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Can Congress Denationalize? The Supreme Court's View in Kennedy v. Mendoza-Martinez

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Comments / Can Congress Denationalize?

The Supreme Court's View in

Kennedy v. Mendoza-Martinez.

IN AN AGE WHEN PERHAPS THE FOREMOST CONCERN of the legal profession is the status and protection of the rights of individuals, the few decided cases on the right to citizenship—the most basic of all rights, the "right to have rights"—are of special significance. Since 1950, but prior to this Term, only two Supreme Court cases directly confronted the constitutional questions inherent in an assertion by Congress of the right to separate a person from his nationality.[1] These cases, decided on the same day in 1957, were scarcely reconcilable with each other; now, in 1963, the Supreme Court has handed down its decision in companion cases *Kennedy v. Mendoza-Martinez* and *Rusk v. Cort*,[2] applying a rationale as different from the prior two decisions as they were from each other.

This comment will be concerned with one phase of the three citizenship cases. Since 1957, three vacancies have occurred on the Court—Justice Burton retired in favor of Justice Potter Stewart, and in 1962, Justices Whittaker and Frankfurter were succeeded by Justices White and Goldberg. The importance of these changes may not be fully known for years, but in citizenship matters the repercussions have already begun. Justice Frankfurter's powerful opinion in *Perez* is in some measure offset by that of Justice Goldberg in *Mendoza-Martinez;* the full scope of Justice White's views is not yet known; and Brennan has expressed "felt doubts"[3] of the correctness of *Perez,* which he joined. We hope, in this comment, to provide some insight into the present Court's stand on citizenship, and at the same time read the Court's latest pronouncement in light of its predecessors.

[1] Perez v. Brownell, 356 U.S. 44 (1957); Trop v. Dulles, 356 U.S. 86 (1957).
[2] 83 S. Ct. 554 (1963).
[3] *Id.* at 577.

In 1865,[4] in 1940,[5] and most recently in 1952,[6] the Congress has enacted laws which provide that a citizen shall lose his nationality by performing certain acts. Some of these prescribed acts obviously constitute a voluntary renunciation of citizenship, and with these there is no argument. But there are other provisions which provide expatriation as the consequence of actions which of themselves do not indicate an unequivocal intention to cast away one's nationality. These are the sections whose constitutionality is questioned.[7]

The difficulty in the *Mendoza-Martinez* and *Cort* cases is Section 401 (j) of the Nationality Act of 1940, and its subsequent counterpart, Section 349 (a) (10) of the Immigration and Nationality Act of 1952. Petitioners Francisco Mendoza-Martinez and Joseph Cort are claimed to have lost their citizenship by "departing from and remaining outside the jurisdiction of the United States in time of war . . . for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

Though their suits were joined for argument and decision in the Supreme Court, the petitioners' cases bear little resemblance to each other. Mendoza-Martinez, born in the United States of Mexican parents, went to Mexico in 1942 to avoid the draft, and remained there for the duration of the war. On his return to the United States he was tried and convicted of violating Section 11 of the Selective Training and Service Act of 1940,[8] and served a year in prison. Not until 1953 were deportation proceedings initiated, from which, eventually, the action reached this Court.[9]

[4] Act of March 3, 1865, 13 Stat. 487.

[5] The Nationality Act of 1940, 54 Stat. 1172.

[6] The Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1481.

[7] The clauses in question in Perez v. Brownell, Trop v. Dulles, and Kennedy v. Mendoza-Martinez are set forth as they appear in the 1952 Act. Corresponding sections of the 1940 statute are noted:

"Section 349 (a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by —. . . .

" (5) voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; . . . [1940 Act, sec. 401 (e)]

" (8) deserting the military, air, or naval forces of the United States in time of war, if and when he is convicted thereof by court martial and as a result of such conviction is dismissed or dishonorably discharged from the service of such military, air, or naval forces: . . . [1940 Act, sec. 401 (g)]

" (10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. . . ." [1940 Act, sec. 401 (j)].

