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EVIDENTIARY PROOF IN EXPATRIATION PROCEEDINGS

Vance v. Terrazas
444 U.S. 252 (1980)

_Vance v. Terrazas_\(^1\) is the most recent case in a series of expatriation decisions\(^2\) handed down by the United States Supreme Court. In this 1980 decision, the Court examined for the first time the constitutionality of congressionally-set standards of evidentiary proof necessary to establish whether a citizen has expatriated himself.\(^3\)

Prior to _Terrazas_, few expatriation cases addressed issues relating to the appropriate burden of proof. Two early cases\(^4\) considered the burden of proof and determined that a clear and convincing standard was required. In 1961, however, Congress amended the Immigration and Nationality Act of 1952 to include a provision on evidentiary proof.\(^5\) The statute now provides that the Government must prove loss of nationality by a preponderance of the evidence.\(^6\) The clause further provides that acts of expatriation are presumed to have been committed voluntarily, but that the presumption may be rebutted on a showing, by a preponderance of the evidence, that the act was committed involuntarily.\(^7\)

The Court in _Terrazas_ concluded that Congress has the power to

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3. Although loss of nationality is normally an administrative determination made by the Department of State, the decision is based on evidence pertaining to whether the citizen intended to relinquish his citizenship and to whether he committed an act which is deemed an act of expatriation. See text accompanying notes 17-21 infra.
5. 8 U.S.C. § 1481 (1976) [hereinafter referred to as the Act of 1952].
6. Act of Sept. 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 656 (codified at 8 U.S.C. § 1481(c) (1976)). This section provides: Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter, shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily.
7. _Id._
determine evidentiary standards in expatriation decisions. The Court also considered, and upheld, the constitutionality of the statutory evidentiary provision. In addition to the proof necessary under the congressional provision, the Court imposed a further requirement that the Government establish by a preponderance of the evidence that a citizen intended to commit the expatriating act. However, because the Court declined to find a liberty interest in citizenship, there was no procedural due process analysis of whether a preponderance of the evidence standard in expatriation proceedings affords adequate due process to the citizen.

This comment will briefly review the development of the immigration and nationality acts. It will then survey the Supreme Court case law on expatriation. The Terrazas case will be presented with an analysis of the reasoning of the Supreme Court on the issue of the appropriate burden of proof. This comment will conclude that the Court too narrowly viewed the concept of liberty with respect to citizenship and that the due process clause of the fourteenth amendment requires proof of expatriation by clear and convincing evidence.

**HISTORICAL BACKGROUND**

*The Development of Statutory Expatriation Law*

In 1907, Congress first codified expatriation law. The first statute, the Expatriation Act of 1907, described two conditions under which a United States citizen would be deemed to have expatriated himself.

8. This comment will address only the issue in *Terrazas* of whether a preponderance of the evidence burden of proof mandated by Congress is constitutional.

9. Prior to the Expatriation Act of 1907, the earliest forms of expatriation law in the United States were treaties with foreign nations. Roche, *The Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25, 25 (1950) [hereinafter referred to as Roche]. The treaties did not incorporate substantive and procedural guidelines for expatriation proceedings nor were they consistent with each other. Two types of treaties in the mid-nineteenth century were the Naturalization Convention of 1870 with Great Britain and the Bancroft Treaties with the German States. The former acknowledged that United States citizenship was lost following an individual’s naturalization in a foreign state. Alternatively, the Bancroft Treaties authorized loss of citizenship, and in some situations mandated the relinquishment of citizenship following, naturalization in a foreign state. *Id.*

There is a question whether the Act of March 3, 1865, 13 Stat. 490, or the Act of 1868, 15 Stat. 223, was actually the statutory source of present day expatriation law. The statute enacted in 1865 provided that those who deserted the armed forces relinquished their “rights of citizenship.” “Rights of citizenship” were not clearly defined within that Act. The Act of 1868 defined “right of expatriation” and provided that, “any declaration, instruction, opinion, order or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.” See generally Ekins, *Expatriation after Terrazas v. Vance: Right or Retribution?* 19 VA. J. INT’L LAW 107, 110-11 (1978); Roche, *supra*, at 26; Note, *Expatriation Legislation*, 6 HARV. J. LEGIS. 95 (1968).

10. Ch. 2534, 34 Stat. 1228 (1907) [hereinafter referred to as the Act of 1907].
The statute provided that an individual relinquished his citizenship when he had "been naturalized in any foreign state in conformity with its laws, or when he had taken an oath of allegiance to any foreign state." A second provision stated that a naturalized citizen expatriated himself when he had "resided for two years in the foreign state from which he came, or for five years in any other foreign state." The presumptions of residence embodied in the statute were rebuttable, however, on the presentation of evidence to a United States diplomatic or consular office.

The Nationality Act of 1940, which replaced the Act of 1907, expanded the list of actions by which an individual would lose his nationality. The additional actions included serving in foreign armed forces, performing duties or being employed by a foreign government, voting in a political election in a foreign state, making a formal renunciation of nationality, deserting the military or naval service in time of war or committing an act of treason. The Act of 1940, however, altogether eliminated the clause providing for a rebuttable presumption of residence for naturalized citizens who have resided in foreign states.

The current statute, the Immigration and Nationality Act of 1952, became effective on June 27, 1952. Although this statute is more comprehensive than its earlier counterparts, it describes a series of actions resulting in expatriation which closely resembles that contained in the Act of 1940. In 1961, the statute was amended by the addition of a provision setting forth standards of evidentiary proof.

