

Fordham International Law Journal

Volume 5, Issue 1

1981

Article 4

Preponderance of the Evidence: An Ineffective Burden of Proof in Expatriation Proceedings

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Abstract

This Comment will review the recent history of evidentiary standards in expatriation proceedings. The Comment will also analyze the views espoused by the Supreme Court in the Terrazas opinion regarding the use of the preponderance standard in light of constitutional limitations on congressional power and the standard's effectiveness in preventing forcible denationalization. Finally, the propriety of the alternative clear, convincing and unequivocal evidence standard will be briefly examined.

PREPONDERANCE OF THE EVIDENCE: AN INEFFECTIVE BURDEN OF PROOF IN EXPATRIATION PROCEEDINGS

I. INTRODUCTION

In *Vance v. Terrazas*¹ the Supreme Court evaluated the protections afforded an individual's rights in expatriation proceedings.² The then-existing protections were held inadequate to prevent un-

1. *Vance v. Terrazas*, 444 U.S. 252, *rehearing denied*, 445 U.S. 920 (1980). Laurence J. Terrazas was a dual national by virtue of his birth in Maryland to an American mother and a Mexican father. Terrazas' dual citizenship was consistent with United States law. *See, e.g.*, *Perkins v. Elg*, 307 U.S. 325 (1939). In 1971, while a student in Mexico at Colegio Comercial Ingles, Terrazas was advised that in order to be graduated he had to file a Certificate of Mexican Nationality. He obtained the certificate but later found out that other identification would have sufficed.

The Certificate of Mexican Nationality read in part: "I therefore hereby expressly renounce _____ citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of _____, of which I might have been subject. . . ." *Vance v. Terrazas*, 444 U.S. at 255 n.2 (original in Spanish). The blanks were later filled in with the words *Estados Unidos* and *Norteamerica* respectively. *Id.* at 9. Terrazas subsequently testified that by signing the Certificate of Mexican Nationality he neither thought nor intended to renounce United States citizenship. 577 F.2d 7, 9 (7th Cir. 1978).

After he obtained the certificate Terrazas was informally notified by a United States State Department employee that the certificate may have affected his status as a United States citizen. Terrazas was then informed that he had expatriated himself by signing the Certificate of Mexican Nationality. He sued the Secretary of State to reinstate his citizenship. The district court held that he had committed an expatriating act as set forth by Congress in sec. 349(a)(2) of the Immigration and Nationality Act (INA). Immigration and Nationality Act, 8 U.S.C. § 1481(a)(2) (1976). *See* note 4 *infra*. The court of appeals found the statute applied by the district court unconstitutional. The Supreme Court reversed the court of appeals decision, affirming the result reached by the district court on different grounds. The *Terrazas* case is discussed in Note, 21 HARV. INT'L L.J. 527 (1980); Note, *Vance v. Terrazas: The Standard of Proof in Expatriation Proceedings*, 32 BAYLOR L. REV. 427 (1980).

2. Expatriation proceedings initiated by the government threaten persons with the loss of nationality, a constitutional right, and its attendant rights and privileges. *See Afroyim v. Rusk*, 387 U.S. 253 (1967), and note 29 *infra* and accompanying text. Prior to *Terrazas*, the only protections afforded citizens faced with expatriation were the procedural provisions of the INA. *See* note 17 *infra*. Essentially, anyone found committing one of the expatriating acts listed in the INA could lose citizenship if it were shown that he or she had performed the expatriating act voluntarily. No intent to expatriate had to be shown under the provisions of the INA. *See* note 4 *infra* for a list of expatriating acts. *See* note 32 *infra*, for a discussion of voluntariness and intent.

constitutional, forcible denationalization.³ The Court formulated the act plus intent test which requires the government to show that a citizen voluntarily performed a congressionally-designated expatriating act⁴ and the person's intent⁵ to surrender citizenship in order to establish a loss of nationality.

The *Terrazas* act plus intent test strongly reaffirmed a prior Court holding⁶ that Congress lacks the power to forcibly expatriate

3. Historically there has been considerable debate over whether Congress has the power to take away citizenship. See *Gray, Expatriation—A Concept in Need of Clarification*, 8 U. CAL. D. L. REV. 375 (1975). The exercise of that power is not the direct concern of this paper except as it relates to congressional power over the burden of proof in expatriation proceedings. Currently, the government may initiate expatriation proceedings subject to the constitutional limitations over the exercise of congressional power. See notes 25-36, 49-56 *infra* and accompanying text. The following definitions will clarify the concepts discussed throughout this paper. Expatriation refers to a loss of nationality by a person born or naturalized a citizen in the United States. Denationalization as used herein will also refer to any loss of nationality by a person born or naturalized a citizen in the United States. It has been proposed that these terms be distinguished so that denationalization denotes a government-initiated loss of citizenship and expatriation refers to the loss of nationality initiated by the citizen. See *Expatriation—A Concept in Need of Clarification, supra* at 388. Denaturalization refers to an annulment of citizenship. In denaturalization proceedings the government claims that the person never had citizenship because it was improperly granted. See 8 U.S.C. § 1451 (1976). Several types of United States citizenship exist. They differ in the manner in which the person acquires nationality. This Comment focuses on fourteenth amendment citizenship; that acquired by persons born or naturalized citizens within the United States.

