v. Ju Toy, 198 U.S. 253, 264 (1905) (dissent); Fong Yue Ting v. United States, 149 U.S. 698, 744 (1893) (same); State v. Doughtie, 237 N.C. 434, 74 S.E.2d 925 (1953) (banishment from a state of the Union); *Ex parte* Sheehan, 100 Mont. 244, 49 P.2d 438 (1935) (same); People v. Baum, 251 Mich. 187, 231 N.W. 95 (1930) (same); Legazda v. Valdez, 1 Phill. 146 (1902); Note, 32 N.C.L. REV. 221, 222 (1954). It could therefore be imposed, if at all, only after a trial in which all criminal safeguards were accorded. See notes 18-22 *supra*.

139. ARENDT, THE ORIGINS OF TOTALITARIANISM 266-98 (1951).

> "The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion—formulas which were designed to solve problems *within* given communities—but that they no longer belong to any community whatsoever.
>
> ....
>
> "We became aware of the existence of a right to have rights . . . and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.
>
> ....
>
> "Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights, whatsoever, has been the calamity which has befallen ever-increasing numbers of people."

Id. at 293-94. For further discussion of the problems created by statelessness, both for the individual and for States, see 1 OPPENHEIM, INTERNATIONAL LAW §§ 137, 292, 312, 313a (7th ed., Lauterpacht 1948); authorities cited notes 84 *supra*, 158-62 *infra*.

140. Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Attorney-General for Canada v. Cain, [1906] A.C. 542; 4 MOORE, DIGEST OF INTERNATIONAL LAW 67, 68 (1906); 1 OPPENHEIM, *op. cit. supra* note 139, at 631. A State which arbitrarily expels a foreign national may be liable in damages to the parent State acting in behalf of its national, *id.* at 632, but a stateless person has no parent State to represent his interests. See note 142 *infra*.

141. The power to exclude aliens is absolute. See Chinese Exclusion Cases, 130 U.S. 581 (1889); 4 MOORE, *op. cit. supra* note 140, at 67; 1 OPPENHEIM, *op. cit. supra* note 139, § 323. While many nations have entered into treaty obligations modifying the power to exclude, such obligations apply only to nationals of signatory States. See, generally, Comment, 61 YALE L.J. 171 (1952). Only American citizens or nationals are entitled to United States passports. *Ibid.* Often a State may wish to deport a stateless alien but find it legally impossible because no nation, not even the state of origin, will accept him. The State will thereupon order the alien to leave its borders within a week on threat of imprisonment. This gives the stateless person no choice but to become a fugitive, in either

port to him, and no State is obliged to admit him without one.[141] Moreover, if a stateless person is a victim of a "denial of justice" by the governmental authorities of a State, he has no recourse whatever. Under contemporary international law neither the governments of individual States nor international organizations are considered to have legal standing to intervene in his behalf.[142] In summary, the stateless person has no rights, either intranational or international, which are inalienable. He exists at the mercy of the State in which he resides.[143]

A striking and disturbing feature of expatriation as a punishment is that its full consequences for the individual are unknowable. Undoubtedly Congress and state legislatures are constitutionally capable of discriminating against aliens in ways which have never yet been attempted.[144] By tagging the individual "alien," Congress would impress upon him a kind of permanent guilt,

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that State or one of its neighbors, or to embark upon an interminable prison sentence; he violates the law by remaining alive. See ARENDT, *op. cit. supra* note 139, at 280-85; Abel, *Denationalization*, 6 MODERN L. REV. 57 (1942); Preuss, *International Law and Deprivation of Nationality*, 6 GEO. L.J. 250, 273 (1934); Williams, *Denationalization*, 8 BRIT. Y.B. INT'L L. 45, 56 (1927). See also HUDSON, INTERNATIONAL LAW 138 (3d ed. 1951); 2 HUDSON, INTERNATIONAL LEGISLATION 873 (1931); 1 OPPENHEIM, *op. cit. supra* note 139, §§ 291, 312-13.