11. Id. § 2, 34 Stat. 1229.
12. Id.
13. Id.
14. Ch. 4, § 401, 54 Stat. 1168 (1940) [hereinafter referred to as the Act of 1940].
15. Id. §§ 401(a)-(h), 54 Stat. 1168-69. Remaining sections of the Act provide guidelines limiting an individual's ability to expatriate himself and provisions relating to parents' loss of nationality upon minors residing abroad. Id. §§ 402-410, 54 Stat. 1169-71.
16. The Act of 1940 provided that a citizen who was subject to the presumptions prior to the effective date of the Act of 1940 should be allowed a period of one year following the approval of the Act to overcome the presumption. The elimination of the rebuttable presumption was the result of Attorney General Wickesham's interpretation of the statute. He contended that since the presumption was included to relieve the State Department of the obligation to protect citizens abroad, it had little relevance to loss of citizenship. Roche, supra note 9, at 38-39.
ment shall have the burden of establishing loss of nationality by a preponderance of the evidence.\textsuperscript{20} The clause also provides that the expatriating act is presumed to have been committed voluntarily, and the person performing the act shall be allowed to rebut the presumption by showing by a preponderance of the evidence that the act was involuntarily performed.\textsuperscript{21}

\textit{Expatriation Law Prior to Vance v. Terrazas}

Expatriation case law has developed in the Supreme Court primarily through a series of seven cases.\textsuperscript{22} The first case, \textit{Gonzales v. Landon},\textsuperscript{23} was decided in 1955. In \textit{Gonzales}, an expatriation proceeding was brought against the plaintiff for remaining outside of the jurisdiction of the United States during time of war for the purpose of avoiding the draft. In a per curiam decision, the Court held that a clear and convincing standard of proof was required in expatriation cases which arose under section 401(j) of the Act of 1940.\textsuperscript{24}

The next three decisions were handed down on March 31, 1958.\textsuperscript{25} In \textit{Perez v. Brownell},\textsuperscript{26} the Government claimed that the plaintiff, an American citizen, had lost his citizenship under the Act of 1940 by voting in a Mexican political election and by remaining outside of the United States during time of war in order to avoid the draft.\textsuperscript{27} The Court found it necessary to address the source of Congress' power to

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{23} 350 U.S. 920 (1955).
\textsuperscript{24} Id. The Court applied this evidentiary standard since it was the same standard used in denaturalization cases. \textit{Id.} See note \textsuperscript{27} infra for the text of § 401(j) of the Act of 1940.
\textsuperscript{26} 356 U.S. 44 (1958).
\textsuperscript{27} \textit{Id.} at 46-47. Sections 401(e) and (j) of the Act of 1940 provided that a person shall lose his nationality by:

\begin{itemize}
  \item[(e)] Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory.
  \item[(j)] 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 land or naval forces of the United States.
\end{itemize}

Section 401(j) was added to the Act of 1940 by the Act of Sept. 27, 1944, ch. 418, § 401(j), 58 Stat. 746 (1944).
enact legislation to regulate foreign affairs.\textsuperscript{28} It found such power “inherent” and stated that there was an inference from the Act of 1940 that Congress had inherent power to regulate foreign affairs by making voting in foreign elections an act of expatriation.\textsuperscript{29}

The Court determined that Congress had the authority to expatriate an individual for voting in a foreign election,\textsuperscript{30} stating that there need only be a “rational nexus” between the source of congressional power and the act of effectuating that power.\textsuperscript{31} The Court found this “rational nexus” satisfied in \textit{Perez} since the withdrawal of citizenship was reasonably related to the regulation of foreign affairs.\textsuperscript{32} The Court further held that Congress’ power to withdraw citizenship can be exercised only when an expatriating act has been engaged in voluntarily,\textsuperscript{33} but added that “it would be a mockery of this Court’s decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so.”\textsuperscript{34}

The dissenting opinion in \textit{Perez}, written by Chief Justice Warren, voiced the objection of three dissenting justices\textsuperscript{35} to traditional congressional power over citizenship. They contended that citizenship is too valuable a right to be subjected to congressional whim. Justice Warren stated:

\begin{quote}
Whatever may be the scope of its powers to regulate the conduct and affairs 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.\textsuperscript{36}
\end{quote}

Justice Warren emphasized the extreme importance of citizenship rights noting that “citizenship is man’s basic right for it is nothing less

\begin{itemize}
\item [28.] 356 U.S. at 57. The Court reasoned that although the Constitution does not specifically grant Congress this power, the states in creating a federal government must have granted that government the “powers indispensable to its functioning effectively in the company of sovereign nations.” \textit{Id.}
\item [29.] \textit{Id.} at 57. The Court reasoned that voting in such elections might give rise to international embarrassment. \textit{Id.} at 59.
\item [30.] In light of its earlier decision with respect to voting rights under the Act of 1940, the Court found it unnecessary to consider the constitutionality of the portion of § 401(j) which dealt with draft evasion. \textit{Id.} at 62.
\item [31.] \textit{Id.} at 58.
\item [32.] \textit{Id.} at 60.
\item [33.] \textit{Id.} at 61.
\item [34.] \textit{Id.} Prior decisions to which the Court was referring include Savorgnan v. United States, 338 U.S. 491 (1950), and Mackenzie v. Hare, 239 U.S. 299 (1915), which upheld loss of citizenship despite the plaintiff’s lack of intention in both cases to renounce allegiance to the United States.
\item [36.] \textit{Id.} at 65. (Warren, C.J., dissenting) (emphasis in original).
\end{itemize}
than the right to have rights." He concluded that Perez had not expatriated himself by having voted in the Mexican election. Although recognizing that citizenship can be lost by voluntary conduct, Justice Warren reasoned that expatriating conduct must invariably involve a dilution of undivided allegiance sufficient to show a voluntary abandonment of citizenship.

In *Trop v. Dulles*, decided the same day as *Perez*, the Court faced the issue of whether an individual could lose his citizenship for having been convicted and sentenced for desertion from the armed forces during time of war. Justice Warren, announcing the decision of the Court, reiterated the thrust of his *Perez* dissent noting that citizenship cannot be divested merely through the exercise of the general powers of the government. He added that there must be a showing that the individual voluntarily relinquished his citizenship by express language or conduct or from language from which renunciation could be inferred, and that neither existed as to *Trop*.

*Nishikawa v. Dulles* was the third case decided on March 31, 1958. The Court distinguished *Nishikawa* from *Perez* and *Trop* by noting that the latter decisions had involved the constitutionality of sections 401(e) and 401(g) of the Act of 1940, whereas in *Nishikawa*, the sole concern was the burden of proof.