4. The expatriating acts under the 1952 version of the INA and their current status are as follows: naturalizing in a foreign state; taking an oath of allegiance to another state; serving in another nation's armed forces without permission of the State Department; holding a government post in another state; voting in a foreign election (held an unconstitutional restriction on citizenship in *Afroyim v. Rusk*, discussed in note 6 *infra*); formally renouncing United States citizenship to a diplomatic officer of the United States when outside the United States; making a formal written renunciation to the United States government when within the United States; deserting from the United States armed forces in time of war (repealed 1978 by Pub. L. No. 95-432, § 2, 92 Stat. 1046 (1978)); committing an act of treason; leaving the United States during time of war for the purpose of avoiding military service (repealed 1976 by Pub. L. No. 94-412, § 501(a), 90 Stat. 1258 (1976)). Immigration and Nationality Act of 1952, ch. 477, § 349, 66 Stat. 267 (current version at 8 U.S.C. § 1481(a)(1)-(9) (1976)). The performance of an expatriating act was the only criterion prior to *Terrazas*. Although Congress lacks the power to place conditions upon citizenship, it does determine what conduct will constitute an expatriating act. See generally notes 28-36 *infra* and accompanying text. Procedures for expatriation proceedings apply to any party claiming the loss of nationality, but the government is usually the party initiating the expatriation action and thus usually bears the burden of persuasion. See note 17 *infra*. Consequently, in this Comment the procedural sections of the INA will be said to apply to the government. Sometimes the citizen rather than the government initiates the action. See, e.g., *United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976) (Government sought taxes from person claiming previous expatriation).

5. 444 U.S. at 263. See note 32 *infra* for a discussion of intent.

6. *Afroyim v. Rusk*, 387 U.S. 253 (1967). See notes 25-36 *infra* and accompanying text. The term "act plus intent test" is used in this Comment to denote the current requirements

citizens and improved protections for fourteenth amendment citizenship.⁷ Despite the addition of the substantive act plus intent test, the Court left intact the procedural schema for expatriation proceedings enacted by Congress,⁸ including the use of the preponderance standard of proof.⁹ This Comment examines the possibility that by upholding the preponderance standard the Court may have negated beneficial protections provided by the act plus intent test and may have allowed unconstitutional forcible expatriation to continue.¹⁰

This Comment will review the recent history of evidentiary standards in expatriation proceedings. The Comment will also analyze the views espoused by the Supreme Court in the *Terrazas* opinion regarding the use of the preponderance standard in light of constitutional limitations on congressional power and the standard's effectiveness in preventing forcible denationalization. Finally, the propriety of the alternative clear, convincing and unequivocal evidence standard will be briefly examined.

II. RECENT HISTORY OF THE EVIDENTIARY STANDARD IN EXPATRIATION PROCEEDINGS

A. *The Clear and Convincing Evidence Standard of Nishikawa v. Dulles*

The 1952 version of the Immigration and Nationality Act (INA) provided for the denationalization of any citizen committing an expatriating act.¹¹ At that time Congress was considered to have the power to forcibly denationalize citizens under its foreign

for loss of nationality in government-initiated expatriation proceedings. The act requirement of the test refers to the expatriating acts listed in the INA. *See* note 4 *supra*. The intent requirement of the test refers to the intent requirement mandated by the Court in *Terrazas*. *See* note 52 *infra* and accompanying text.

7. The *Terrazas* intent requirement is the first affirmative step taken by the Court to provide protection for fourteenth amendment citizenship and represents broad-reaching protection for such citizenship. Previous attempts to protect citizenship were limited, negative sanctions on specific government action. *See* notes 25-36 *infra* and accompanying text.

8. *See*, 8 U.S.C. § 1481(c) (1976). *See* note 17 *infra* and accompanying text.

9. The preponderance standard requires the trier of fact to find that the "existence of the fact is more probable than its non-existence." J. PRINCE, *RICHARDSON ON EVIDENCE*, § 97 (10th ed. 1973) quoting MORGAN, *BASIC PROBLEMS OF EVIDENCE* 24 (1962 ed.).

10. *See* notes 69-72 *infra* and accompanying text.

11. *See* note 4 *supra*.

affairs power.¹² The INA did not specify an evidentiary standard to be used in denationalization proceedings.

The standard then used in denaturalization proceedings was clear, convincing and unequivocal evidence.¹³ In 1958 the Supreme Court's *Nishikawa v. Dulles* decision found that clear, convincing and unequivocal evidence was also appropriate for denationalization cases.¹⁴ In concluding that the clear and convincing standard was applicable to all loss of citizenship actions, the Court found no reason for imposing a lighter burden on the government merely because it seeks to show the expatriation of a native-born citizen.¹⁵

B. *Congress Enacts the Preponderance Standard*

In 1961 Congress examined the evidentiary standards used in expatriation proceedings and found the preponderance standard appropriate.¹⁶ Congress amended the INA to include a specific procedural section for use in expatriation proceedings.¹⁷ The legislative history of this amendment discloses that Congress began investigating the evidentiary standard seeking to expedite the denationalization of persons then avoiding that result in administrative hearings.¹⁸ To facilitate denationalization Congress lowered the

12. See *Perez v. Brownell*, 356 U.S. 44 (1958), *overruled*, 387 U.S. 253 (1967) (denationalization of person voting in a foreign election upheld as part of government's inherent power to regulate foreign affairs).

13. See also *Gonzales v. Landon*, 350 U.S. 920 (1955); *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); *Acheson v. Maenza*, 202 F.2d 453 (D.C. Cir. 1953).

14. *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (expatriation of United States citizen of Japanese descent serving in Japanese armed forces).

15. *Id.* at 133-38.

16. 8 U.S.C. § 1481(c) (1976) (*originally enacted as* Act of Sept. 26, 1961, Pub. L. 87-301, § 19, 75 Stat. 656). See H.R. REP. NO. 1086, 87th CONG., 1st Sess., *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950.

17. The relevant part of the INA states:

Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act 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. 8 U.S.C. § 1481(c) (1976).