[8] 54 Stat. 894, 50 U.S.C. App. (1946 ed.) §311.

[9] Litigious petitioner Mendoza-Martinez has proceeded as follows: he sought a declaratory judgment to affirm his citizenship in the Federal District Court for the Southern District of California. The judgment against him was affirmed by the Court of Appeals, 238 F. 2d 239 (9th Cir. 1956) ; the Supreme Court granted certiorari, 356 U.S. 258 (1958) , but remanded the case to the District Court for further consideration in the light of Trop v. Dulles. Later, on direct appeal, the Supreme Court noted probable jurisdiction, 359 U.S. 933 (1959) , but

In contrast, American-born Joseph Cort, an ex-communist and Yale graduate, was a Research Fellow at Cambridge University in England, who refused to return to the United States for military service after repeated notices from his draft board. When his passport expired and was not renewed, Cort moved to Prague where he now lives. Though his wife received a passport and returned to this country in 1959, Cort's application has continually been rejected in light of his "expatriation" under Section 349 (a) (10) of the Immigration and Nationality Act of 1952.[10]

In the 1957 cases, petitioners were also quite dissimilar. Clemente Perez was charged, in deportation proceedings, with voting in a Mexican election, in violation of Section 401 (e) of the 1940 statute. Albert Trop, in the other case, had been convicted by court martial of deserting the military forces of the United States in time of war and allegedly was expatriated by Section 401 (g). The facts were not in dispute in any of the three decisions and need no elaboration here.

The Court has declared two of the questioned provisions unconstitutional, and has upheld the other. But in so doing, each opinion was endorsed by a bare majority of the Court. In *Perez,* five Justices agreed that the statute was a valid exercise of Congress' power over foreign affairs;[11] in *Trop,* Chief Justice Warren wrote for himself and Justices Douglas, Black, and Whittaker, with Justice Brennan unexpectedly switching sides,[12] to hold Section 401 (g) unconstitutional.

Mendoza-Martinez (who had filed briefs as *amicus curiae* in the *Perez* case) argued that Section 401 (j) was an invalid exercise of Congress' power over foreign affairs, of its war powers, or of the "inherent sovereignty" of the government, and alternatively that it imposes a cruel and unusual punishment. Cort's arguments were similar, but he stressed the fact that the determination of loss of citizenship in his case had been made by an administrative agency and that this denied him due process of law.

Apparently the Court had only to choose between *Perez* and *Trop* for a cornerstone to uphold or annul the statute. But, in accordance with its reticent tradition, and its reluctance to decide the case on other than the narrowest possible grounds, the Court's opinion scarcely touches the question

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again remanded so that the parties might include another issue in the pleadings, 362 U.S. 384 (1960). Again noting probable jurisdiction, 365 U.S. 809 (1961), the Supreme Court heard the case during the 1961 Term, and restored it to the calendar for re-argument this Term, 369 U.S. 832 (1962).

[10] Joseph Cort has apparently been a "model expatriate", if such is possible. For his reactions to the Court's decision in his case, see the Washington Post, March 26, 1963, p. 28, col. 2.

[11] Justice Frankfurter, writing for the Court, was joined by Justices Brennan, Clark, Harlan and Burton.

[12] Concurring by separate opinion, Trop v. Dulles, supra, 356 U.S. at 105.

of Congress' power to expatriate. Indeed Justice Goldberg had to assume the validity of that power, for he reasons through legislative history to the conclusion that the power to impose expatriation on draft-dodgers is unquestionably penal, and as such lacks the "procedural safeguards" demanded by the Fifth and Sixth Amendments.[13]

The opinion of the Court is thus twofold—it first classifies the effect of Section 401 (j) as a penal sanction, and then invalidates it because it does not afford Cort and Mendoza-Martinez the required due process of law, "including notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel."[14]