142. See 1 OPPENHEIM, *op. cit. supra* note 139, §§ 291-94, 313; notes 163-66 *infra* and accompanying text. Orthodox theory holds that States alone are subjects of international law, so that a person without a State to represent his interests is without recourse if he suffers a "denial of justice" at the hands of the State in which he resides. This helplessness of stateless persons under international law makes it "both illogical and offensive to human dignity that International Law should permit a condition of statelessness." 1 OPPENHEIM, *op. cit. supra*, § 313a; see LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 10-11 (1950); Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438 (1947), 64 *id.* 97 (1948); McDougal, *International Law, Power, and Policy*, 82 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 137 (1953).

143. The REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 241 (1953) recognized the evils produced by statutes creating statelessness. It recommended full review of American citizenship laws with the objective, *inter alia*, of eliminating those leaving persons stateless. In this respect the *Report* concurred with the United Nations Universal Declaration of Human Rights art. 15, which declares that "everyone has a right to a nationality." See notes 84 *supra*, 158-62 *infra* for other organizations, conventions, and commentators which have condemned statelessness.

144. Statutes discriminating against aliens are constitutional if the classification made is not arbitrary or unreasonable. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); Clark v. Deckebach, 274 U.S. 392 (1927); Terrace v. Thompson, 263 U.S. 197 (1923); Comment, 20 U. CHI. L. REV. 547, 566-69 (1953). However, since the term "alien" has in the past been assumed to refer to individuals with certain factual characteristics, Terrace v. Thompson, *supra*, at 219; Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Techt v. Hughes, 229 N.Y. 222, 128 N.E. 185 (1920); BLACK, LAW DICTIONARY 95 (4th ed. 1951), classifying expatriates as aliens could be attacked as unreasonable, and hence violative of equal protection clauses of state constitutions. See note 11 *supra*. For the suggestion that federal expatriation statutes could not divest state citizenship, see Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949).

making him subject to additional punishment [145] as imagination and inclination might subsequently direct. In a sense, expatriation is not itself punishment, but a blanket authorization of punishment to be specified later. This feature of the Expatriation Act might alone be sufficient to bring about its invalidation. The Act might thus be considered to violate the ex post facto clause of the Constitution in that it purports to authorize imposition of punishment in addition to that imposed by law at the time of commission of the crime.[146] It might in the alternative be considered so vague and indefinite as to deny due process of law: the accused would be unable, either at the time of engaging in

145. It seems not inaccurate to speak of civil disabilities imposed upon expatriates as "punishment," since expatriates will lack the factual characteristics of aliens which have supported holdings that such disabilities have a protective rather than penal function. See note 144 *supra*. Moreover, these disabilities will be imposed upon such persons only by virtue of a penal expatriation statute. See notes 76-100 and accompanying text. Indeed, the various rationales employed by the Court to hold that deportation of aliens is not "punishment," and that it may be imposed without regard to substantive provisions of the Bill of Rights, all seem inapplicable to expatriates, since those rationales are based on the assumption that aliens are *foreigners* who have sought admission to the U.S. from abroad. Thus, the power to deport is implied from the "sovereign" power over foreign affairs as a corollary of the power to exclude entering aliens. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893). In holding that deportation is not "punishment," the Court has either emphasized or assumed that the alien (1) is being sent "home," or at least to a place no more foreign than the U.S.; (2) knew when he entered the U.S. that he could be deported, and thus to some extent waived the right to protest; (3) continued to be an alien of his own free will, since he could have become a citizen. The Court has also emphasized that deportation is a weapon of reprisal in international politics, so that to surround it with safeguards might impair the government's effectiveness in dealing with other nations. See, generally, Harisiades v. Shaughnessy, 342 U.S. 580, 587-91 (1952); Galvan v. Press, 347 U.S. 522, 530 (1954); Fong Yue Ting v. United States, *supra*, at 711-12; KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 46-78 (1946). The primary line of reasoning involved in the holding that substantive constitutional provisions of the Bill of Rights are inapplicable is that since Congress has absolute power to exclude aliens, it must have absolute power to expel them. Fong Yue Ting v. United States, *supra*; Comment, 20 U. CHI. L. REV. 547, 551-56 (1953). Whatever the intrinsic worth of the above considerations and reasoning, none of them can be used to justify civil deportation of persons born in the United States and expatriated as punishment for crime. Since the foreign affairs power would not seem to embrace the power to deport native-born Americans who have never left this country, or acquired citizenship in another State, *cf. Ex parte* Tadayasu Abo, 76 F. Supp. 664 (N.D. Cal. 1947), *rev'd in part on other grounds*, 186 F.2d 775 (9th Cir.), *cert. denied*, 342 U.S. 832 (1951), only the power to punish could sustain deportation of such persons.