18. See H.R. REP. NO. 1086, 87th CONG., 1st Sess., *reprinted in* [1961] U.S. CODE CONG. & AD. NEWS 2950, 2984.

burden of proof from the clear, convincing and unequivocal standard established in *Nishikawa* to the preponderance standard.¹⁹

The procedures detailed by Congress state that the government must show by a preponderance of the evidence that an expatriating act was committed.²⁰ Upon such a showing the government benefits from the presumption that the act was performed voluntarily.²¹ The statute permits citizens to rebut the presumption of voluntariness by posing an alternative explanation for the conduct.²² The alternative explanation must similarly be established by a preponderance of the evidence.²³ Under this congressional scheme if the presumption were rebutted, then the proceedings would end; if not, then the citizen could be denationalized.²⁴

C. *Afroyim v. Rusk*: A Redefinition of the Extent of Congressional Power Over Expatriation

Afroyim v. Rusk,²⁵ although a landmark case in expatriation law, did not specifically address congressional power over the evidentiary standard. *Afroyim* focused on the scope of congressional power over expatriation proceedings.²⁶ *Afroyim* was a dual national who voted in an Israeli election and was subsequently denied renewal of his American passport because such a vote was an expatriating act under the INA.²⁷ *Afroyim* challenged the ability of Congress to place conditions upon his citizenship.²⁸ After examining the powers of Congress under the fourteenth amendment, the Supreme Court found that citizenship granted under the amendment was unconditional; Congress lacked the power to forcibly denationalize a citizen.²⁹ Speaking for the majority, Justice Black said, "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship . . . and gives this citizen . . . a consti-

19. *See id.*; 8 U.S.C. § 1481(c) (1976).

20. 8 U.S.C. § 1481(c) (1976). The relevant portion of the statute is reproduced in note 17 *supra*.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. 387 U.S. 253 (1967) (5-4 decision).

26. *See* note 32 *infra*.

27. 8 U.S.C. § 1481(a)(5) (1976).

28. 387 U.S. at 254.

29. *Id.* at 267.

tutional right to remain a citizen in a free country unless he *voluntarily relinquishes* that citizenship.”³⁰

However clearly Justice Black stated the limitations placed upon congressional power, the protection of citizenship mandated by *Afroyim* never came to fruition.³¹ After *Afroyim* the concept of voluntariness³² within the INA was exploited to sustain the viability

30. *Id.* at 268 (emphasis added). Justice Black was criticized for his reading of the history and purpose of the fourteenth amendment. Justice Harlan, dissenting, accused Justice Black of expanding the intent and effect of the fourteenth amendment beyond its definitional character in regard to citizenship. Justice Harlan claimed that the only purposes of the fourteenth amendment in regard to citizenship were to specify who were citizens, overturn the *Dred Scott* decision and establish the superiority of federal citizenship over state citizenship. See, *Scott v. Sanford*, 19 How. 393 (1856). Justice Harlan declared that the fourteenth amendment was not an instrument limiting congressional power to denationalize unwilling citizens. *Id.* at 268-93 (Harlan, J., dissenting). See note 108 *infra*.

31. Inasmuch as the government could easily bring denationalization proceedings after *Afroyim* the protections mandated could be termed ineffective. *Afroyim*, however, could provide the basis for limiting Congressional power. See notes 90-95 *infra* and accompanying text.

32. The *Afroyim* Court created confusion through its use of the concepts of “voluntariness,” “assent” and “intent.” Under the INA the only assessment of the purpose of the individual concerns the voluntariness of the conduct. **Voluntariness thus did not mean the same thing as the person’s intent to relinquish citizenship.** See *Revedin v. Acheson*, 194 F.2d 482 (2d Cir. 1952) *cert. denied* 344 U.S. 820 (1952); *Rosasco v. Brownell*, 163 F. Supp. 45 (E.D.N.Y. 1958). **Instead, the voluntary commission of an expatriating act was considered to embody assent to a loss of nationality because the conduct was fundamentally inconsistent with United States citizenship.** See *Perez v. Brownell*, 356 U.S. 44, 68 (Warren, C.J., dissenting). ***Afroyim* made expatriation depend upon the person’s assent.** See, 387 U.S. at 257. “[A]cademic commentary” maintained that *Afroyim*

imposed the requirement of intent to relinquish citizenship on a party seeking to establish expatriation. See Comment, An Expatriation Enigma: *Afroyim v. Rusk*, 48 B.U. L. REV. 295, 298 (1968); Note, Acquisition of Foreign Citizenship: The Limits of *Afroyim v. Rusk*, 54 CORNELL L. REV. 624, 624-625 (1969); The Supreme Court: 1966 Term, 81 HARV. L. REV. 69, 126 (1967); Note, 29 OHIO ST. L. J. 797, 801 (1968).

444 U.S. at 262 n.6. The interpretation of the term assent, though, vitiated the effectiveness of the requirement. According to the Attorney General, conduct could still establish expatriation because it embodied the assent required by *Afroyim*. 42 Op. Att’y Gen. 397, 400 (1969). Justice Harlan dissenting in *Afroyim* presaged the practical ineffectiveness of the intent requirement:

[The majority] has assumed that voluntariness is here a term of fixed meaning; in fact, of course, it has been employed to describe both a specific intent to renounce citizenship, and the uncoerced commission of an act conclusively deemed by law to be a relinquishment of citizenship. Until the Court indicates with greater precision what it means by “assent,” today’s opinion will surely cause still greater confusion in this area of the law.

387 U.S. at 269 n.1 (Harlan, J., dissenting).

The *Terrazas* Court finally indicated with “greater precision” exactly what assent in *Afroyim* embodied. The Court held that assent meant the person’s intent to relinquish

of the proceedings based merely upon conduct. The Attorney General asserted that voluntary relinquishment of citizenship was not confined to written declarations; citizenship could be renounced through conduct.³³ *Afroyim* thus did not affect the validity of the INA except insofar as it concerned voting in foreign elections.³⁴ The factfinder's inquiry after *Afroyim* was the same as it had been before; it was concerned with whether the expatriating act had been committed willingly rather than whether the citizen intended such an act to signify rejection of American nationality.