Justice Goldberg is joined unequivocally only by the Chief Justice; Justices Douglas and Black concur,[15] but incorporate by reference their dissent in *Perez*,[16] while Justice Brennan concurs on the somewhat broader ground that Congress lacks power to impose this particular sanction.[17] The parts of Justice Stewart's dissent[18] that are relevant to our discussion here are joined by the remaining members of the Court, Justices White, Clark, and Harlan.[19] Stewart's rationale is simple: "... I cannot agree with the Court's major premise —that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of that term."[20]

While we intend to analyze all these opinions in more detail, we submit that the important clash of high court theory is not between Justices Goldberg and Stewart, or between Justice Frankfurter's philosophy and the libertarian views of Justices Black and Douglas, but between all the above and the pervading insistence of the views of Mr. Justice Brennan. His is the only position from which a functional test of constitutionality can be derived.

Justices Douglas, Black, and probably Chief Justice Warren, would insist, if a case hinged on the point, that citizenship is an inviolable right which Congress under no circumstances can remove or dilute—but no other member of the present Court has ever intimated the possibility of adhering to such an "absolute" view. Rather, in one way or another, they all adhere to the basic thesis of Justice Frankfurter, that when legislative power is challenged, the Supreme Court's sole function "is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may

[13] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 576.
[14] *Id.* at 565.
[15] *Id.* at 577.
[16] Perez v. Brownell, supra, 356 U.S. at 79.
[17] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 577.
[18] *Id.* at 584.
[19] Justices Clark and Harlan also submit a separate dissent wherein they disagree with Justice Stewart's contention that the evidentiary presumption attached to Section 349 (a) (10) is unconstitutional.
[20] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 585.

fairly be, referred,"[21] keeping always to itself "the final determination of its own power to act."[22] This, of course, is the essence of judicial self-restraint, but it also points up the prevailing view that the protections of the Bill of Rights are less than pure license, and require in each case some "balancing" of individual rights against the sovereign's right to protect itself.

Justice Frankfurter in the *Perez* opinion thus takes the position that it is within the powers of the legislative branch of government to annul a person's citizenship for voting in a foreign election; a sufficient "rational nexus"[23] exists between Congress' powers over our international relations and the embarrassments caused by American citizens voting abroad, to justify expatriation.

Conceding that the requisite rational relationship existed under Congress' war powers, the Court in *Trop* nonetheless struck down the expatriating statute because it imposed a "cruel and unusual" punishment on the individual. Justice's scales tipped first right, then left.

Realizing then that there are broad and divergent theories at work in the present Court, we will investigate them more closely.

A. Citizenship—An Absolute Right

Three members of the present Court have clearly indicated their views that citizenship is an *absolute* constitutional right. Justices Warren, Black and Douglas have held that expatriation is entirely outside the scope of Congressional power. In his dissent in *Perez,* Chief Justice Warren stated:

> Whatever may be the scope of its powers to regulate the conduct of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.[24]

Writing for the majority in *Trop v. Dulles,* and before he distinguished that decision from *Perez,* the Chief Justice further averred:

> It is my conviction that citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers.[25]

Justice Douglas, dissenting in *Perez,* sustained his stand with this explanation:

[21] Trop v. Dulles, supra, 356 U.S. at 120 (dissenting opinion).
[22] *Ibid.*
[23] Perez v. Brownell, supra, 356 U.S. at 58.
[24] *Id.* at 65.
[25] Trop v. Dulles, supra, 356 U.S. at 92.