Congress apparently intended the Expatriation Act to deprive the individuals it affects of whatever constitutional protections they had against civil deportation. See note 18 *supra*. The Act in effect punishes the individual by making him subject to the imposition of further punishment upon a finding of statutory deportability by an administrative tribunal. If neither expatriation nor deportation is held to constitute cruel and unusual punishment, this effect of the statute might be upheld by analogy to probation. *Cf.* Giordano v. Walker, Criminal No. 3927, D. Conn., 1937; DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 191, 1033-46 (1948). *But see* note 125 *supra* (void-for-vagueness).

146. See note 125 *supra*.

the prohibited conduct or during the trial, to estimate accurately the consequences of conviction.[147]

The inherent uncertainty of the consequences of expatriation makes difficult the process of weighing which is necessary in determining whether the deprivation imposed is disproportionate, either to the seriousness of the offense or to the benefits derived by the community from its imposition. Thus, nearly all the concrete ill effects which may flow from expatriation are possible or probable, rather than certain. The individual made a stateless alien may suffer intolerable cruelties,[148] but he may on the other hand lead a relatively normal life, free of any inconvenience even comparable to a prison sentence. The benefits to be derived by the State from imposition of this punishment are similarly uncertain. Since denationalization *may* not result in any concrete ill effects for those who suffer it, the example made of such persons will not necessarily deter others.[149] Imposition of this sanction would not necessarily operate to reform criminals, nor would it necessarily incapacitate them to commit additional crimes.[150] Economy to the State is perhaps the only objective of punishment which expatriation is certain to serve.[151] Expatriation might, of course, have such unpleasant effects as to perform admirably every function of punishment except reformation, and consequent restoration of the individual to society.

Since Congress is responsible for the uncertainty of the consequences of the sanction it chose, and since expatriation affects fundamental human rights, the possible effects of this sanction should be considered in the light least favorable to the government.[152] In the inquiry whether expatriation is disproportionate to the crime for which it is imposed, the most drastic consequences made legally possibly by expatriation should be balanced against the

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147. *Ibid.*

148. See materials cited notes 139, 141, 143 *supra*, especially ARENDT, THE ORIGINS OF TOTALITARIANISM 266-98 (1951).

149. Once abroad, the expatriate might not only escape mistreatment but might, by posing as a martyr or otherwise, advance his cause and injure United States interests more successfully than he could if he had remained in this country.

The objectives of punishment include example, reformation, incapacitation, satisfaction to the person injured, and economy to the State. See Belden v. Hugo, 88 Conn. 500, 510, 91 Atl. 369, 372 (1914); DESSION, CRIMINAL LAW, ADMINISTRATION AND PUBLIC ORDER 54, 192 (1948).

150. Expatriation alone would not prevent continuance of criminal subversive activities. And deportation would merely shift to another country the burden of guarding against further criminal activities. *Cf.* BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD § 334 (1916).

151. Presumably neither expatriation nor deportation would be as expensive to the State as imprisonment. If international difficulties arose as a result of deportation of expatriates, see notes 163-66 *infra* and accompanying text, or if expatriates were able successfully to continue anti-American activities abroad, see note 149 *supra*, even this objective of punishment might be defeated.

152. See 3 SUTHERLAND, STATUTORY CONSTRUCTION § 5604 (3d ed., Horack 1943); Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748 (1935).

evil of the least blameworthy conduct which it is used to punish.[153] In the separate inquiry whether this punishment is disproportionate to the value gain which may be derived by society from its use, only benefits which are substantially certain to ensue should be considered.

Denationalization might conceivably be considered an overly severe punishment for violation of the Smith Act. Such an argument would emphasize that expatriation is added to the ten years' imprisonment that may already be imposed for this offense,[154] and that mere knowing membership in the Communist Party or "conspiracy to teach" may constitute the crime.[155] However, the courts have traditionally refused to accept the argument that punishments imposed for seditious activities are excessive.[156] Certainly it could not reasonably be contended that denationalization is a penalty disproportionate to the remaining crimes for which it is presently imposed. If loss of citizenship can be imposed at all as punishment for crime, it would seem a reasonable penalty for crimes such as treason, desertion in time of war, rebellion and insurrection, which have throughout history been deemed worthy of maximum punishment.