The plaintiff in *Nishikawa* was born in the United States of Japanese parents. He was a United States citizen but was also considered a citizen of Japan due to his parents' Japanese citizenship. After receiving a college degree in the United States, he went to Japan to visit and study but was inducted into the Japanese army and served as a mechanic while the United States was at war with Japan. Following the war, the plaintiff applied for an American passport, but instead was

37. *Id.* at 64. (Warren, C.J., dissenting) (emphasis in original).
38. *Id.* at 75. (Warren, C.J., dissenting).
40. Section 401(g) of the Act of 1940, ch. 876, § 401(g), 54 Stat. 1169 (1940), as amended by Act of Jan. 20, 1944, ch. 2, 58 Stat. 4 (1944), stated that a person, shall lose his nationality by: Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces. . . .
41. 356 U.S. at 92-93. The majority further found that expatriation under § 401(g) of the Act of 1940 was cruel and unusual punishment within the meaning of the eighth amendment and, therefore, held the law unconstitutional.
43. See note 27 *supra* for the text of § 401(e) of the Act of 1940 and note 40 *supra* for the text of § 401(g) of the Act of 1940.
44. 356 U.S. at 131.
45. *Id.*
issued a Certificate of Loss of Nationality.\textsuperscript{46} The plaintiff then brought an action for a declaration of United States citizenship.

Justice Warren, speaking for the Court, addressed the issue of the required standard of proof in expatriation cases. He declared that whether an individual acquires citizenship at birth or through naturalization, the burden is on the Government to show expatriation by clear and convincing evidence.\textsuperscript{47} He reached this conclusion by relying on Gonzales \textit{v. Landon}. Justice Warren went further than Gonzales, which had addressed just one provision of the 1940 statute, by extending the evidentiary standard to all sections of the Immigration and Nationality Act.\textsuperscript{48} Furthermore, the Court found that because the consequences of loss of citizenship are so drastic, the Government also has the burden of proving by clear, convincing and unequivocal evidence that the expatriating act was performed voluntarily.\textsuperscript{49}

\textit{Kennedy v. Mendoza-Martinez}\textsuperscript{50} and \textit{Schneider v. Rusk}\textsuperscript{51} were the next Supreme Court cases to resolve expatriation questions. In both cases the Court invalidated sections of the Act of 1952, which declared that a citizen shall lose his nationality for leaving or remaining outside of the jurisdiction of the United States in time of war and for continually residing for three years in the foreign state of which he was formerly a national or in which he had been born. In both instances, the Court concluded that the withdrawal of citizenship was a deprivation of due process of law.\textsuperscript{52}

The last case which substantially contributed to the development of expatriation case law was \textit{Afroyim v. Rusk},\textsuperscript{53} decided in 1967.\textsuperscript{54} In

\begin{itemize}
  \item \textsuperscript{46} \textit{Id.}.
  \item \textsuperscript{47} \textit{Id.} at 133.
  \item \textsuperscript{48} \textit{Id.}.
  \item \textsuperscript{49} \textit{Id.} at 134. The Court concluded that the Government had not sustained the burden by clear, convincing and unequivocal proof.
  \item \textsuperscript{50} 372 U.S. 144 (1963).
  \item \textsuperscript{51} 377 U.S. 163 (1964).
  \item \textsuperscript{52} In \textit{Kennedy}, the Supreme Court declared § 349(a)(10) of the Act of 1952 unconstitutional. The section had stated that a citizen shall lose his nationality for leaving or remaining outside of the jurisdiction of the United States in time of war, on the grounds that the provision acted as a "punishment" and would, therefore, deprive the plaintiffs of citizenship without due process of law. 372 U.S. at 165-66. In \textit{Schneider}, the plaintiff was a German immigrant who subsequently became a naturalized United States citizen. She later returned to Germany to live with her husband. After a prolonged absence from the United States, the plaintiff was denied a passport. 377 U.S. at 163-64. The Court declared § 352(a)(1) of the Act of 1952, which provided for the loss of citizenship of a naturalized citizen who continually resides for three years in the foreign state of which he was formerly a national or in which he had been born, unconstitutional. The Court found that the section was discriminatory and violative of due process in that it placed restrictions on naturalized citizens which were not placed on native-born citizens. \textit{Id.} at 168.
  \item \textsuperscript{53} 387 U.S. 253 (1967).
  \item \textsuperscript{54} Following \textit{Afroyim}, one other case, Rogers \textit{v. Bellei}, 401 U.S. 815 (1971), challenged the
Afroyim, the Court overruled its holding in Perez v. Brownell,\(^{55}\) recognizing that since Perez it had consistently invalidated other sections of the Immigration and Nationality Act which provided for involuntary loss of citizenship.\(^{56}\) Writing for the majority, Justice Black rejected the Perez notion that Congress has a general power to take away citizenship without the citizen’s “assent.”\(^{57}\) The Court stated that this power, in contradistinction to the reasoning in Perez, is not an implied attribute of sovereignty.\(^{58}\) The majority emphasized that the Constitution limits congressional powers to those specifically enumerated or those necessary or proper to carry out the express powers.\(^{59}\) It concluded that the Constitution does not expressly grant Congress power to remove citizenship rights, nor can Congress do so through its implied power to regulate foreign affairs.\(^{60}\) The Court held that under the fourteenth amendment every citizen by way of birth or naturalization is protected against congressionally-mandated forcible destruction of his right of citizenship whatever his creed, color or race; he does not relinquish that right unless he does so voluntarily.\(^{61}\)

The cases from Gonzales to Afroyim reflect the state of expatriation law at the time the Supreme Court decided Vance v. Terrazas. The decisions show that the Court has been careful to limit the role of Congress in expatriation. Furthermore, the decisions indicate the Court’s emphasis on the significance of citizenship. This is evidenced by the

constitutionality of a section of the Act of 1952. The principles developed in Afroyim and Schneider were not applied by the Court since the case was distinguished on its facts. 401 U.S. at 818-19. The plaintiff in Rogers lost his citizenship for failing to comply with the residence requirements of § 301(b) of the Act of 1952. Section 301(b) provides that an individual born abroad who acquires citizenship because one of his parents is a United States citizen, loses his citizenship rights if he fails to reside in the United States for five years between the ages of 14 and 28.

Justice Blackmun, delivering the opinion of the Court, concluded that the plaintiff, born outside of the United States, was not a citizen within the meaning of the fourteenth amendment, which applies to “all persons born or naturalized in the United States.” The Court distinguished Afroyim and Schneider by observing that in those cases the plaintiffs had resided in the United States and had acquired citizenship by the naturalization process. The Court thus concluded that Bellei’s claim to citizenship was subject to congressional regulation and was “wholly, and, only statutory.” \(^{55}\) at 833. The dissenting justices, including Justice Black who had written the Afroyim majority opinion, contended that the fourteenth amendment principles announced in Afroyim applied to all citizens of the United States whether or not they were naturalized in the United States or acquired citizenship abroad. The dissent suggested that the Court in making this distinction had, in effect, overruled its holding in Afroyim. \(^{55}\) at 837.

