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## Loss of Nationality by Service in a Foreign Army

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state law." As to the Little Norris-LaGuardia Act, the court held that by expressly recognizing the right of an employee to join a union the statute also "impliedly" grants to that employee the right *not* to join. In consequence, it would be unlawful for an employer to force his employees to join a union under state law.<sup>25</sup> This, held the Supreme Court, was the unlawful object.

Although the injunction entered in the *Hagen* case had the effect of stopping the picketing, it also had the effect of making the defendant union cease attempting to generate a labor-management dispute where one did not exist; the picketing was an incidental rather than a primary feature of the case. There was no dispute here in the real sense inasmuch as none of the plaintiff's employees were members of the defendant union. To force these employees to join the union would have been unlawful under state law. We could speculate that the union would have prevailed in this case had even one of the plaintiff's employees belonged to the union and refused to cross the picket line. Then there would have been a real labor dispute, the protective provisions of the Little Norris-LaGuardia Act would have applied, and no injunction could have been issued.<sup>26</sup>

In conclusion, states still retain important jurisdiction where labor-management disputes exist, or where they do not exist and an "outside union" tries to generate one. If a "pattern of violence" can be established by a plaintiff seeking an injunction against mass picketing, state courts have jurisdiction. Further, under existing Wyoming statutes, picketing may be enjoined where no real labor dispute exists on the theory that an employer cannot and should not declare that hereafter he will maintain a "closed shop," thereby forcing his employees to join a union. Organized labor will always be able to strike and picket if it does so peacefully. Where a labor dispute exists, if an employer has reason to believe that the pickets will become violent, and a state of tension exists, it is within his right to seek a state court injunction to prevent violence, but not to stop the picketing. State courts need not be apologetic when called upon to decide questions in these areas.

D. THOMAS KIDD

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### LOSS OF NATIONALITY BY SERVICE IN A FOREIGN ARMY

Most Americans would be surprised to learn that by the voluntary commission of certain insignificant acts they could forfeit one of their most precious rights, their citizenship. Prior to 1907, the Department of State had authority to determine what constituted intentional renunciation of citizenship.<sup>1</sup> However, in that year, Congress specified three acts which,

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25. *Supra* note 21.

26. The Little Norris-LaGuardia Act was raised as a defense in the answer in the *Bucknam* case, but both the District Court and the Supreme Court seem to have ignored it.

1. 1943 U.S. Code Cong. and Adm. News 2886.

it voluntarily performed, would result in expatriation.<sup>2</sup> They were: marriage by an American woman to a foreign national, taking an oath of allegiance to a foreign country, and accepting naturalization in a foreign country. Subsequent legislation<sup>3</sup> has increased the list of acts so that a revised enumeration would include:

- (a) Naturalization in a foreign state.
- (b) Declaration of allegiance to a foreign state.
- (c) Entering or serving in foreign armed services.
- (d) Service under a foreign government in an official capacity.
- (e) Voting in a foreign political election.
- (f) Renunciation of American citizenship.
- (g) Conviction for certain acts (e.g., treason, attempt to overthrow the United States by force.)
- (h) Evasion of military service.
- (i) Desertion in time of war.<sup>4</sup>

In the principal case, *Nishikawa v. Dulles*,<sup>5</sup> petitioner was a native-born citizen of the United States, and because of the citizenship of his parents he was also considered by Japan to be a citizen of that country.<sup>6</sup> In 1939, he went to Japan intending to stay between two and five years studying and visiting. Two years later, he was conscripted into the Japanese Army and served in the war against the United States. After the war he applied for an American passport but was given instead a certificate of loss of nationality. Petitioner sued for a judgment declaring him to be a citizen of the United States. At the trial, Nishikawa testified that he had heard rumors about the brutality of the Japanese secret police which made him afraid to protest. The only affirmative evidence introduced by the government was that petitioner went to Japan at a time when he was subject to conscription. Judgment was issued against him and affirmed by the Circuit Court of Appeals, Ninth Circuit.<sup>7</sup> On certiorari, the Supreme Court held that the evidence was not sufficient to establish petitioner's loss of