> [T]he requirement of Due Process is a limitation on powers granted, not the means whereby rights granted by the Constitution may be wiped out or watered down. The Fourteenth Amendment grants citizenship to the native-born.... That right may be waived or surrendered by the citizen. But I see no constitutional method by which it can be taken from him. Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms. The power of Congress to withhold it, modify it, or cancel it does not exist. One who is native-born may be a good citizen or a poor one. Whether his actions be criminal or charitable, he remains a citizen for better or worse, except and unless he voluntarily relinquishes that status. While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act of expatriation. For them the right granted by the Fourteenth Amendment becomes subject to regulation by the legislative branch. But that right has no such infirmity. It is deeply rooted in history.... And the Fourteenth Amendment put it above and beyond legislative control.
>
> That may have been an unwise choice. But we made it when we adopted the Fourteenth Amendment and provided that the native-born is an American citizen. Once he acquires that right there is no power in any branch of our government to take it from him.[26]

The foregoing raises two questions. First, does the emphasis laid on native-born status indicate that Justice Black and Douglas would acquiesce in Congressional expatriation of a naturalized citizen? And second, does recognition of Congressional power to "prescribe conditions for voluntary expatriation" offer a legislative loophole through which this "absolute" argument can be avoided?

As to the first question, Chief Justice Warren indicated in his *Perez* dissent that no distinction can be drawn between a naturalized and a native-born citizen. "The Constitution also provides that citizenship can be bestowed under a 'uniform rule of Naturalization,'[27] but there is no corresponding provision authorizing divestment... the status of the naturalized citizen is secure."[28] Concurrences by Justices Black and Douglas indicate agreement with this statement. Moreover, there is little doubt that in the United States, loss of citizenship by denaturalization is based exclusively on the theory that the individual obtained his citizenship by fraud.[29] In the technical sense then, the person never actually was a "citizen," and was never entitled to the constitutional protection of that status.

[26] Perez v. Brownell, supra, 356 U.S. at 83-84.
[27] U.S. Const. art I, sec. 8, cl. 4 (footnote in original).
[28] Perez v. Brownell, supra, 356 U.S. at 66.
[29] Knauer v. United States, 328 U.S. 654 (1946); Baumgartner v. United States, 322 U.S. 665 (1944); Schneiderman v. United States, 320 U.S. 118 (1943); Luria v. United States, 231 U.S. 9 (1913).

The second query is a bit more difficult to answer. Where is the line to be drawn between voluntary expatriation, Congressionally prescribed conditions for voluntary expatriation, and involuntary expatriation through legislative action? The necessity of drawing such a line has not yet arisen and will not arise until a majority of the Court adopts the Warren-Douglas-Black view, yet it is worthwhile to point out that in the *Cort* case, the statute in question raised a conclusive presumption of voluntary relinquishment of citizenship.[30] Though none of the three Justices here being discussed addressed any comment to the point, they all apparently rejected that type of Congressionally prescribed condition.[31] In light of their view that citizenship is an absolute right, it would seem necessary to their position that any valid statutory designation of expatriating conditions require a precise knowledge by the expatriate of the consequences of his action. In other words, before a person may be held to have voluntarily given up his citizenship, Justices Black, Douglas and Warren would probably hold that knowledge and subjective intent must be present in the expatriate. Just as the Government now has the burden of proving "lack of duress," they would add the very difficult burden of demonstrating that the draft evader had a prior awareness of the consequences of his conduct.

B. The Powers of Congress to Expatriate

The remaining members of the Court, Justices Brennan, Goldberg, Stewart, Harlan, Clark and White, all concede that Congress does have the power to expatriate citizens, at least in some circumstances. But their individual views are diverse on questions concerning the extent of the power, instances of permissible exercise of the power, and constitutionally-mandated procedural requirements.

With the retirement of Justice Whittaker in 1962, one of the thirteen "citizenship opinions" is, in effect, removed from the purview of our discussion.[32] Conversely Justice Frankfurter's influence remains predominant—urging the Court to "go slow" in striking down legislation. His views on

[30] Sec. 349 (a) (10) of the 1952 Act, 8 U.S.C. sec. 1481 (a) (10), supra note 7, concludes:

"... For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

[31] Justice Stewart devotes a considerable portion of his dissent to the validity of the presumption and concludes it is unconstitutional in light of Nishikawa v. Dulles, 356 U.S. 129 (1957), Gonzales v. Landon, 350 U.S. 920 (1955), and Tot v. United States, 319 U.S. 463 (1943). Justice Clark, in his separate dissent, would sustain even the presumption, distinguishing it from the invalid presumption in Tot v. United States, supra.