55. See text accompanying notes 26-38 supra.
57. \(^{55}\) at 257.
58. \(^{55}\).
59. \(^{55}\).
60. \(^{55}\).
61. \(^{55}\) at 268.
Court’s holdings that expatriating acts must be performed voluntarily and in its holding that citizenship cannot be taken away without an individual’s “assent.”

**VANCE v. TERRAZAS**

**Factual Background**

Laurence J. Terrazas was born in Takoma Park, Maryland in 1947. At that time, his mother was a citizen of the United States and his father a citizen of Mexico. As a result of his parents’ citizenship, Terrazas acquired dual nationality under the laws of Mexico and the fourteenth amendment.

In 1970, while Terrazas was a student at the Colegio Comercial Ingles in Monterrey, Mexico, he signed an application for a Certificate of Mexican Nationality to serve as evidence of his Mexican citizenship. He claimed he had been told by a college official that completion of the certificate was a requirement for graduation. In signing the application, Terrazas expressly renounced his United States citizenship and all loyalty and obedience to “North America,” and swore adherence, obedience and submission to the Mexican Republic. Terrazas claimed that when he signed the application, none of the blanks containing the words “United States” and “North America” were filled in. He also insisted that he did not know that he was relinquishing his United States citizenship.

Several months after receiving a Certificate of Mexican Nationality...
ity, Terrazas went to the United States Consulate in Monterrey to determine whether the certificate had affected the status of his United States citizenship. He was told by a consular officer that by having acquired the certificate he had probably expatriated himself. The officer explained that for a final determination of the status of his United States citizenship he should file the appropriate forms with the Department of State.

In December, 1971, the United States Department of State issued a Certificate of Loss of Nationality. Terrazas appealed the issuance of this certificate before the Board of Appellate Review of the Department of State and requested issuance of a passport. In April, 1975, the Board affirmed the prior administrative decision and denied Terrazas' application for a passport. Terrazas brought an action against Secretary of State Cyrus Vance seeking issuance of a passport and a declaration of United States nationality.

Procedure in the Courts

On August 16, 1977, the United States District Court for the Northern District of Illinois denied Terrazas' claim for relief. In reaching its decision, the court applied the evidentiary standards of the Act of 1952. The district court found that the United States had proved by a preponderance of the evidence that Terrazas had relinquished his United States citizenship. Furthermore, the court found that Terrazas had failed to rebut sufficiently the presumption of volun-

70. 577 F.2d at 8.
71. Id.
72. Id. at 9. It is uncertain whether Terrazas knew he was applying for a Certificate of Loss of Nationality at the time he was filling out the documents supplied by the consular officer. The procedure had been explained to him as a determination of whether he had relinquished his United States citizenship. Id. at 9 n.7.
73. Id. at 9.
74. Id.
75. Id.
76. Terrazas brought his action under 8 U.S.C. § 1503(c) (1976), which provides that:
A person who has been issued a certificate of identity under the provisions of subsection (b) of this section, and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this chapter relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings. . .
77. The findings of the district court were issued in an unreported memorandum decision. Terrazas v. Vance, No. 75 C 2370 (N.D. Ill., filed Aug. 16, 1977).
78. See note 5 supra.
The district court concluded that in signing the Certificate of Mexican Nationality, Terrazas had knowingly and voluntarily acted to renounce allegiance to the United States and to swear obedience to the Mexican Republic.

The United States Court of Appeals for the Seventh Circuit reversed the district court's holding and remanded the case for further proceedings, concluding that a clear and convincing standard of proof was constitutionally required. It stated three reasons for its decision. First, the court noted that a clear and convincing test had been adopted by the Court in Nishikawa v. Dulles prior to the 1961 amendment to the Act of 1952 which set out, as a statutory matter, a preponderance of the evidence standard. Second, the Seventh Circuit noted that most lower court decisions decided after Afroyim also had applied the clear and convincing standard in expatriation cases. Finally, the court concluded that a clear and convincing standard better reflects the importance of the citizenship interest which the United States attempts to protect. The court stated that clear and convincing proof would be the "minimum burden of proof necessary to guarantee the adequate protection of an individual's citizenship."

The United States Supreme Court decided the case on appeal on January 15, 1980. The Court first considered the contention of the Secretary of State that it was unnecessary for the Government to prove specific intent to relinquish citizenship. The Court relied on Afroyim v. Rusk in rejecting this contention. It noted that Afroyim had over-

80. Id. at 4.
81. Id. at 8-9.
82. 577 F.2d at 12.
83. Id. at 11. In addition to discussing the appropriate burden of proof, the court held that Congress does not have the power to determine the standard of proof in expatriation decisions. The court stated that by adopting the burden of proof that Congress had imposed through § 1481(c), it would be indirectly granting Congress power which the Supreme Court in Afroyim had refused to sanction. Id. at 10. Intent was not specifically discussed by the court of appeals. Nevertheless, the court indicated in its discussion of a proper evidentiary standard that it found no reason to disagree with United States v. Matheson, 532 F.2d 809 (2d Cir.), cert. denied, 429 U.S. 823 (1976), which held that specific intent to relinquish citizenship must be proved by a clear and convincing standard. 577 F.2d at 11.
84. See text accompanying notes 42-49 supra.
85. 577 F.2d at 11. The Seventh Circuit was referring to the 1961 amendment to the Act of 1952 which provided evidentiary standards of proof in expatriation cases.
87. 577 F.2d at 11.
88. Id. at 12.
89. 444 U.S. at 258-63.
90. See text accompanying notes 53-61 supra.
ruled Perez v. Brownell, and the holding in Perez that an individual could be expatriated without regard to his intent to relinquish citizenship. The Court added that in Afroyim it had emphasized that Congress has no power, express or implied, to take away United States citizenship without an individual’s “assent.” The Terrazas Court reasoned that it would be very difficult not to give “assent” to expatriation essentially the same meaning as “intent” to relinquish citizenship. Thus, the Court explained that the “will of the citizen rather than the will of Congress and its assessment of his conduct” is necessary for expatriation.