Afroyim, however, did affect the procedural aspects of expatriation proceedings.³⁵ Despite the INA's mandate for the use of the preponderance standard, many courts after *Afroyim* employed the clear, convincing and unequivocal standard, citing the *Afroyim* decision as a limitation upon congressional power over the evidentiary standard.³⁶

citizenship which was not conclusively indicated by the voluntary commission of an expatriating act. See notes 52-54 *infra* and accompanying text.

33. 42 Op. Att'y Gen. 400 (1969).

34. The effect of *Afroyim* has been summarized as follows:

Afroyim thus represents the culmination of the past ambiguity in expatriation law and the source of its present confusion. On the one hand it appeared to settle the basic issue of congressional power to expatriate by directly overruling *Perez*. On the other it generated the more practical question of what constitutes "voluntary renunciation." Moreover, the very narrowness of the margin of decision gave rise to doubts as to its real impact. A change in the Court's composition could easily lead to still another reversal in its position. Meanwhile, the Attorney General's interpretation, in an attempt to simplify the burden on those who had to administer the law, struck a middle ground between the polar extremes of *Perez* and *Afroyim*.

Expatriation—A Concept in Need of Clarification, *supra* note 3, at 382.

35. See, e.g., *Jolley v. Immigration & Naturalization Service*, 441 F.2d 1245 (5th Cir.), *cert. denied*, 404 U.S. 946 (1971).

36. By enacting § 349(c) of the INA in 1961 Congress clearly specified that the preponderance standard should be used in all loss of nationality actions, *see* note 17 *supra*, but clear and convincing evidence has been employed repeatedly since. In *Berenyi v. District Director, Immigration & Naturalization Service*, 385 U.S. 630 (1967), the Supreme Court declared that "[w]hen the Government seeks to strip a person of citizenship already acquired . . . it carries the heavy burden of proving its case by 'clear, unequivocal, and convincing evidence.'" *Id.* at 636. The Second Circuit in *United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976) held that a mere oath of allegiance to another nation would not result in expatriation unless there was clear, convincing and unequivocal evidence of specific intent to renounce United States citizenship. A three judge court in *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972) also employed the clear, convincing and unequivocal evidence standard in a post-*Afroyim* expatriation case.

In a pre-*Afroyim* case, the Supreme Court held, 5-4, that some expatriation proceedings under the INA were distinctly penal in character and thus were subject to the procedural safeguards of the fifth and sixth amendments. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

III. THE TERRAZAS DECISION

Laurence J. Terrazas, a national of both the United States and Mexico from birth, signed a Certificate of Mexican Nationality in order to receive a degree.³⁷ The United States State Department told Terrazas that he had expatriated himself by signing that certificate.³⁸ The State Department contended that the certificate plainly effected express renunciation of non-Mexican nationality and constituted an expatriating act under the INA.³⁹ Terrazas denied that he had intended to affect his American citizenship by signing the certificate.⁴⁰ Terrazas sued to overturn the State Department's determination. The district court found that Terrazas had indeed committed an expatriating act and upheld his loss of United States citizenship.⁴¹

A. *The Circuit Court's Consideration of Vance v. Terrazas*

The court of appeals reviewed the district court's decision and stated that the record fully supported the denationalization of Terrazas because he had voluntarily committed an expatriating act.⁴² The court, though, remanded the decision to the district court because the preponderance standard was inappropriate for loss of nationality actions.⁴³

The court attacked the statutory preponderance standard contending that it exceeded the limitations placed upon congressional power in *Afroyim*.⁴⁴ Judge Sprecher perceived that the ability to retain citizenship is a function of the burden of proof.⁴⁵ He determined that because the evidentiary standard was tantamount to the

37. *Terrazas v. Vance*, 577 F.2d 7, 7 (7th Cir. 1978).

38. 577 F.2d at 8. See note 1 *supra*.

39. *Id.*

40. 577 F.2d at 9. The State Department confronted the problem of persons seeking to avoid the draft many times during the sixties and seventies. See, e.g., Note, *Formal Renunciation of United States Citizenship to Avoid Criminal Liability Under Selective Service Law Constitutes a Voluntary Relinquishment of Nationality Within the Meaning of Afroyim v. Rusk*, 71 COLUM. L. REV. 1532 (1971). The official in charge of the Terrazas case expressed doubts that Terrazas' conduct was motivated by a desire to avoid the draft. 577 F.2d at 9 n.6.

41. *Terrazas v. Vance*, No. 75-2370 (N.D. Ill. Aug. 16, 1979) (memorandum opinion).

42. *Id.*

43. *Id.* at 12.

44. *Id.* at 10.

45. *Id.* Indeed, Judge Sprecher cited the legislative history of the INA amendment which lowered the burden of proof to a preponderance of the evidence. H.R. REP. NO. 1086, 87TH CONG., 1ST SESS., reprinted in (1961) U.S. CODE CONG. & AD. NEWS 2950, 2984.

power to forcibly denationalize citizens Congress lacked power over the burden of proof.⁴⁶ The court proclaimed that the Constitution mandated the use of the clear, convincing and unequivocal evidence standard in expatriation proceedings after it had considered the value of United States citizenship and other post-*Afroyim* decisions.⁴⁷

**B. The Supreme Court's Consideration of Terrazas:
The Act Plus Intent Test and the Preponderance Standard**

The Supreme Court rejected the court of appeals' finding that Terrazas may not have expatriated himself.⁴⁸ In finding that Terrazas was properly stripped of his citizenship the Court confronted the concept of voluntariness.⁴⁹ The Court realized that certain persons, although not truly intending to expatriate, were nonetheless subject to forcible destruction of their citizenship because they had engaged in congressionally-defined expatriating conduct.⁵⁰ Seeking to prevent such unconstitutional denationalization, the Court held that "expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct."⁵¹

The INA was not found unconstitutional; rather, the acts listed therein were held insufficient to establish a loss of nationality.⁵² In addition, the Court mandated that intent to expatriate be demonstrated before expatriation can result.⁵³ The act plus intent test

46. 577 F.2d at 10.