The more important eighth amendment question posed by penal expatriation is not whether it is excessive in amount when imposed for a particular crime, but whether it is a type of punishment which accomplishes deprivations so severe, of values so fundamental, as to be an unjustifiable punishment for any crime. Expatriation, which deprives the individual of all rights against expulsion from the United States as a stateless alien, seems to fit this description. Certainly if the eighth amendment constitutes a meaningful limitation on the power of the federal government to punish, other than as a prohibition of physical torture, it should be held to forbid the use of expatriation as a punishment.[157]

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153. *Cf.* Weems v. United States, 217 U.S. 349, 380-81 (1910).

154. 54 STAT. 670 (1940), 18 U.S.C. § 2385 (1952).

155. Dennis v. United States, 341 U.S. 494 (1950); United States v. Lightfoot, Criminal No. 54-CR-262, N.D. Ill., Jan. 26, 1955. See N.Y. Times, Jan. 27, 1955, p. 1, col. 2; Feb. 16, 1955, p. 15, col. 6.

156. See United States v. Rosenberg, 195 F.2d 583, 611 n.4 (2d Cir. 1952) (petition for rehearing); *cf.* Dunne v. United States, 138 F.2d 137 (8th Cir.), *cert. denied*, 320 U.S. 790 (1943) (Espionage Act penalties not disproportionate).

157. A distinct rationale for holding that penal expatriation statutes violate the eighth amendment would be available to a court that was prepared to hold that *deportation* of native-born Americans would constitute cruel and unusual punishment. It would seem axiomatic that if deportation is an unconstitutional punishment, then the Expatriation Act is unconstitutional to the extent that it purports to authorize it.

Banishment of citizens would be "unusual" and would constitute "punishment." Notes, 32 N.C.L. REV. 221, 224 (1954), 44 ILL. L. REV. 106, 107 (1949); *cf.* Note, 6 S.C.L.Q. 229 (1953). These same conclusions would seem to follow with respect to native-born expatriates. See notes 127, 138 *supra*. For dicta to the effect that banishment would be cruel and unusual, see Fong Yue Ting v. United States, 149 U.S. 698, 732, 744, 759 (1893) (dissent); United States v. Ju Toy, 198 U.S. 253, 264 (1905) (same); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); *but see* Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (dissent). For denunciation of banishment by international law commentators see

THE EXPATRIATION ACT AND INTERNATIONAL LAW

Any general appraisal of the Expatriation Act must take into consideration the fact that the Act conflicts with clearly formulated policies of the world community.[158] Since the 1920's, when statelessness was first recognized as a world problem,[159] every international conference on nationality has explicitly condemned legislation which results in the creation of stateless persons.[160] The recognized treatises are unanimous in their disapproval of statutes which denationalize individuals without regard to whether they possess two nationalities.[161] And the Universal Declaration of Human Rights strongly reaffirms the right of every individual to retain a nationality.[162]

HUDSON, INTERNATIONAL LAW 534 n.8 (3d ed. 1951); SCOTT, RESOLUTIONS OF INSTITUTE OF INTERNATIONAL LAW 104 (1917). The REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 200 (1953), quoting Judge Augustus Hand, condemns exile as "a dreadful punishment, abandoned by the common consent of all civilized people." Deportation and expatriation present substantially the same eighth amendment question, since the danger of expulsion, and its consequences, is by far the most serious consequence of expatriation.