The Court next addressed the issue of whether Congress has the power to determine the standards of evidentiary proof in expatriation cases. In concluding that Congress has such power, the Court explained that Congress derives its power to prescribe rules of evidence and standards of proof in the federal courts from the Constitution, and that such power has often been recognized. To further substantiate its view, the Court reasoned that since Congress has the express power to enforce the fourteenth amendment, it would be untenable to hold that Congress has no power to determine the means of enforcing the amendment.

Finally, the Court discussed the constitutional validity of the congressional standards. It found both the statutory presumption of voluntariness and the preponderance of the evidence standard to be valid. The Court found no reason to replace the preponderance of the evidence standard contained in section 1481(c) with the clear and convincing standard set forth in Nishikawa v. Dulles. It noted that in Nishikawa the Court had acted without legislative guidance and that the decision was not based on the Constitution. The Court also found

91. Perez sustained § 401(e) of the Act of 1940 which provided that a United States citizen would lose his nationality by voting in a political election in a foreign state. See notes 26-38 supra and accompanying text.
92. 444 U.S. at 260.
93. Id.
94. Id. at 266. The Court based its finding on U.S. Const. art. 1, § 8, cl. 9.
96. 444 U.S. at 266.
97. Id. at 264-70.
98. The Court noted that Nishikawa did not rule on the constitutionality of the evidentiary standards contained in § 1481(c) since the standards were not enacted until after the decision was published. 444 U.S. at 264-65.

The legislative history of the evidentiary amendment to the Act of 1952 states that the evidentiary standards are designed to govern expatriation proceedings and are not intended to apply to the standards in denaturalization decisions. The House Committee found it difficult to assent to
that neither the citizenship clause\textsuperscript{99} nor the due process clause\textsuperscript{100} invalidates the preponderance of the evidence standard in section 1481(c). It acknowledged that in criminal and involuntary commitment cases where liberty interests are at stake, the due process clause requires proof beyond a preponderance of the evidence, but explained that "expatriation proceedings are civil in nature and do not threaten a loss of liberty."\textsuperscript{101} Furthermore, the Court reasoned that the preponderance of the evidence standard provides sufficient protection since the Government has the heavy burden of proving "intent" to renounce citizenship.\textsuperscript{102}

Justices Marshall and Stevens dissented from the Court's conclusion that the standard of evidentiary proof in expatriation proceedings should be a preponderance of the evidence.\textsuperscript{103} Justice Marshall stated that the importance of United States citizenship deserved more emphasis by the Court and that expatriation proceedings do, in fact, threaten a loss of liberty.\textsuperscript{104} As a result, he concluded that a requirement of clear and convincing evidence is the necessary standard in determining loss of citizenship.\textsuperscript{105} Justice Stevens stated that the majority had too the holdings in \textit{Gonzales v. Landon} and \textit{Nishikawa v. Dulles} where the Court applied the clear and convincing standard, but the committee failed to explain its reasons for applying the lesser preponderance of the evidence standard in expatriation. See H.R. REP. No. 1086, 87th Cong., 1st Sess. 40, 41 \textit{reprinted in} [1961] U.S. CODE CONG. & AD. NEWS 2984-85.

\begin{itemize}
  \item \textsuperscript{99} U.S. CONST. amend. XIV, § 1.
  \item \textsuperscript{100} U.S. CONST. amend. V.
  \item \textsuperscript{101} 444 U.S. at 266.
  \item \textsuperscript{102} \textit{Id.} at 267.
  \item \textsuperscript{103} On remand from the Supreme Court, the district court specifically addressed the issue of whether Terrazas intended to abandon his citizenship in addition to his committing an expatriating act. Terrazas argued that his fight to retain his citizenship is evidence of a lack of intention to relinquish citizenship, but the court stated that the relevant inquiry was 'Terrazas' state of mind in 1970-71 rather than his struggle to retain citizenship. The court held that the evidence supporting a finding of intent was nearly overwhelming and clearly met the preponderance of the evidence standard. Terrazas v. Muskie, 494 F. Supp. 1017, 1019-20 (N.D. Ill. 1980).
  \item \textsuperscript{104} Justice Marshall and Justice Stevens each wrote an opinion concurring in part and dissenting in part. Justice Brennan, with whom Justice Stewart joined, wrote a dissenting opinion. The opinions addressed various issues contained in the opinion of the majority. 444 U.S. at 270-76. Since the focus of this comment is on the burden of proof in expatriation decisions, only those portions of the opinions which relate to this issue are mentioned in the text.
  \item \textsuperscript{105} \textit{Id.} at 271. In support of his opinion, Justice Marshall cited a statement by Chief Justice Warren in \textit{Trop v. Dulles}, which articulated the lost rights of expatriates. Justice Warren stated: [T]he expatriate has lost the right to have rights. This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious. \textit{Id.}, \textit{citing} 356 U.S. at 102.
  \item \textsuperscript{106} 444 U.S. at 272.
\end{itemize}
narrowly construed the meaning of liberty in holding that expatriation proceedings do not result in the loss of liberty.\textsuperscript{106} In his judgment, an individual's interest in preserving his citizenship is an aspect of liberty which cannot be deprived without due process, and due process requires a clear and convincing standard of proof.\textsuperscript{107}

**Analysis**

**Liberty Interest**

The most significant determination made by the Supreme Court in *Vance v. Terrazas* was that "expatriation proceedings are civil in nature and do not threaten a loss of liberty."\textsuperscript{108} By so concluding, the Court never reached the question of whether a preponderance of the evidence standard affords adequate due process to the citizen, since it is well recognized that a court need not decide how much process is due unless first there is found to be a liberty or property interest within the fourteenth amendment's protection.\textsuperscript{109} Unfortunately, neither the majority nor the dissenters, who did perceive a liberty interest to be at stake, provided any authority for their conclusions as to this issue.\textsuperscript{110}

The identification of sources which give rise to a liberty interest has been difficult for the Court.\textsuperscript{111} One of the first definitions of what constitutes a liberty interest was made in *Meyer v. Nebraska*,\textsuperscript{112} where the Court explained:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also

\textsuperscript{106} Id. at 273.