47. *Id.* at 12.

48. 444 U.S. at 270.

49. *Id.* at 261. See that portion of Justice Harlan's dissent discussed in note 30 *supra*.

50. *Id.* at 261-62.

51. *Id.* at 260. All facts considered, the approach to *Terrazas* advocated by Mr. Justice Brennan in his dissenting opinion seems the most logical. He stated:

Appellee was born a dual national. He is a citizen of the United States because he was born here and a citizen of Mexico because his father was Mexican. The only expatriating act of which appellee stands accused is having sworn an oath of allegiance to Mexico. If dual citizenship; *per se*, can be consistent with United States citizenship, *Perkins v. Elg*, 307 U.S. 325, 329 (1939), then I cannot see why an oath of allegiance to the other country of which one is already a citizen should create inconsistency. One owes allegiance to any country of which one is a citizen, especially when one is living in that country. *Kawakita v. United States*, 343 U.S. 717, 733-35 (1952). The formal oath adds nothing to the existing foreign citizenship and, therefore, cannot affect his United States citizenship.

444 U.S. at 276 (Brennan, J., dissenting) (footnotes omitted).

52. 444 U.S. at 261.

53. *Id.*

provides a specific standard by which to measure the constitutionality of government-initiated expatriation proceedings.⁵⁴ The test affords considerable protection for citizenship and individual rights.⁵⁵

Addressing the evidentiary standard issue, Mr. Justice White stated that the Supreme Court was "in fundamental disagreement" with the circuit court's proposition that the proper burden of proof for expatriation proceedings was clear, convincing and unequivocal evidence.⁵⁶ The Court noted that it had implemented the clear, convincing and unequivocal evidence standard in *Nishikawa*, but dismissed the current viability of *Nishikawa* and deferred to the congressional purpose behind the 1961 amendment to the INA, to reinstate the preponderance standard.⁵⁷

The Court then addressed the circuit court's contention that the preponderance standard contravened "the spirit, if not the logic," of *Afroyim*.⁵⁸ The Court argued that if the *Afroyim* Court had wished to limit congressional power over the evidentiary standard, then it would have addressed the issue.⁵⁹ The Court reasoned that because the *Afroyim* Court had not discussed the evidentiary standard, it could not have intended to limit congressional power.⁶⁰

The Court did not address the circuit court's observation that ability to retain citizenship during expatriation proceedings was a function of the evidentiary standard.⁶¹ Instead, the Court discussed the general powers of Congress over the federal courts and over the implementation of the fourteenth amendment. The Court

54. The *Terrazas* Court left no ambiguity concerning the new intent requirement. The Court carefully pointed out that the assent of the individual as used by Chief Justice Warren in his *Perez* dissent was too limited for use under the INA and that actual intent must be demonstrated separately from the performance of acts listed in the INA. 444 U.S. at 260-61.

55. See generally, *Expatriation—A Concept in Need of Clarification*, *supra* note 3, at 375-380.

56. 444 U.S. at 264. Seven members of the Court supported the portion of the decision regarding the intent requirement, but only five agreed with the part concerning the preponderance standard.

57. *Id.* at 265.

58. 577 F.2d at 10. See notes 25-36 *supra* and accompanying text.

59. 444 U.S. at 265. See note 69 *infra*.

60. *Id.*

61. 577 F.2d at 10. The Court did aver to the power of Congress to establish the evidentiary standard. This resort to the propriety of congressional power led Mr. Justice Marshall to chastise the majority for its "casual dismissal" of the value of American citizenship which could not "withstand scrutiny." 444 U.S. at 271 (Marshall, J., concurring in part and dissenting in part). See also note 69 *infra*.

noted that because "Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has *no* power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished."⁶²

The Court briefly considered possible limitations on congressional power under the citizenship clause and the due process clause.⁶³ The Court conceded that the due process clause mandated higher evidentiary standards than preponderance in certain situations, such as criminal and involuntary commitment proceedings.⁶⁴ Despite its previous statements regarding the importance of citizenship, the Court found that citizenship was insufficiently important to warrant strict evidentiary protections.⁶⁵ The Court also declared that the preponderance standard was appropriate for expatriation proceedings because they "are *civil in nature* and *do not threaten a loss of liberty*."⁶⁶ Reaching back to earlier arguments in *Terrazas*, Mr. Justice White concluded that the act plus intent test represented a heavy burden and therefore the congressionally-approved preponderance standard should not be disturbed.⁶⁷

IV. AN EXAMINATION OF THE PREPONDERANCE STANDARD: ITS FUNCTION WITHIN THE ACT PLUS INTENT TEST AND PROTECTIONS FOR CITIZENSHIP

As Circuit Court Judge Sprecher perceived, a thorough analysis of the evidentiary standard in expatriation proceedings is vital to assure the effectiveness of the substantive protections afforded citizenship.⁶⁸ The Court did not provide such an analysis in *Terra-*

62. 444 U.S. at 266 (emphasis added). It is equally untenable to hold that Congress has *absolute* power. See note 61 *supra*; see note 69 *infra* and accompanying text.

63. 444 U.S. at 266.