Because deportation of expatriates may be only a theoretical possibility when the Expatriation Act is tested, see notes 10-11, 45-46 *supra*, and may depend on difficult questions of statutory interpretation, see note 11 *supra*, the courts may be urged to defer decision on these questions until they arise directly. The Act would be interpreted as divesting the "rights of nationality," or perhaps those rights of nationality *which may constitutionally be divested. Cf.* Comment, 64 YALE L.J. 712, 730-32 (1955). Such an interpretation would avoid all eighth amendment questions at least until a deportation case arose, and might result in permanent avoidance of these questions. See United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950), holding that an individual once held to have lost his citizenship may raise no special constitutional objections to deportation. Legislative history should preclude this interpretation however. See note 18 *supra.*

158. See notes 159-62 *infra* and accompanying text.

159. Until the first world war there were relatively few stateless persons. The problem was of little international interest mainly because neither the individuals nor the States in which they resided had any complaints. Frontiers were easy to cross, passports and visas were unnecessary. The stateless remained within a State without ill-treatment. See BRIGGS, THE LAW OF NATIONS 465 (2d ed. 1952). The problem sprang into prominence with the mass denationalizations carried out by Russia, Germany, Italy, Austria, and Turkey after World War I. See Preuss, *International Law and Deprivation of Nationality,* 23 GEO. L.J. 250 (1934); Holborn, *The Legal Status of Political Refugees, 1920-1938,* 32 AM. J. INT'L L. 680 (1938).

160. United Nations Universal Declaration of Human Rights art. 15; Convention on Certain Questions relating to the Conflict of Nationality Laws, signed at The Hague, April 12, 1930, reprinted in 5 HUDSON, INTERNATIONAL LEGISLATION 359 (1936); see 1928 Havana Convention on the Status of Aliens art. 6, reprinted in 4 HUDSON, INTERNATIONAL LEGISLATION 2374 (1932); Report of the 1924 Meeting of the International Law Association at p. 32, quoted in Abel, *Denationalization,* 6 MODERN L. REV. 57, 63 (1942). See also *Second Report on the Elimination or Reduction of Statelessness,* INTERNATIONAL LAW COMMISSION, U.N. Doc. No. A/CN.4/75 (Aug. 8, 1953) (mimeograph).

161. *E.g.,* BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD §§ 262, 334 (1916); FENWICK, INTERNATIONAL LAW 263 (3d ed. 1948); 1 OPPENHEIM, INTERNATIONAL LAW §§ 313-13a (7th ed., Lauterpacht 1948). See also REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 241-42 (1953); *A Study of Statelessness,* U.N.

The Expatriation Act would almost undoubtedly be held void under international law in any dispute where the complaining State could qualify as a proper party to challenge the Act's validity.[163] Such a dispute might arise if the United States refused to receive denationalized Americans, who had emigrated or been deported to another State, on the ground that the Expatriation Act had terminated American responsibility for such individuals.[164] But such a dispute is unlikely to arise. Like many international prescriptions, those relating to nationality are debilitated by the traditional doctrine that States alone are the subjects of international law. Under this doctrine only States, not individuals, have rights under international law,[165] and they may protest

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Doc. No. E/1112 and addenda (1949); GETTYS, CITIZENSHIP IN THE UNITED STATES 137-38, 160 (1934); SECKLER-HUDSON, STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES *passim* (1934); Abel, *supra* note 160, at 63; Preuss, *supra* note 159, at 274.

162. United Nations Universal Declaration of Human Rights art. 15, approved by the United Nations General Assembly in Paris, Dec. 10, 1948. U.N. Doc. A/810, reprinted in UNESCO, HUMAN RIGHTS, A SYMPOSIUM app. III (1949).

163. Williams, *Denationalization*, 8 BRIT. Y.B. INT'L L. 45, 52 (1927), reasoned that it was a violation of international law for a nation to denationalize any person who had not already obtained a second citizenship. Despite the fact that treatise writers and international conventions have always decried the existence of laws, such as the Expatriation Act, which created stateless persons, see notes 84, 160-61 *supra*, the courts have generally been unable to make their decisions in accordance with such policies. They have felt obliged to adhere to the authorities who maintained that questions of nationality were within the sole jurisdiction of each individual state. United States v. Wong Kim Ark, 169 U.S. 649, 668 (1898); Tunis-Morocco Nationality Decrees, P.C.I.J., Ser. B, No. 4 (1923). For citation of cases and comment on nationality and statelessness, see BRIGGS, THE LAW OF NATIONS 452-66 (2d ed. 1952).

164. "It is surely contrary to principle that a state should in relation to any particular individual, whether inside or outside its territory, by its own unilateral act free itself from this obligation . . . to receive back its own nationals." Williams, *supra* note 163, at 56.