\textsuperscript{107} Id. at 274. Justice Stevens reasoned that an individual's interest in retaining his citizenship is comparable to an individual's interest in not being involuntarily confined indefinitely. Justice Stevens thus concluded that for the reasons expressed by the Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1979), a civil commitment case where a clear and convincing standard was held to be the necessary burden of proof, due process requires clear and convincing proof in expatriation as well. See 441 U.S. at 425-27, 431-33.

\textsuperscript{108} 444 U.S. at 266.

\textsuperscript{109} See *Smith v. Organization of Foster Families*, 431 U.S. 816, 847 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The Court, however, in extraordinary circumstances has created special exceptions to the rule that an individual must be afforded some kind of hearing before being deprived of a protected interest. See, e.g., *Mackey v. Montrym*, 443 U.S. 1 (1979) (suspension of driver's license due to refusal to take a breath-analysis test upon arrest); *Ewing v. Mytinger & Casselberry*, Inc., 339 U.S. 594 (1950) (multiple seizures of misbranded articles); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (United States may collect taxes assessed against transferees of corporate property); *Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921) (property supposedly belonging to an enemy may be seized during time of war without a prior hearing).

\textsuperscript{110} See text accompanying notes 101-07 supra.

\textsuperscript{111} G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 646-47 (10th ed. 1980).

\textsuperscript{112} 262 U.S. 390 (1923).
the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.\textsuperscript{113}

In \textit{Meyer}, the Court held that interference with a teacher’s right to teach a foreign language and the right of parents to determine who shall instruct their children and in what manner were restraints on liberty.\textsuperscript{114} Since \textit{Meyer}, the Court also has found, among others, liberty interests in the right to travel,\textsuperscript{115} personal privacy,\textsuperscript{116} freedom from civil commitment\textsuperscript{117} and freedom from punishment.\textsuperscript{118}

Freedom from punishment has been an identifiable and protected liberty interest in a variety of contexts. In \textit{Ingraham v. Wright},\textsuperscript{119} a case involving corporal punishment in the public schools, the Court found a liberty interest at stake. It reasoned that, “[a]mong the historic liberties so protected was a right to be free from . . . unjustified intrusions on personal security. While the contours of this historic liberty interest . . . have not been defined precisely, they always have been thought to encompass freedom from . . . punishment.”\textsuperscript{120}

In the context of expatriation the spectre of punishment also has been raised. In \textit{Kennedy v. Mendoza-Martinez},\textsuperscript{121} a United States citizen was expatriated for remaining outside of the United States for the purpose of avoiding military service in violation of section 401(j) of the Act of 1940.\textsuperscript{122} The Court examined the provisions of the statute to determine whether they were regulatory in nature or whether they were punitive. After finding that throughout history forfeiture of citizenship has been used as punishment and that the congressional purpose conclusively indicated that the provisions should be interpreted as punitive, the Court concluded that section 401(j) was punitive and, therefore, could not constitutionally stand “lacking as [it does] the procedural safeguards of the Constitution.”\textsuperscript{123}

Since the assessment of particular procedural safeguards under the

\textsuperscript{113} \textit{Id.} at 399.
\textsuperscript{114} \textit{Id.} at 400-03.
\textsuperscript{115} Aptheker v. Secretary of State, 378 U.S. 500 (1964).
\textsuperscript{117} \textit{In re Gault}, 387 U.S. 1 (1966).
\textsuperscript{119} 430 U.S. 651 (1977).
\textsuperscript{120} \textit{Id.} at 673-74.
\textsuperscript{121} 372 U.S. 144 (1963). \textit{See also} text accompanying notes 50-52 supra.
\textsuperscript{122} \textit{Id.} at 147-48. For the text of § 401(j) of the Act of 1940 \textit{see} note 27 supra.
\textsuperscript{123} 372 U.S. at 186.
due process clause does not even arise unless there is a liberty interest involved, *Kennedy* appears to stand for the proposition that freedom from punishment gives rise to a liberty interest, given its statement that procedural safeguards are required where punishment is the sanction imposed under section 401(j) of the Act of 1940. The precise meaning of the Court's holding, however, is not clear. It is uncertain from the language in *Kennedy* whether the decision establishes that freedom from punishment generally gives rise to a liberty interest or that a liberty interest is involved solely where expatriation under section 401(j) is the form of punishment being imposed.

The broader interpretation of *Kennedy*, however, was firmly established by the Court in *Bell v. Wolfish*. Although *Bell* involved punishment of pre-trial detainees, the Court specifically cited and relied on *Kennedy* for the proposition that punitive measures may not be constitutionally imposed without due process of law. The Court recited the factual setting of *Kennedy* and depicted the holding in *Kennedy* as applying to expatriation in general. Referring to *Kennedy*, the Court in *Bell* remarked that, because forfeiture of citizenship "traditionally had been considered punishment and the legislative history of the forfeiture provisions 'conclusively' showed that the measure was intended to be punitive, the Court [in *Kennedy*] held that forfeiture of citizenship in such circumstances constituted punishment that could not constitutionally be imposed without due process of law."

Thus, on the basis of the *Bell* Court's application of *Kennedy*, there is no reason to limit the *Kennedy* holding solely to section 401(j) of the Act of 1940.

The Court in *Terrazas* failed to consider the standards set forth in *Kennedy* and authoritatively interpreted in *Bell*. The Court should have recognized that expatriation proceedings do threaten a loss of liberty and, therefore, ought to have reached the question of how much

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125. *Id.* at 535. Justice Stevens dissented in *Bell*, but supported the majority's finding of a liberty interest. Justice Stevens noted the majority's divergence from its prior line of case law by explaining that the right to be free from punishment is neither expressly contained within the provisions of the Bill of Rights nor within any statute. He further pointed out that the source of the freedom "is the word 'liberty' itself as used in the Due Process Clause, and as informed by 'history, reason, the past course of decisions,' and the judgment and experience of 'those whom the Constitution entrusted' with interpreting the word." *Id.* at 580, quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1950). The majority responded to Justice Stevens' comment in a footnote, stating that its holding was, in fact, based on prior decisional law. The Court cited two cases, Ingraham v. Wright, 430 U.S. 651 (1977), and Wong Wing v. United States, 163 U.S. 228 (1896), for the proposition that a liberty interest is implicated where there is a finding of punishment. 441 U.S. at 535-36 n.17.
126. *Id.* at 538.
127. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court reasoned that although bodily
Due Process

The resolution of what process is due "is not a technical conception with a fixed content unrelated to time, place and circumstances," but is "flexible and calls for such procedural protections as the particular situation demands." Generally, the courts balance the interests of the individual against that of the government in determining what process is due. In a leading decision, *Mathews v. Eldridge*, the Court enumerated a balancing test utilizing three distinct factors which had been identified in prior due process decisions as important elements for determining the specific dictates of due process. According to *Mathews*, the courts must consider the private interest that will be affected; second, they must consider the risk of erroneous deprivation of the private interest through the procedures, and the probable value of the substituted procedural safeguards; and, finally, the courts must look at the interest of the government, including the function involved and the fiscal and administrative burdens required by the substituted procedural requirements.