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2. Act of March 2, 1907, c. 2534, §§ 2, 3, 4, 34 Stat. 1228. Sections 3, 4 repealed Sept. 22, 1922, c. 41, §§ 6, 7, 42 Stat. 1022, § 2 repealed and superseded by Nationality Act of 1940, c. 876, § 504, 54 Stat. 1172, 8 U.S.C. § 904 (1940 ed.). The Cable Act, c. 411, 42 Stat. 1022 (1922) although repealing the sections of the old act dealing with the loss of citizenship by marriage, provided that any woman citizen who marries an alien ineligible for citizenship (i.e., Chinese) shall cease to be a citizen. This piece of discriminatory legislation was repealed in 1931 so that today marriage per se in no case effects loss of nationality. Act of March 3, 1933, c. 422, § 4, 46 Stat. 155.
  3. Nationality Act of 1940, c. 876, § 401, 54 Stat. 1168, 8 U.S.C. § 801 (1940 ed.) superseded by Immigration and Nationality Act of 1952, c. 477, § 349, 66 Stat. 267, 8 U.S.C. § 1481 (1952 ed.).
  4. One ground, desertion, has been declared unconstitutional as applied in the Nationality Act of 1940 on the grounds that expatriation for the military crime of desertion is "cruel and unusual punishment" and therefore violates the Eighth Amendment of the United States Constitution. *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). It would appear that an identical objection could be made to the same provision in the Immigration and Nationality Act of 1952, c. 477, § 349, 66 Stat. 267, 8 U.S.C. § 1481 (a) (8) (1952 ed.).
  5. 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958).
  6. The present provision, Immigration and Nationality Act of 1952, c. 477, § 349 (a) (3), 66 Stat. 267, 268, 8 U.S.C. § 1481 (a) (3) eliminates the necessity that the expatriate have or acquire the nationality of the foreign state in order to be expatriated by joining a foreign army.
  7. *Nishikawa v. Dulles*, 235 F.2d 135 (9th Cir. 1957).

citizenship under Section 401 (c) of the Nationality Act of 1940<sup>8</sup> as a result of his entering and serving in the armed forces of a foreign country. (Nishikawa went into the service when the 1940 Act was in effect.) The government had not sustained the burden of establishing the voluntary conduct which is an essential ingredient of expatriation.<sup>9</sup>

What is the nature of the status that the government was insisting the plaintiff had forfeited? Perhaps citizenship can be understood best by a consideration of its antonym, alienage. The alien while residing in our country enjoys substantially the same protection available to citizens. Indeed, the Supreme Court has declared that:

While he lawfully remains here, he is entitled to the benefits of the guaranties of life, liberty and property secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights . . . are as fully protected as if he were a native or naturalized citizen of the United States.<sup>10</sup>

The major difference would appear to be that an alien is not entitled to *permanent* protection by the government. When the government decides to withdraw its hospitality from the alien, he can be deported to the land of his origin or any other place that will accept him. Citizenship would seem to be valuable.

What persons are entitled to citizenship? The English view was that all persons born within the allegiance, or in other words, under the protection and control of the Crown, were natural-born British subjects.<sup>11</sup> As might be expected, a similar rule was judicially adopted in the United States,<sup>12</sup> as least as far as white persons were concerned,<sup>13</sup> and was in force until adoption of the Civil Rights Act of 1866.<sup>14</sup> This bill, designed to extend citizenship to Negroes, declared that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens. . . ." This act and its constitutional counterpart, the Fourteenth Amendment,<sup>15</sup> established the rule which controls the acquisition of citizenship by birth within the country at the present time. Naturalized citizens and children born abroad of American nationals receive their citizenship by virtue of the Naturalization Power.<sup>16</sup>

By whatever means acquired, citizenship definitely may be relinquished. In order to divest oneself of nationality at Common Law, it was

8. Nationality Act of 1940, c. 876, § 401, 54 Stat. 1168, 8 U.S.C. § 801 (1940 ed.) superseded by Immigration and Nationality Act of 1952, c. 477, § 349, 66 Stat. 267, 8 U.S.C. § 1481 (1952 ed.).

9. Nishikawa v. Dulles, 356 U.S. 129, 137, 78 S.Ct. 612, 617, 2 L.Ed.2d 659, 666 (1958).

10. Lem Moon Sing v. United States, 158 U.S. 538, 547, 15 S.Ct. 967, 971, 39 L.Ed. 1082, 1085 (1895).

11. Calvins Case 7 Co.Rep. 1, 4b-6a, 18a, 18b, 70 Eng.Rep. 377 (K.B. 1608).

12. Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155, 7 L.Ed. 617, 637 (1830); United States v. Wong Kim Ark, 169 U.S. 649, 674, 18 S.Ct. 456, 42 L.Ed. 890.