A State has a *duty* to take back its own nationals or persons whom it has expelled in the event the nation in which they are residing wishes to deport them. Protocol Concerning Statelessness, Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague, April 12, 1930, reprinted in 5 HUDSON, INTERNATIONAL LEGISLATION 387 (1936); ARENDT, THE ORIGINS OF TOTALITARIANISM 280-81 & n.36 (1951); BORCHARD, *op. cit. supra* note 161, § 334; HUDSON, INTERNATIONAL LAW 533 (3d ed. 1951); 1 OPPENHEIM, *op. cit. supra* note 161, §§ 294, 326.

The authorities cited above appear to indicate that the receiving State retains, despite its acceptance of the stateless deportee or emigrant, the right to demand at a future time that the State of origin repatriate the individual. The international obligation of a State to receive back its expellees or nationals would remain unaffected by the passage of internal legislation which declared the State's responsibility for such persons at an end. Municipal law cannot be pleaded as a reason for non-compliance with international law. FENWICK, *op. cit. supra* note 161, at 89 & n.9. It is doubtful that denationalization prior to expulsion will be effective to terminate the expelling State's duty to receive back such persons. See Williams, *supra* at 56. International law would probably view the individual as still the responsibility of his native country. See FIELD, OUTLINES OF AN INTERNATIONAL CODE art. 276 (1876); ARENDT, *op. cit. supra.*

165. See Schwarzenberger, *The Protection of Human Rights in British State Practice*, 1 CURRENT LEGAL PROBLEMS 153 (1948); 1 OPPENHEIM, *op. cit. supra* note 161, §§ 13,

only violations which injure their own interests. Unless an injury to another State occurs, through the tie of nationality, a State's treatment of persons within its borders is considered to be a matter within its "domestic jurisdiction."[166]

While as a practical matter the Expatriation Act is probably beyond the reach of the contemporary international law of nationality so far as injury to the individual is concerned, the use of denationalization as a punishment is diametrically opposed to the trend of international law towards a greater protection of human rights.[167] This nation has always sought to effect the general

63, 288-92; Idelson, *The Law of Nations & The Individual*, 30 TRANS. GROTIUS SOC'Y 50, 54 (1944). Article 34 of the Statute of the International Court of Justice provides that "only States may be parties in cases before the Court." The Annual Report of the Permanent Court of International Justice prints the summaries of eight typical cases where private individuals had sought to invoke the court's jurisdiction against a government and had been refused on grounds that they could not be parties to cases before the Court. 15th Annual Report (1938-39), P.C.I.J., Ser. E, No. 15, at pp. 59-60 (1939). See 1 OPPENHEIM, *op. cit. supra*, § 291. But the more modern approach is to recognize in addition to States both individuals and international organizations as the subjects of international law. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 10-11 (1950); Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438 (1947); McDougal, *International Law, Power, and Policy*, 82 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 137 (1953); *cf.* Advisory Opinion of April 11th, 1949, [1949] I.C.J. Rep. 181; Jenks, *The Legal Personality of International Organizations*, 22 BRIT. Y.B. INT'L L. 267 (1945); note 149 *supra*. On the subjects of international law generally, see BRIGGS, *op. cit. supra* note 159, at 65-93 for commentary and citation of cases.

166. See the Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10 (1927); BORCHARD, *op. cit. supra* note 161, §§ 200, 306-09. The traditional "sovereign" powers of States to control their own affairs without interference from other nations precludes objection by another State except where actual injury to the nationals of the complaining State is threatened or has occurred; a humanitarian interest is not sufficient to undermine the doctrine of "domestic jurisdiction." See Tunis-Morocco Nationality Decrees, P.C.I.J., Ser. B, No. 4 (1923) (State has exclusive jurisdiction in regard to nationality questions in its own territory); 1 OPPENHEIM, *op. cit. supra* note 165, § 140b.