[32] Justice Whittaker's short opinion in Perez, 356 U.S. at 590, accepted Justice Frankfurter's premise as to the powers of Congress, but failed to find any international "embarrassment" when voting by non-citizens was legal in the foreign state.

Congressional power, expressed in *Perez,* are tacit in Goldberg's opinion, are the core of Stewart's, and are the rough-hewn policy which Justice Brennan is so anxious to perfect.

1. *Justice Goldberg*

Though bearing Justice Goldberg's signature, his opinion is not his alone, but that of the Court. His words are the legal reasoning on which the result turned, and we cannot extract or pinpoint our newest Justice's personal feelings on citizenship from this single opinion. Yet there are some guidelines worth mentioning.

With the reticence of his predecessor, the Justice is careful to emphasize that only judicial restraint compels the "due process" rationale:

> We have come to the conclusion that there is a basic question in the present cases, *the answer to which obviates a choice here between the powers of Congress and the constitutional guarantee of citizenship.* (Emphasis added) [33]

In order then, to decide the case on these narrow "due process" grounds, and at the same time to write not only for himself, but also for Justices Black, Douglas, Brennan and Chief Justice Warren, he must accept what prior cases have said is the law. And the "law" is *Perez.* Congress *does* have expatriating authority in the exercise of its broad powers. Justice Goldberg must accept this premise, and the opening paragraphs of Part IV of his opinion do not evidence any misapprehension of that fact. Nor does he view the assertion of such legislative power with any degree of repugnance or disapproval:

> The powers of Congress to require military service for the common defense are broad and far-reaching, for while the constitution protects against invasions of individual rights, it is not a suicide pact. . . . Latitude in this area is necessary to ensure effectuation of this indispensable function of government.[34]

The substance of Justice Goldberg's opinion is the development and tracing of the predecessor statute and the judicial construction of Section 401 (j),[35] culminating in his reading into the margin the full text of Attorney General Biddle's letter which was the impetus for passage of the bill.[36] From his study, his conclusion that the statute was intended to be, and is, penal, follows as a matter of course. At this precise point Justice Goldberg faces a crossroad. His choices are three: he can reject the statute as a cruel and unusual punishment, under *Trop;* he can either sustain or reject it within the wider holding of

[33] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 565.
[34] *Id.* at 563.
[35] For some earlier background material, see Comment, 56 MICH. L. REV. 1142, 1147-57 (1958).
[36] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 574, note 36.

Perez; or he can void the statute for failing to provide sufficient procedural safeguards. He elects the easier, more traveled path—due process.

Students of the Court must necessarily wonder at the questions left unanswered in this, Justice Goldberg's first attempt at civil-rights opinionating.

In *Trop,* the Court assumed that petitioner had received some semblance of due process by virtue of his military court martial.[37] Of course Justices Black and Douglas would never assent to this proposition if decisive of a case at bar, but nonetheless they joined an opinion which did not question whether Albert Trop had received his requisite 5th and 6th Amendment protections. Now, in *Mendoza-Martinez* the petitioner had been convicted of extraterritorial draft evasion by a "jury of his peers" in a federal District Court. Certainly in that prosecution due process was not denied him. Is it not true that the factual issues in that case are identical to those for which Goldberg's majority opinion demands a criminal trial? If denationalization is but an "added penalty" imposed on violators of the Selective Service Laws, what distinguishes the types of trial needed for the two "crimes?" An alleged expatriate would produce no new witnesses, no other evidence, no different plea. Disregarding for a moment the question of the validity of the presumption in Section 349 (a) (10) [which was not appended to 401 (j)], would the government prosecutor present any different a case under the expatriation statute than he presented against Mendoza-Martinez in California in 1947? We think not. Justice Goldberg himself points out that the earlier criminal trial does not bear on the constitutionality of *this statute,* since such a trial is not *required.*[38] Does he not then open the door for Congress to insert in the Act a prerequisite criminal prosecution, similar to the military court martial required in *Trop*? And if this is done, future cases may stand or fall on the Eighth Amendment argument that was so convincing in *Trop.*