13. Dred Scott v. Sanford, 19 How. 393, 15 L.Ed. 691 (1856).

14. Act of April 9, 1866, c. 31, § 1, 14 Stat. 27.

15. U.S. Const. Amend. XIV.

16. U.S. Const. Art. I, § 8, cl. 4.

necessary to have consent of the sovereign.<sup>17</sup> However, in 1868, Congress gave statutory recognition to voluntary expatriation.<sup>18</sup> Congress declared that "the right of expatriation is a natural and inherent right of all people. . . ." The right of expatriation has been extended subsequently so that any of the aforementioned acts, i.e., joining a foreign army, taking an oath of allegiance, etc., will denationalize a citizen regardless of the absence of a specific intent to lose citizenship<sup>19</sup> or ignorance of the consequences<sup>20</sup> so long as the act is voluntary.

The constitutionality of taking away citizenship for service in a foreign army is not entirely clear. The Supreme Court in the recent case of *Perez v. Brownell*<sup>21</sup> upheld the constitutionality of Section 401 (e) of the Nationality Act of 1940<sup>22</sup> which provides that "a person who is a national . . . shall lose his nationality by: (e) Voting in a political election in a foreign state. . . ." The Court first pointed that Congress has the inherent power to deal with foreign affairs as an attribute of sovereignty. Then the opinion stated that the constitutional test was whether expatriation bore a reasonable relationship to the regulation of foreign affairs. The Court found that voting by an American in a foreign election might be a source of embarrassment to our government and was therefore regulable under the foreign affairs power. In order to avoid this embarrassment Congress took what it regarded as a reasonable method of solving the problem in summary fashion. By reaffirming the inhere power doctrine and applying it specifically to this field the Court has ended the confusion existing because of its previous unwillingness to confront the problem of Constitutional authority for Congressional expatriation.<sup>23</sup>

However, the test applied by the Court in the *Perez* case<sup>24</sup> has never been used in a Supreme Court decision dealing with loss of nationality because of service in a foreign army. In accordance with the Court's policy of judicial restraint in deciding constitutional questions, the problem was not discussed, at least by the majority, in the principal case, as it could be disposed of on other grounds.<sup>25</sup> Nevertheless, the rationale of the *Perez* decision would seem to be equally pertinent to this situation, as American participation in foreign military ventures has been an acute source of embarrassment to our nation. Expatriation indicates disapproval by our government of adventurers who involve our country in difficult situations, and would deter others from taking a similar course. Therefore, by the

17. *Shanks v. Dupont*, 3 Pet. 242, 7 L.Ed. 666 (1830).

18. Act of July 27, 1868, c. 249, § 1, 15 Stat. 223.

19. *Acheson v. Wohlmut*, 196 F.2d 866 (D.C. Cir. 1952); *Devedin v. Acheson*, 194 F.2d 482 (2d Cir. 1952).

20. *Scavone v. Acheson*, 103 F.Supp. 59 (S.D.N.Y., 1952); *Acheson v. Mariko Kuniyuki*, 190 F.2d 897 (10th Cir. 1951).

21. 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958).

22. Nationality Act of 1940, c. 876, § 401, 54 Stat. 1168, 8 U.S.C. § 801 (1940 ed.) superseded by Immigration and Nationality Act of 1952, c. 477, § 349, 66 Stat. 267, 8 U.S.C. § 1481 (1952 ed.).

23. *Mackenzie v. Hare*, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297 (1915).

24. *Supra* note 20.

25. 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958).

criteria established by the *Perez* case, it is submitted that the section will probably be held constitutional if the issue arises.

The *Nishikawa* case introduces another problem, however, as to who bears the burden of proof during succeeding stages of the trial. In a *Per Curiam* decision, *Gonzales v. Landon*,<sup>26</sup> the Court had held that the standard proof required of the government in denaturalization cases<sup>27</sup> was applicable to expatriation cases arising under Section 401 (j) of the Nationality Act of 1940. In the *Nishikawa* case, the Court concluded that the same rule should govern cases under all subsections of Section 401. When the citizenship claimant proves his birth in this country or the acquisition of American citizenship in some other way, "the burden is upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence."<sup>28</sup> A mere preponderance of evidence will not suffice. In the *Schneiderman*<sup>29</sup> and *Baumgartner*<sup>30</sup> denaturalization cases where the burden of proof rule was applied to loss of citizenship cases, the government was trying to revoke certificates of naturalization on the grounds of illegal and fraudulent procurement because of statements made at the time of the oath of allegiance. The exacting standard required by the Supreme Court was not met and the government lost both cases because the evidence failed to show with the requisite degree of certainty that during the period in question the defendant was not attached to the principles of the Constitution.<sup>31</sup>

Yet, in the cases involving expatriation, the task of proving by clear and unequivocal evidence that an expatriation act has occurred would not seem to be so formidable. The government under which the citizenship claimant had served in a civilian or military capacity or had taken an oath of allegiance would presumably have records available which could aid the United States in the preparation of its case.