167. For evidence of the increasing international concern for human rights, see *e.g.*, United Nations Charter, Preamble, arts. 1(3), 55, 62(2), 68, 76(c), quoted in BRIGGS, *op. cit. supra* note 159, app. II; United Nations Universal Declaration of Human Rights; proposed Covenant on Human Rights reprinted in 22 DEP'T STATE BULL. 949 (1950); Convention on Genocide, U.N. Doc. A/810, at p. 174 (1948); proposed Implementation of the Principles of the Nuremberg Charter and Trial, U.N. Doc. A/CN.4/22 (1950). The United Nations Universal Declaration of Human Rights art. 15 would make imposition of the status of statelessness an offense against the law of nations and a matter for international concern. See 1 OPPENHEIM, INTERNATIONAL LAW § 340*l* (7th ed., Lauterpacht 1948). Article 15 reaffirms the conclusion reached by the Convention on Certain Questions relating to the Conflict of Nationality Laws, signed at The Hague, April 12, 1930. See note 160 *supra*. Although the United States has not signed the Declaration, its nonadherence is not attributable to any widespread disagreement with the principles of human liberty stated therein, or to a belief that the Declaration would materially increase the rights and freedoms already guaranteed by the United States Constitution. Rather, it reflects the view that the federal government should not utilize the treaty-making power to deal with matters considered reserved to the states under U.S. CONST. amend. X. Bricker & Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529,

betterment of all mankind in the field of human rights. It must then be regretted that the United States, the world's leading proponent of human dignity, is today engaging in punitive denationalization causing an increase in statelessness, a practice long disfavored by civilized nations, and notoriously identified with the totalitarian States.[168]

The existence of a conflict between the Expatriation Act and the dictates of international law will not directly influence decisions on its constitutionality. Under usual doctrines, international law is subordinate to municipal law in domestic courts.[169] In the event of a direct clash between the two, the courts will follow domestic law, leaving the injured party to claim damages through the executive branch of the government.[170] Despite these considera-

540 (1954); AMERICAN BAR ASSOCIATION, REPORT OF COMMITTEE FOR PEACE AND LAW THROUGH UNITED NATIONS 21 (1950).

168. "One is almost tempted to measure the degree of totalitarian infection by the extent to which the concerned governments use their sovereign right to denationalize." ARENDT, THE ORIGINS OF TOTALITARIANISM 277 (1951). See notes 159-60 *supra*. An historical review of the use of denationalization as a punishment by the communist, fascist and nazi governments can be found in Abel, *Denationalization*, 6 MODERN L. REV. 57 (1942); Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L.J. 250 (1934). In 1953 all the communist governments had laws which denationalized persons who lacked loyalty to their governments. See *National Legislation Concerning Grounds for Deprivation of Nationality*, International Law Commission, U.N. Doc. No. 4 A/CN.4/66 (April 6, 1953) (mimeograph); LAWS CONCERNING NATIONALITY, U.N. Doc. No. ST/LEG/SER.B/4 (1954).

169. The Supreme Court will uphold domestic legislation in the event of a direct conflict with a rule of international law. Cunard v. Mellon, 262 U.S. 100 (1923); Head Money Cases, 112 U.S. 580 (1884); *cf.* Nereide, 13 U.S. (9 Cranch) 388 (1815) (international law applicable until an act of Congress passed). The indirect effect which international law may have in the domestic courts is indicated by the decisions of the Supreme Court in Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); The Paquete Habana, 175 U.S. 677 (1900).

On the relationship between international law and municipal law, see, generally, FENWICK, INTERNATIONAL LAW 90-92 (3d ed. 1948); 1 HACKWORTH, INTERNATIONAL LAW 24-39 (1940); 1 OPPENHEIM, *op. cit. supra* note 167, §§ 20-25.

170. Whitney v. Robertson, 124 U.S. 190, 194 (1888); FENWICK, *op. cit. supra* note 169, at 87-88. See also COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 12-14, 178, 301 (1941); Potter, *Relative Authority of International Law and National Law in the United States*, 19 AM. J. INT'L L. 315 (1925).