Would it not have been more consistent for the Court in the present case to concede due process to Mendoza-Martinez (but not Cort), yet hold the statute unconstitutional as a cruel and unusual punishment; and in *Trop* to have found a lack of procedural due process since the petitioner had not been tried by a civilian court? One answer, we admit, is that there are no "priorities" within the Bill of Rights—if either the Fifth, Sixth or Eighth Amendment is

[37] Chief Justice Warren: "While Section 401 (j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401 (g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court martial." Trop v. Dulles, supra, 356 U.S. at 94. As the dissent in Trop points out, however, the requirement of a court martial conviction was inserted merely to protect those who had their citizenship automatically restored by being returned to active duty. Dissent of Justice Frankfurter, Trop v. Dulles, supra, 356 U.S. at 119.

[38] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 566, note 21.

violated, the statute must fall. Our point is only that the opinions in *Trop* and *Mendoza-Martinez* seem mismatched to their respective fact situations.

2. *Dissent of Justice Stewart:*

The primary dissent in *Mendoza-Martinez* is that of Justice Potter Stewart.[39] He is joined by Justices White, Clark and Harlan, the latter two by separate opinion.[40] Clearly Justice Stewart belongs in the Frankfurter camp, for his basic premise is that

> ... it has been established for almost 50 years that Congress under some circumstances may, without providing for a criminal trial, make expatriation the consequence of the voluntary conduct of a United States citizen, irrespective of the citizen's subjective intention to renounce his nationality, and irrespective too of his awareness that denationalization will be the result of his conduct.[41]

In this statement Justice Stewart sheds light on some of the shadier aspects of the law of expatriation—the "gray areas" of the law which are not clear even in the minds of our juridical patriarchs.

First, he accepts the power of Congress to expatriate; then, in accord with the *Mackensie* and *Savorgnan* cases, he realizes that the expatriating act must be performed voluntarily; but, third, he would not require the expatriate to have knowledge of the consequences of his actions. This last sets Stewart apart from "the Three"—Douglas, Black and the Chief Justice. Their concept of "voluntariness," discussed above, implies a substantial degree of willful conduct, with full awareness that denationalization will result.

The more forceful part of Justice Stewart's dissent is written to debunk the majority's holding that expatriation is, in any sense, a punishment. He too calls on legislative history to sustain his views.[42] It cannot be denied that the history of Section 401 (j) is distinguishable from that of Section 401 (g) which preceded it by four years. But this temporal separation does not, it seems, adequately establish Section 401 (j) as a remedial statute. Attorney General Biddle's letter lends itself no more to support Stewart's view than it does Justice Goldberg's.

Suffice it to say that Stewart's understanding of the statute and its history is that

[39] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 584.

[40] *Id.* at 582.

[41] *Id.* at 585. This statement may involve some over-extension of the holdings in Mackensie v. Hare, 239 U.S. 299 (1915), and Savorgnan v. United States, 338 U.S. 491 (1950). In the former case the petitioner's citizenship was merely "suspended during coverture," while in the latter the alleged expatriate had performed a much more definitive act of disallegiance than had Mendoza-Martinez or Cort.

[42] S. Rep. No. 1075, 78th Cong., 2d Sess. (1944); H.R. Rep. No. 1229, 78th Cong., 2d Sess. (1944).