The procedural due process question presented in *Terrazas* is whether a preponderance of the evidence standard affords adequate due process or whether a clear and convincing standard is required. The latter is an intermediate standard between preponderance of the evidence and evidence beyond a reasonable doubt. Civil cases involving allegations of moral turpitude often use a clear and convincing standard. Similarly, the courts apply this heavier burden where the restraint and corporal punishment provide a sufficient level of punishment to implicate a fourteenth amendment liberty interest, there is a de minimus level of imposition with which the Constitution is not concerned. Id. at 674. It would appear that loss of citizenship in expatriation decisions provides a sufficient level of punishment to implicate a liberty interest in view of the importance the Court has continually placed on citizenship. See text accompanying notes 140-48 infra.

132. 424 U.S. at 335.
consequences of the government action are great and where important individual interests are at stake.\textsuperscript{135} For example, the individual interest involved in the outcome of an involuntary civil commitment proceeding requires clear and convincing proof.\textsuperscript{136} The standard also is applied in denaturalization\textsuperscript{137} and deportation cases\textsuperscript{138} where loss of citizenship and expulsion from the United States are considered to present unusually drastic consequences for the individual.\textsuperscript{139}

In using the \textit{Mathews} balancing test as a guide to determine what process is due in \textit{Terrazas}, the first consideration is the individual interest in citizenship. The Supreme Court has continually emphasized the significance of the citizenship interest in expatriation\textsuperscript{140} and denaturalization decisions.\textsuperscript{141} Although denaturalization and expatriation decisions differ in some respects,\textsuperscript{142} the individual interest to be protected in

\textsuperscript{135} Addington v. Texas, 441 U.S. 418, 424 (1978).

\textsuperscript{136} \textit{Id}. at 427.


\textsuperscript{139} \textit{Id}. at 285; Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943). The Court in \textit{Woody} explained:

\[ It \text{ does } not \text{ syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all bonds formed here and go to a foreign land where he often has no contemporary identification. \]

\[ \ldots \] The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores.

\textsuperscript{385} U.S. at 285-86.

\textsuperscript{140} In his \textit{Perez} v. \textit{Brownell} dissent, which later became the majority view in \textit{Afroyim} v. \textit{Rusk}, Chief Justice Warren wrote, "[c]itizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen." 356 U.S. at 64 (Warren, C.J., dissenting) (emphasis in original). Likewise in \textit{Kennedy} v. \textit{Mendoza-Martinez}, the Court expressed a view that citizenship rights are one of the most valuable rights in the world today and recognized that a person who loses his nationality possesses no protection whatsoever and has no means of redress against the state. 372 U.S. at 160. The Supreme Court also expressed an interest in citizenship rights in \textit{Afroyim}. The Court stated that its holding gives citizens that which is their own—"a constitutional right to remain a citizen in a free country. \ldots " 387 U.S. at 268.

\textsuperscript{141} Compare 8 U.S.C. \textsection 1481 (1976) with 8 U.S.C. \textsection 1451 (1976). Expatriation denotes an individual's voluntary renunciation of his citizenship or nationality whereas denaturalization denotes government withdrawal of a naturalized citizen's citizenship. Denaturalization proceedings
both is the same. It was the importance of protecting citizenship that led the Supreme Court in *Schneiderman v. United States*,¹⁴³ to hold that the burden of proof in denaturalization cases must be "clear and convincing."¹⁴⁴ *Schneiderman* found that the consequences of depriving an individual of citizenship rights is "more serious than the taking of one’s property or the imposition of a fine or other penalty."¹⁴⁵ It added that its value and importance would be difficult to exaggerate and that it may be "regarded as the highest hope of civilized man."¹⁴⁶ The Court feared that if a lesser standard were applied, the security of the status of naturalized United States citizens might depend on the "political temper of majority thought and the stresses of the times."¹⁴⁷ Since *Schneiderman*, the Court has continually applied that standard in denaturalization decisions.¹⁴⁸

The expatriation and denaturalization decisions illustrate the importance the Court has placed on citizenship rights. The private interest in citizenship is substantial and weighs heavily in favor of the individual.

The second factor of the *Mathews* test involves a consideration of the risk of erroneous deprivation of the private interest under a preponderance of the evidence standard and the probable value of the clear and convincing standard. In *Addington v. Texas*,¹⁴⁹ where an individual was involuntarily committed to a state mental hospital, the Court applied *Mathews* to determine whether the clear and convincing standard or the preponderance of the evidence standard was appropriate. The Court explained that the preponderance of the evidence standard is used in civil cases which may typically involve a monetary dispute

Involves the process of revoking and setting aside the order admitting a person to citizenship and cancelling the Certificate of Naturalization. Such action is taken on the ground that the order and certificate were illegally procured or were procured by misrepresentation, on the ground that a person within five years of naturalization became affiliated with an organization which at the time of naturalization would have precluded the individual from naturalization, and on the ground that a person within five years of naturalization takes up permanent residence in another country. Immigration and Nationality Act, 8 U.S.C. § 1451 (1976).