64. *Id.*

65. *Id.*

66. *Id.* (emphasis added). The civil nature of expatriation proceedings does not necessarily dictate the use of the preponderance standard. See *Addington v. Texas*, 441 U.S. 418 (1979). Moreover, some types of expatriation proceedings have been described by the Supreme Court as having a distinct "penal character." See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). The majority's statement that expatriation proceedings do not threaten a loss of liberty also seems inappropriate. See note 69 *infra* and accompanying text. The dissenters in *Terrazas* complained that the majority's concept of liberty was tantamount to mere lack of physical confinement. 444 U.S. at 271 (Marshall, J., concurring in part and dissenting in part); *Id.* at 273 (Stevens, J., concurring in part and dissenting in part).

67. 444 U.S. at 267.

68. See 577 F.2d at 10. If intent to expatriate cannot clearly be established, then the protections provided by the Court in *Terrazas* will have no value.

zas. Instead, the Court set forth a series of defensive arguments calculated to meet points proposed by the circuit court.⁶⁹

The Court's position in support of the lower evidentiary standard was especially disturbing because it stood in stark contrast to the concern expressed for protecting citizenship earlier in the *Terrazas* opinion.⁷⁰ Although the Court declared that the intent requirement was a heavy burden,⁷¹ it failed to acknowledge that the weight of the burden would depend entirely upon the strictness of the evidentiary demands made upon the government.⁷²

A. Congressional Power over the Burden of Proof in *Expatriation Proceedings*

One reason the *Terrazas* Court was reluctant to disturb the preponderance standard was the congressional preference for that standard expressed in the INA.⁷³ The Court found that congressional power over the burden of proof came from power to enforce the fourteenth amendment.⁷⁴ The Court's mere reference to congressional power is unpersuasive. As Mr. Justice Marshall noted in his dissent, finding the grant of congressional power "is the beginning, not the end, of the inquiry."⁷⁵

The importance of the preponderance standard arises from two sources: first, the burden of proof in expatriation proceedings

69. The Court's argument was particularly unpersuasive at times. See note 66 *supra* for a discussion of the Court's statement that expatriation proceedings warrant the preponderance standard because they are "civil in nature" and do not threaten a loss of liberty. Additionally, the Court's reliance upon silence in *Afroyim* concerning the burden of proof is unsatisfying because the evidentiary standard was not an issue before the *Afroyim* Court. See notes 25-36 *supra* and accompanying text. Also, deference to congressional preferences seems inappropriate because the INA deliberations took place in Congress at a time when it was empowered to forcibly denationalize citizens through merely specifying expatriating conduct. It is unlikely that now, alerted to the lack of general congressional power to denationalize citizens and to the value of American citizenship, representatives would decide the issue of the burden of proof in expatriation proceedings the same as in 1961. Due to significant changes in the law concerning the scope of congressional power and the need to show intent to expatriate, the Court should not have relied upon the obviously outdated congressional findings.

70. See 444 U.S. at 260 ("[E]xpatriation depends upon the will of the citizen rather than on the will of Congress and its assessment of his conduct").

71. 444 U.S. at 267.

72. See notes 79-89 *infra* and accompanying text.

73. 444 U.S. at 266-67. See note 69 *supra*.

74. 444 U.S. at 266.

75. 444 U.S. at 271 (Marshall, J., concurring in part and dissenting in part). See note 69 *supra*.

may support or defeat the effectiveness of the substantive protections afforded citizenship by *Terrazas*;⁷⁶ second, the burden of proof reflects the value of citizenship to society in expatriation proceedings.⁷⁷ Congress controls this critical aspect of expatriation proceedings; by lowering or raising the burden of proof Congress can make it easier or harder to keep nationality. The circuit court reasoned that because congressional control over the evidentiary standard affects citizenship and thus exceeds the *Afroyim* limitations, the burden of proof should be determined by constitutional requirements without regard to the congressional enactment.⁷⁸

B. In Its Practical Application the Preponderance Standard Likely Does Not Prevent Unconstitutional Denationalization

The preponderance standard, used within the act plus intent test, will not likely prevent the unconstitutional, forcible denationalization of non-assenting citizens.⁷⁹ Despite the Supreme Court's statement that after the requirements of the INA have been satisfied the "question remains whether . . . the expatriating act was performed with the necessary intent to relinquish citizenship," in many instances the question, in all likelihood, will have already been answered.⁸⁰

In approving the preponderance standard, the Court did concede that intent would not be an independent evidentiary issue.⁸¹ Evidence of the expatriating conduct can be "highly persuasive" on the issue of intent.⁸² In some cases, the new intent requirement may be satisfied by the same evidence which established expatriation under the old voluntary relinquishment standard.⁸³

76. See note 32 *infra* and accompanying text.

77. The value of citizenship is also eroded by intent determined by a bare preponderance because the "standard of proof ultimately 'reflects the value society' places on the interest at stake." 444 U.S. at 272 quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979) (Marshall, J., concurring in part and dissenting in part).

78. 577 F.2d at 10. See notes 44-47 *supra* and accompanying text.

79. *Id.*; see also note 32 *supra*.

80. 444 U.S. at 270. Even though the Court mandated an additional test, the intent requirement, the actual proof needed may not have changed in some cases. Thus, the actual testimonial and physical evidence proffered in cases after *Terrazas* to establish the expatriating conduct might very well be sufficient after *Terrazas* to establish intent.

81. *Id.*

82. *Id.* at 261. See notes 87-89 *infra* and accompanying text.