> these putative indicia of punitive intent are far overbalanced by the fact that this legislation dealt with a basic problem of wartime morale reaching far beyond concern for any individual affected.
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> * * *
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> ... the statute seems to me precisely the same kind of regulatory measure, rational and efficacious, which this Court upheld against similar objections in *Perez v. Brownell, supra.*[43]

The dissimilarity from *Perez* is merely the specific power used to justify the statute. In that case it was Congress' power to regulate foreign affairs; here Justice Stewart relies on the war power. The distinction is irrelevant when weighed against the more basic controversies inherent in the *Mendoza-Martinez* case.

Concluding his discussion of the substantive provisions of Section 401 (j) of the 1940 Act, and of Section 349 (a) (10) of the 1952 Act with the assertion that "it is hardly an improvident exercise of constitutional power for Congress to disown those who have disowned this Nation in time of ultimate need,"[44] Stewart adverts to the evidentiary presumption attached to Section 349 (a) (10). In line with *Nishikawa v. Dulles*[45] and *Gonzales v. Landon,*[46] he insists that the Government cannot be relieved of its burden of proof in these cases, and that "evidentiary ambiguities are not to be resolved against the citizen."[47] On this point, Justices Clark and Harlan desert him, but we do not propose to pursue their differences here. In their fundamental concept of legislative power they are in concert: the dissenters in *Trop* remain four in number dissenting in *Mendoza-Martinez* and *Cort.*

3. *Justice Brennan*

From his concurrence with Justice Frankfurter's opinion in *Perez,* and from his concurring opinions in *Trop* and the instant case, it is apparent that Justice Brennan recognizes Congressional power to expatriate. But unlike those Justices who, like Justice Frankfurter, would presume the constitutionality of denationalization statutes by invoking judicial restraint, Justice Brennan demands that more stringent criteria be met. We can garner the broad outlines of his criteria through analysis of his two written opinions:

[43] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 589.
[44] *Id.* at 592.
[45] 356 U.S. 129 (1957).
[46] 350 U.S. 920 (1955).
[47] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 593, quoting Nishikawa v. Dulles, 356 U.S. at 136.

first, a legitimate Congressional objective—the "rational nexus" of the Frankfurter school—must exist, and *second,* expatriation must demonstrably further the attaining of that legitimate objective. This second criterion seems to be the factor which set Justice Brennan apart from the rest of the Court in 1957, and compelled him to write a separate opinion in 1963.

Justice Brennan first indicated the essence of his views on citizenship in *Trop.* With his concurring opinion in *Mendoza-Martinez* we can more readily chart the course on which he has embarked. He has explained his seemingly "paradoxical" position in *Perez* (where he joined the majority) by pointing out that there, Congress utilized expatriation "as a *uniquely potent corrective* which precludes recrimination by disowning, at the moment of his provocative act, him who might otherwise be taken as our spokesman or our operative."[48] (emphasis added) Note how the unique potency factor fulfilled the second criteria. In the instant case, he now expresses "felt doubts"[49] about the correctness of the *Perez* decision. We can only guess at what might underlie these second thoughts, but the most logical answer appears to be, that on re-analysis, Justice Brennan no longer sees his dual test fully met. Possibly he would now grasp the factor used by Justice Whittaker as the basis of his *Perez* dissent—the legality of alien voting under Mexican law.[50] Certainly there appears to be no need to safeguard our foreign policy from embarrassment when the precluded act is not provocative and cannot endanger our foreign policy.

Notwithstanding his beneficial use of hindsight, Justice Brennan does recognize that Congress, under certain circumstances, can expatriate.[51] But clearly, his two criteria must be met, a causal-effect relationship must exist between the end sought and the means used. It seems the Congressional use of expatriation *as a penal sanction* can never meet this test. To justify expatriation as a penal sanction under Justice Brennan's test it must tend towards achieving at least one legitimate objective of penology. Traditionally those objectives are deterrence, rehabilitation and the protection of society. But if the offender is "not deterred by thought of the specific penalties of long imprisonment or even death [he] is not very likely to be swayed from his course by the prospect of expatriation";[52] and expatriation is the "antithesis of rehabilitation for instead of guiding the offender back into the useful paths of society, it excommunicates him . . ."[53] Moreover, society is hardly protected since "the sanction