¹⁴³. 320 U.S. 118 (1943).
¹⁴⁴. *Id.* at 123.
¹⁴⁵. *Id.* at 122.
¹⁴⁶. *Id.*
¹⁴⁷. *Id.* at 159. Also, in *Knauer v. United States*, 328 U.S. 645 (1946), another denaturalization case upholding a clear and convincing standard, the Court noted that citizenship rights are important in that they carry with them the privilege to participate in the affairs of society, the right to speak freely, to criticize government officers and to promote changes in the law. *Id.* at 658.
between private litigants.\textsuperscript{150} It added that society places a minimal concern on the outcome of such suits and that as a result the plaintiff's burden is a mere preponderance of the evidence.\textsuperscript{151} The Court further noted that with this standard, the parties share the risk of error in nearly equal fashion.\textsuperscript{152} The \textit{Addington} Court explained that the interests at stake when a clear and convincing standard is used are much more substantial than when a preponderance of the evidence standard is used and that the risk to the defendant of an erroneous charge is reduced by increasing the plaintiff's burden of proof.\textsuperscript{153}

In the context of expatriation, the use of the clear and convincing standard reduces the risk of erroneous deprivation of citizenship by increasing the government's burden of proof. Moreover, the increased burden impresses the factfinder with the importance of the decision, thereby reducing the chances of error.\textsuperscript{154} Admittedly, the preponderance of the evidence standard promulgated by Congress was not intended by Congress or by the Supreme Court to stand alone. Congress added a rebuttable presumption that the expatriating act was committed voluntarily and the Supreme Court held that, in light of the congressional standards, a court must find by a preponderance of the evidence that the individual has "intentionally" expatriated himself. While the Court in \textit{Terrazas} found that the infusion of an "intent" element provided sufficient protection to the individual, it is doubtful that the risk of erroneous deprivation is thereby sufficiently reduced. A presumption of voluntariness places a \textit{greater} burden on the citizen to preserve his citizenship than on the government attempting to impose expatriation. Furthermore, although the "intent" element reduces the risk of erroneous deprivation by requiring proof of intent to commit an expatriating act, the risk of error is still great where that element, also, need be proved by no more than a mere preponderance of the evidence.

The final factor of the \textit{Mathews} test is the interest of the government. The primary governmental interest in the application of evidentiary standards in expatriation proceedings is avoiding potential embarrassment in foreign affairs.\textsuperscript{155} The majority in \textit{Perez v. Brownell}

\footnotesize{150. \textit{Id.} at 423.}
\footnotesize{151. \textit{Id}.}
\footnotesize{152. \textit{Id}.}
\footnotesize{153. \textit{Id.} at 424.}
\footnotesize{154. \textit{Id.} at 427.}
\footnotesize{155. The obvious result of using a clear and convincing standard is that the government will find it more difficult to expatriate citizens who have become involved in the types of activities listed as expatriating actions in the Act of 1952. For example, a citizen has less fear of expatriation if he serves in foreign armed forces, votes in a political election in a foreign state, commits an}
first discussed the interest of the government in avoiding embarrassment in foreign affairs in conjunction with the power of Congress to deal with such matters. The Court reasoned that the "activities of citizens of one nation when in another country can easily cause serious embarrassment to the government of their own country as well as their fellow citizens."\textsuperscript{156} The Perez Court feared that if a citizen participated in political or governmental affairs of another country, such activities might jeopardize the successful conduct of America's international relations. Further, there was concern that a citizen may promote "conduct contrary to the interest of his own government" or that the people or government of the foreign country may look upon the citizen's activities as the action of the United States government or as a reflection of its policy.\textsuperscript{157}

More recently, following the \textit{Afroyim v. Rusk} holding that citizenship cannot be taken away without an individual's "assent," a similar concern was expressed by at least one commentator.\textsuperscript{158} He conjectured that as a result of \textit{Afroyim}, which makes it harder for the government to expatriate its citizens, it would be more difficult to deter citizens from serving as "volunteers" in the Israeli armed forces. These volunteers potentially could anger the Arab states, thereby further aggravating Middle East tensions and interfering with United States peace efforts.\textsuperscript{159}

Although it is possible that the use of a clear and convincing standard in expatriation proceedings may occasionally create an embarrassing situation for the United States, this interest does not appear as significant as protecting the citizenship rights of United States citizens. It is unlikely that the actions of citizens abroad will be taken seriously by foreign governments as a reflection of United States foreign policy. In addition, once a citizen is expatriated he is left with no alternative remedy. The government, on the other hand, through its political processes, is capable of dealing with its potential embarrassment. Financially and administratively, the only significant additional burden on the government is a requirement to present a stronger case against the citizen.\textsuperscript{160}

\begin{footnotesize}
\begin{enumerate}
  \item \footnotesize{In addition, the interest of the government in avoiding embarrassment in foreign affairs
  \item \footnotesize{356 U.S. at 59.}
  \item \footnotesize{Id.}
  \item \footnotesize{Id.}
  \item \footnotesize{Dionisopoulus, \textit{Afroyim v. Rusk: The Evolution, Uncertainty and Implications of a Constitutional Principle}, 55 MINN. L. REV. 235, 254-56 (1970).}
  \item \footnotesize{Id.}
\end{enumerate}
\end{footnotesize}
While the Mathews test is a subjective way of determining what process is due, it at least allows the courts to look at the particular circumstances of each case and weigh the specific interests involved. In expatriation cases, a clear and convincing standard should be required, in order to afford adequate due process to the citizen. The interest in preserving citizenship rights should weigh more heavily than the government's apprehension of potential embarrassment in foreign affairs. The clear and convincing standard would reduce the risk of erroneous deprivation of an individual's citizenship, a right which has long been recognized as one of man's most cherished rights.

CONCLUSION

In Vance v. Terrazas, the Supreme Court for the first time reviewed the constitutionality of the statute establishing the necessary burden of proof in expatriation cases. In upholding the preponderance of the evidence standard, the Court erroneously refused to recognize a liberty interest in citizenship. As a result, the Court never reached the question of how much process was due in Terrazas. There is indeed a liberty interest at stake in citizenship and the due process clause of the fourteenth amendment requires that the Government establish expatriation by clear and convincing evidence, not merely by a preponderance of the evidence. This result is necessary in view of the crucial importance of maintaining citizenship rights.

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was neither addressed by the Court in applying a clear and convincing standard in denaturalization cases nor was it considered by Congress in promulgating the preponderance of the evidence standard in the amendment to the Act of 1952. See H.R. REP. NO. 1086, 87th Cong., 1st Sess. 40, 41 reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2984-85.