The party injured through the breach of international law may, through the offices of his State, if he possesses a nationality, claim damages from the injuring State despite the fact that he was refused redress in the courts of the injuring State. "[A] government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law, and in either case that law furnishes the test of the nation's liability and not its own municipal rules." Letter from Secretary of State Bayard to Connery, [1887] FOREIGN REL. U.S. 753 (1887). See also Draft on The Law of Responsibility of States art. 2, HARVARD RESEARCH IN INTERNATIONAL LAW (1929); BRIGGS, THE LAW OF NATIONS 62, 889 (2d ed. 1952) (comment and bibliography); FENWICK, *op. cit. supra*, at 89 & n.9.

tions, the fact that laws which breed statelessness have been condemned by the United Nations and decried by the major States of the world should influence the courts to deny such laws the benefit of any constitutional doubts.[171] These factors are even more powerful as policy reasons why Congress should re-examine the advisability of the Expatriation Act. If the threat of subversion can be met adequately by imposition of conventional sanctions, it would seem to be in the best interests of the United States and anti-communism to abstain from the use of denationalization as a punishment, and thereby to accord with the trend in international law towards greater solicitude for human dignity.

CONCLUSION

The Expatriation Act is a bold attempt to utilize congressional powers of expatriation in order to denationalize Americans who have performed acts of disloyalty. As such it presents solid issues for constitutional debate. Foremost among the arguments for constitutionality will be the subtle and persuasive one which classifies loss of nationality under the Act as voluntary expatriation. Congress has designated certain subversive crimes as acts of expatriation, so this self-contained argument runs, and, by definition, the citizen who performs one of these acts voluntarily expatriates himself. By accepting this rationale, a court may uphold both the Expatriation Act and the traditional ban on withdrawal of nationality without the citizen's consent.

As the investigation into constitutionality proceeds further, it should be apparent that voluntary expatriation is a façade which camouflages the fact that denationalization is used as a punishment for subversive activities. Viewed in this way, the act raises issues concerning the existence of congressional power and the constitutional limitations upon its exercise. The traditional view that the Constitution grants to Congress no power to impose expatriation appears upon examination to be erroneous. The foreign affairs power with respect to dual nationality statutes, and the power to employ all means "necessary and proper for carrying into Execution [granted] . . . Powers" with respect to penal expatriation statutes, appear to authorize use of denationalization provided no explicit constitutional limitations are thereby infringed.

The conclusion that the Act imposes denationalization as a punishment for crime would lead the courts into unexplored constitutional territory, for Congress has seldom if ever used any but the traditional means of punishment. And while the Expatriation Act may encounter serious difficulty with other sections of the Constitution, the only constitutional provision which expressly limits the government's power to punish is the eighth amendment's seldom

171. Chief Justice Marshall, speaking for the Supreme Court in Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." See The Paquete Habana, 175 U.S. 677 (1900) ("international law is a part of our law"); Nereide, 13 U.S. (9 Cranch) 388 (1815). See also BRIGGS, *op. cit. supra* note 170, at 62; Jenks, *The Authority in English Courts of Decisions of the Permanent Court of International Justice*, 18 BRIT. Y.B. INT'L L. 1 (1938).

used prohibition of cruel and unusual punishments. The Act transforms the citizen into a stateless person, having only the rights of an alien under the Constitution and laws of the United States and other nations, and with no recourse under contemporary international law against maltreatment by any State. This status of statelessness, with its ever-present liability to deportation, should be deemed in modern context to constitute a cruel and unusual punishment.

Whether or not the Act is held constitutional, two factors suggest that Congress reconsider the advisability of the legislation. First, the Act conflicts with sound international policy. Second, the Expatriation Act largely duplicates other laws which now protect the United States against subversion.[172] Analysis of the public benefits derived, and human values destroyed, by use of expatriation as a punishment suggests that this sanction is inefficient—that the Act was not a sober response to the demands of national policy,[173] but rather was enacted primarily to vent the nation's hatred of citizens who have forsaken their native country by adopting communism. Actually, democracy and anti-communism would be better strengthened by repeal of the Expatriation Act and reliance upon conventional sanctions to deter and punish subversion.

172. See statutes cited notes 2, 4 *supra*.

173. Total debate on the Expatriation Act in both the Senate and the House of Representatives covered less than six pages of the *Congressional Record*. 100 CONG. REC. 11279-83, 14930, 14981, 14983, 15235 (1955). The bill was introduced in the House on July 19, 1954, *id.* at 10975, and passed on July 21, 1954, *id.* at 11283. It was reported to the Senate on August 2, 1955, *id.* at 13003, and passed on August 18, 1955, *id.* at 14983. The House concurred in the amended version of the bill on August 19, 1955. *Id.* at 15235.