[48] *Id.* at 577.
[49] *Ibid.*
[50] *Cf.,* Perez v. Brownell, supra, 356 U.S. at 590.
[51] "This Court has never granted the existence in Congress of the power to expatriate except where its exercise was *intrinsically and peculiarly appropriate* to the solution of serious problems inevitably implicating nationality." (emphasis added). Justice Brennan writing in Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 577.
[52] Trop v. Dulles, supra, 356 U.S. at 112.
[53] *Id.* at 111.

leaves the offender at large."[54] Thus through his "massive common sense,"[55] Justice Brennan demonstrates his view that the use of expatriation as a penal sanction can never be justifiable.

Where will Justice Brennan stand when confronted with cases where expatriation has been used as a remedial or non-penal deterrent measure? No one can say. But assuredly he will exact full compliance with his criteria before stamping any expatriation statute with his approval. The difficult cases —for him—are yet to come.

Conclusion

The power of Congress to deprive a citizen of his nationality has not been greatly altered by the *Mendoza-Martinez* decision. The *Mackensie* and *Savorgnan* cases[56] remain undisturbed, and no real inroads have been made into *Perez*. But the changing membership of the Court evinces changing rationales in numberless cases; no one will deny that the Supreme Court in 1963 is quite different from that in 1957, for its rulings in almost every case this year have broadened the Court's horizons.[57]

Citizenship is but one field in which we may expect changes, and perhaps it is unwise to categorize the personal feelings of our new Justices until there is more written evidence of their views. However, the present Court is in the throes of indecision. Chief Justice Warren, Justice Black and Justice Douglas have left no doubt as to their stand. Expatriation is simply outside Congressional power since citizenship is an inherent right. The four dissenters in *Mendoza-Martinez* have defined their views with precision: Congress may expatriate, and the Court should defer to the proper exercise of that power whenever possible.

The pivotal votes, therefore, are those of Justices Goldberg and Brennan. The former wrote the controlling opinion in the instant case, and by doing so shunned an opportunity to join the "absolutist" group. Would we have concurred with the majority in *Trop*? His references to the "drastic consequences," and "evils of statelessness,"[58] make it very probable. How would Goldberg limit the powers of Congress, if at all? This question defies answering until another case arises.

[54] *Id.* at 112.

[55] "The distinguishing quality of Brennan's pattern of thought is what may be called massive common sense." Shannon, *The Common Sense of Mr. Justice Brennan*, 11 Cath. U. L. Rev. 3 (1962).

[56] Supra note 41.

[57] See, *e.g.*, Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry, 83 S. Ct. 531 (1963), noted *infra* at 145; Cleary v. Bolger, 83 S. Ct. 385 (1963), noted *infra* 139; NAACP v. Button, 83 S. Ct. 328 (1963), noted *infra* at 142.

[58] Kennedy v. Mendoza-Martinez, supra, 83 S. Ct. at 564, note 16.

One commentator pointed out that

> ... the *Perez* decision has recognized that Congress can exercise this power. Once the power is established, rightly or wrongly, the important question as to the limits on the power is necessarily raised.[59]

Only Justice Brennan has formulated a workable test for measuring this power. Rarely posing sweeping dictum, his opinions nonetheless retain their internal logic and their chronological consistency.

Much has been written of Justice Brennan's judicial philosophy and method. These cases point up again that his case-by-case approach, "practical, specific, factual,"[60] yet based on perhaps the most profound realization of the Court's role, is becoming increasingly persuasive. We endorse a method such as Brennan's which does not approach constitutional questions in a blind, *a priori* manner, but seeks to give each fact its true weight, each constitutional phrase its most reasonable meaning, and each branch of our government its rightfully delimited authority.

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[59] Note, 44 CORNELL L. Q. 593, 597 (1959).
[60] Shannon, supra note 55, at 3.