83. See note 89 *infra* and accompanying text.

Due to the significant overlap between evidence of the act and evidence of intent under the low evidentiary standard, it becomes questionable whether factfinders are able to truly discern intent or are engaging in a redundant exercise.⁸⁴ The strongest evidence of intent will be outward manifestations of intent, and foremost among these is expatriating conduct.⁸⁵ Typically, the citizen confronting the expatriating conduct as evidence of intent will have difficulties in establishing the lack of intent by a preponderance of the evidence and will thus be afforded little protection under the preponderance standard.⁸⁶

The *Terrazas* Court did not sufficiently analyze the interaction of the intent requirement and the evidentiary standard. At one point, the Court declared that the acts listed in the INA cannot be conclusive indicators of denationalization.⁸⁷ The Court also recognized however, that the acts were listed in the INA as expatriating conduct because they were fundamentally inconsistent with United States citizenship.⁸⁸ Even though the Court stated that an inference of assent was not always the same thing as the person's true intent, it disregarded the difficulty in distinguishing assent from intent under the low evidentiary standard. Thus, the mere voluntary commission of an expatriating act may still establish denation-

84. *But see* 444 U.S. at 265.

85. *See* note 32 *supra* and accompanying text.

86. Consider *Terrazas* who signed the Mexican nationality certificate in order to fulfill a school requirement. The certificate expressly renounced all non-Mexican nationalities, but *Terrazas* testified that he did not intend to affect his United States citizenship by signing the certificate. Nonetheless, he was expatriated because the State Department found that the certificate was a manifestation of intent to expatriate. External factors also could have affected that determination. The advantages of Mexican citizenship during the United States draft for service in Vietnam would be a difficult problem for *Terrazas* to overcome on the issue of intent under the preponderance standard. Defendants are also confronted with the designation of certain conduct as expatriating. The finding that a person engaged in expatriating conduct, because of its label, may prejudice any case involving the loss of nationality. Again consider *Terrazas*' situation. Although there were several possible explanations for his signing of the Mexican nationality certificate, and although he was a Mexican citizen from birth, the conduct would be called expatriating once demonstrated by the government. Such labelling may severely hurt dual nationals whose actions are consistent with their other nationality. "Indeed, the opinion of the State Department once was 'that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States.'" *Kawakita v. United States*, 343 U.S. at 734-735 (footnote omitted), *quoted in* 444 U.S. at 276. *See* note 51 *supra*.

87. 444 U.S. at 261.

88. *See, id.* at 260-61.

alization because factfinders could, and likely would, find the inference of *assent* emanating from the expatriating conduct sufficient to show *intent* to expatriate by a preponderance of the evidence.⁸⁹

C. Citizenship Warrants a Higher Evidentiary Standard Than Mere Preponderance

United States citizenship will not necessarily be preserved in borderline situations.⁹⁰ This Comment proposes that United States citizenship should be preserved under such circumstances because of its value.⁹¹ United States citizenship has been described as the "right to have rights, . . . the most priceless possession. . . ."⁹² The *Afroyim* Court declared that citizenship was so valuable that Congress could not "'abridge,' 'affect,' 'restrict the effect of,' or 'take [it] away.'"⁹³ The *Afroyim* Court labelled citizenship a constitutionally protected right "with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee."⁹⁴

Citizenship has high value to both individuals and society in general. Chief Justice Warren outlined exactly what the loss of United States citizenship entails for the individual when he 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.⁹⁵

89. See note 32 *supra*.

90. See, e.g., 444 U.S. at 272 (Marshall, J., concurring in part and dissenting in part).

91. See note 93 *infra* and accompanying text.

92. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting).

93. 387 U.S. at 267, *quoted in* 444 U.S. at 275 (Brennan, J., dissenting).

94. 387 U.S. at 267.

95. *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (footnotes omitted), *quoted in* 444 U.S. at 271 (Marshall, J., concurring in part and dissenting in part).

As a practical matter, a person losing United States citizenship becomes an alien.⁹⁶ As an alien the person cannot vote,⁹⁷ hold elective office,⁹⁸ hold government jobs involving discretionary decision-making⁹⁹ or be employed as a teacher¹⁰⁰ or police officer.¹⁰¹ Aliens are prohibited from tugging United States vessels in United States waters,¹⁰² participating in intracoastal shipping,¹⁰³ being licensed to operate a radio station,¹⁰⁴ being a customs house broker,¹⁰⁵ and holding a regular commission in the United States armed forces.¹⁰⁶ In addition, if the person were to have the great misfortune not to be a dual national, he or she would become a person without a country.¹⁰⁷

Moreover, United States citizens have collective interests in the continued protection and high value of citizenship because citizenship is an embodiment of the freedoms, rights and privileges a society enjoys.¹⁰⁸ The protection afforded citizenship is a measure of how highly those rights are valued. Any threat to citizenship, including government-initiated expatriation proceedings, decreases the value of citizenship to all individuals.

Society's involvement in a given proceeding is reflected by the level of proof necessary for a factfinder to make a decision.¹⁰⁹ The

96. For a comparison of the rights of citizens and those of aliens see an unpublished paper by D. Viada on file at the *Fordham International Law Journal* office.

97. U.S. CONST., amend. XIV, § 2.

98. U.S. CONST. art. I, § 2, cl. 2.

99. *Foley v. Connelie*, 435 U.S. 291 (1978).

100. *Ambach v. Norwick*, 441 U.S. 68 (1979).

101. 435 U.S. 291 (1978).

102. 46 U.S.C. § 316 (1976).

103. 46 U.S.C. §§ 808, 883 (1976).

104. 47 U.S.C. § 310 (1976).

105. 19 U.S.C. § 1641 (1976).

106. 10 U.S.C. §§ 3285, 5571, 8285 (1976).