However, the decision has imposed an additional and much more onerous burden of proof upon the government. The statute requires that the expatriating act be voluntary.<sup>32</sup> The government argued that duress is a matter of affirmative defense and contended that the party claiming that he acted involuntarily must overcome a presumption of voluntariness.<sup>33</sup> The Court held that because the consequences of denationalization are so drastic, the law should be construed in favor of the citizen and

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26. 350 U.S. 920, 76 S.Ct. 210, 100 L.Ed. 806 (1955).  
 27. *Baumgartner v. United States*, 322 U.S. 665 S.Ct. 1240, 88 L.Ed. 1525 (1944); *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943).  
 28. *Nishiwawa v. Dulles*, 356 U.S. 129, 133, 78 S.Ct. 612, 615, 2 L.Ed.2d 659, 663 (1958).  
 29. 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943).  
 30. 322 U.S. 655, 64 S.Ct. 1240, 88 L.Ed. 1525 (1944).  
 31. *Baumgartner v. United States*, 322 U.S. 665, 667, 64 S.Ct. 1240, 1246, 88 L.Ed. 1525, 1533 (1944); *Schneidermann v. United States*, 320 U.S. 118, 135, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, 1807.  
 32. Nationality Act of 1940, c. 876, § 401, 54 Stat. 1168, 8 U.S.C. § 801 (1940 ed.) superseded by Immigration and Nationality Act of 1952, c. 477, § 349, 66 Stat. 267, 8 U.S.C. § 1481 (1952 ed.).  
 33. *Nishikawa v. Dulles*, 356 U.S. 129, 134, 78 S.Ct. 612, 616, 2 L.Ed.2d 659, 664 (1958)

placed upon the government the burden of proving voluntariness.<sup>34</sup> Once the petitioner can show that coercion existed to any degree so as to raise the issue of duress, it is incumbent upon the United States to prove the expatriating act was voluntary.

Voluntariness is, to a certain extent, a subjective state of mind and poses problems similar to specific intent in first degree murder. Furthermore, the difficulty of obtaining from a foreign country after years have elapsed proof of surrounding circumstances existent at the time of the act complained of, makes the evidentiary problems practically insolvable, and seriously limits the effectiveness of the statute.

Presumably the rule announced by the *Nishikawa* case<sup>35</sup> will be applied to the present nationality act, although the more recent statute contains a provision that if such person was a national at the time of the act and had been present in such state for ten years, it is presumed that the act was voluntary.<sup>36</sup>

To conclude, the *Perez* case has largely solved the constitutional difficulties of Congressional expatriation by squarely placing such legislation within the power to regulate foreign affairs, which in turn is based upon the sovereignty of the central government as a nation. The Court, in the *Nishikawa* case, has established a very fair burden of proof, at least as far as citizenship claimants are concerned. And yet, the remedy does not meet the problem as the *Perez* case has outlined it. It is at least arguable that expatriation many years after the expatriation act was committed in no way operates to mollify our sensitive neighbors. The punishment for service in a foreign army exceeds the gravity of such an offense. Perhaps a more effective and equitable solution would be a demand by our government that the offender return to his homeland or cease the objectionable action within a reasonable period of time, or else suffer the penalty of expatriation. This procedure would impose a greater burden on the State Department in these cases but would evoke a greater degree of judicial sympathy and cooperation with the enforcement of the act, and indicate just as clearly the disapprobation of the government. However, Congress has resisted efforts to relax the existing provisions.

Although the test of constitutionality announced by the Court has never been applied to expatriation for service in a foreign army, there is little doubt that the same rationale is equally in point and that the particular provision in both the 1940 act and the more recent enactment will be upheld.

JAMES DALEY

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34. *Ibid.*

35. 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958).

36. *Supra* note 32.