107. See generally note 94 *supra* and accompanying text.

108. Citizenship was not an important concept in the Constitution, but it has evolved in importance in respect to several fundamental rights including the voting franchise. At the time the Constitution was adopted, voting rights were the subject of state citizenship and were based upon landownership, sex, race and age. Such limited distribution of the franchise proved unworkable and gradually barriers were removed, except for age, so that citizenship is largely equated with the right to vote. When confronting the modern concept of citizenship as a constitutional right one must consider the evolving importance of citizenship rather than its early parameters. For varied discussions of the modern constitutional concept of citizenship, see generally, Countryman, *Justice Douglas and American Citizenship*, 15 *GONZ. L. REV.* 957 (1980); Karst, *The Supreme Court 1976 Term*, 91 *HARV. L. REV.* 1 (1977); Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 *AM. J. LEGAL HIST.* 208 (1974).

109. 444 U.S. at 272 (Marshall, J., concurring in part and dissenting in part).

evidentiary standard tells a factfinder how much confidence in the decision is needed to satisfy the community.

Considering the societal interests in expatriation proceedings, one can question whether they are accurately protected by an evidentiary standard that is generally used in ordinary civil actions involving monetary disputes among private parties where the societal interests are minimal.¹¹⁰ The possible destruction of United States citizenship under the preponderance standard also does not accurately reflect the value of United States citizenship.¹¹¹ It is difficult to accept the Court's reluctance to determine that the loss of citizenship, a constitutional right, warrants higher evidentiary protection than mere preponderance.¹¹²

V. THE CLEAR, CONVINCING AND UNEQUIVOCAL EVIDENCE STANDARD

Use of the clear, convincing and unequivocal evidence standard would insure the effectiveness of the act plus intent test, especially the intent requirement, in preventing unconstitutional denationalization. Under the clear, convincing and unequivocal standard, a citizen who had presented significant evidence of lack of intent to expatriate would not face denationalization. Also, the government could not denationalize a citizen on the basis of marginally greater evidence.¹¹³

Factfinders would more closely examine the issue of intent than they might under the preponderance standard.¹¹⁴ The clear and convincing standard would resolve borderline factual situations in favor of the preservation of United States citizenship.¹¹⁵ Under the preponderance standard, citizenship can be preserved or destroyed depending upon the delicate sway of the evidentiary balance.¹¹⁶ By favoring the preservation of United States citizenship through mandating the use of the clear, convincing and unequivocal standard, the Court would have more accurately reflected the value of that right and the privileges and duties it embodies.¹¹⁷

110. See note 9 *supra*.

111. See notes 90-95 *supra* and accompanying text.

112. 444 U.S. at 266.

113. See note 32 *supra* and accompanying text.

114. See generally notes 79-89 *supra* and accompanying text.

115. See note 90 *supra* and accompanying text.

116. *Id.*

117. Consider the comments of the justices dissenting from the *Terrazas* ruling on the evidentiary standard: "I cannot understand, much less accept, the Court's suggestion that

Historically, opinions favoring the use of the clear and convincing standard to protect citizenship have pointed to the enormous value of United States citizenship.¹¹⁸ The clear and convincing standard also would well serve expatriation proceedings of a penal character¹¹⁹ and prevent the denial of voting and other rights for politically motivated reasons.¹²⁰ Both the practical protection and the symbolic measure of value of citizenship are better served by the clear and convincing standard than by mere preponderance.¹²¹

CONCLUSION

Despite the *Terrazas* Court's action to protect citizenship, the effectiveness of the act plus intent test is undermined by the use of the preponderance standard. The intent requirement is reduced to a meaningless evidentiary issue because intent can be shown by a preponderance of the evidence merely from the assent inferred from the voluntary commission of an expatriating act. Thus, the

'expatriation proceedings . . . do not threaten a loss of liberty.' *Ante*, at 266. Recognizing that a standard of proof ultimately 'reflects the value society places' 'on the interest at stake,' *Addington v. Texas*, 441 U.S. 418, 425 (1979), I would hold that a citizen may not lose his citizenship in the absence of clear and convincing evidence that he intended to do so." 444 U.S. at 271-72 (Marshall, J., concurring in part and dissenting in part). "The House Report accompanying the 1961 amendment to the Immigration and Naturalization Act of 1952 refers to 'the dignity and the priceless value of U.S. citizenship.' H.R. Rep. No. 1086, 87th Cong., 1st Sess., 41 (1961). That characterization is consistent with this Court's repeated appraisal of the quality of the interest at stake in this proceeding. In my judgment a person's interest in retaining his American citizenship is surely an aspect of 'liberty' of which he cannot be deprived without due process of law." 444 U.S. at 273-274 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

118. See notes 13, 92-95 *supra* and accompanying text.

119. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

120. The political impact of expatriation proceedings was aptly illustrated by the repeal of certain expatriating conduct as part of the post-Vietnam amnesty program for draft evaders and deserters. See note 4 *supra*.

121. **To establish the clear, convincing and unequivocal evidence burden of proof, the preponderance standard must first be abolished.** If the Supreme Court continues to uphold the power of Congress over expatriation law, then the burden is upon Congress to recognize both the current state of the law and the lack of protection currently afforded citizenship. Congress should codify the act plus intent test set forth by the Court in *Terrazas* and mandate the use of the clear and convincing standard in all loss of nationality actions.

The same result could be obtained if the Court were willing to find Congress without absolute power to legislate in this area. The Court could then apply the clear and convincing standard in all loss of nationality cases for all evidentiary issues much as it did in *Nishikawa* some thirty years ago. The Court could avoid a sweeping rejection of congressional power by leaving the preponderance standard intact for the showing of expatriating conduct but requiring the clear and convincing standard for demonstrating the intent to expatriate.

expatriating conduct prescribed by Congress may still establish a loss of nationality. In order to make intent a meaningful, independent evidentiary issue, the clear, convincing and unequivocal evidence standard should be used. Citizenship is a constitutional right which warrants the full protection of the act plus intent test and the clear, convincing and unequivocal evidence standard in expatriation proceedings.

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