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Vance v. Terrazas Expands the Erosion of the Equal Rights of Dual Nationals

Laurence J. Terrazas, a dual national,¹ applied for a certificate of Mexican nationality using a form which provided for an express renunciation of his United States citizenship.² Terrazas applied for the certificate to satisfy a graduation requirement of a medical school in Monterrey, Mexico. He had met all other requirements for graduation and was assured by his father, a Mexican government official, that his dual nationality status would not be affected.³ The United States Department of State processed this certificate and determined that Terrazas had committed an act of expatriation, and this determination was upheld by a federal district court.⁴ On appeal, the Court of Appeals for the Seventh Circuit reversed and held that section 1481(c) of the Immigration and Nationality Act⁵ was unconstitutional. This section provides that the prosecuting party in an expatriation proceeding may prove expatriation merely by a preponderance of the evidence. The court of appeals based its decision on the "clear, unequivocal and convincing" standard of proof established in

1. A dual national is one recognized by the laws of two countries as a national of each. In the case of the United States, the second nationality is respected. Terrazas was an American citizen both because he was born in the United States (*jus soli*) and because he was born of an American parent (*jus sanguinis*). Because Terrazas' father was a Mexican citizen, under the laws of Mexico, which apply the principle of *jus sanguinis*, Mexico recognized him as a Mexican national. See generally 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 352 (1942); 2 C. HYDE, INTERNATIONAL LAW 1131-32 (2d ed. 1945); 3 J. MOORE, INTERNATIONAL LAW DIGEST 518-19 (1906).

2. It was argued by Terrazas' attorney and factually conceded by the United States Government that the blanks on the application were not filled in when Terrazas signed it. See Brief for Appellee, at 22, Vance v. Terrazas, 100 S. Ct. 540 (1980); see also Brief for Appellant, at 4 n.2.

The application Terrazas signed stated:

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, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic.

100 S. Ct. at 542 n.2.

3. Brief for Appellee, at 2, Vance v. Terrazas, 100 S. Ct. 540 (1980).

4. A national of the United States loses his nationality upon "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision thereof . . ." 8 U.S.C. § 1481(a)(2) (1976).

Interestingly, the State Department recognized Terrazas' nationality to have been affected upon the issuance of the certificate of nationality, rather than upon his signing the application for the certificate, the closest he came to taking an oath. Brief for Appellant, at 5 n.2, Vance v. Terrazas, 100 S. Ct. 540 (1980).

5. 8 U.S.C. § 1481(c) (1976).

the earlier Supreme Court case of *Nishikawa v. Dulles*,⁶ on the fact that several lower courts had applied that stricter standard,⁷ and on the reasoning that an individual's overriding interest in his citizenship required a strict standard for the showing of voluntary intent to renounce one's citizenship.⁸

The Supreme Court in *Vance v. Terrazas*⁹ reversed the Seventh Circuit and upheld the constitutionality of section 1481(c). As a result, once it has been proved by a preponderance of evidence that one has performed an act statutorily deemed expatriating, the presumption of his voluntary commission must be rebutted. While finding specific intent to relinquish one's citizenship to be a necessary element in an expatriation case,¹⁰ the Court dispelled any notion that subjective intent should play any part in the determination. Thus, the burden of proof is on the charged citizen. *Terrazas* may have ended an earlier trend to invalidate various expatriating statutes. At the very least, it has become another step in a retreat from the view that the value of citizenship is absolute.¹¹ That view arose from *Afroyim v. Rusk*,¹² an earlier Supreme Court expatriation case. In a broader sense, *Terrazas* may expand the erosion of the equal rights of all dual nationals and other nonnaturalized citizens. Lastly, since its application may leave a nonnaturalized citizen stateless, *Terrazas* is also a decision with far-reaching international implications which lacks a discussion of the international policy considerations.

In American jurisprudence, the concept of expatriation began as a recognition of the need to allow immigrants to the United States to effectively renounce their former citizenship in order to become American citi-

6. 356 U.S. 129 (1958). *Nishikawa* involved a dual national of the United States and Japan who was found to have served in the military in Japan during World War II. The expatriation section of the Code, 8 U.S.C. § 1481(a)(3) (1976), provides that a United States national will lose his nationality by "entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense . . ." The Court held that the former soldier could only be expatriated upon a showing of "clear, convincing and unequivocal" evidence of a voluntary act of expatriation. Thus, the Supreme Court established a stricter standard of proof in an expatriation case while arguing no constitutional basis for it.

7. See *United States v. Matheson*, 532 F.2d 809 (2d Cir. 1976); *Tanaka v. I.N.S.*, 346 F.2d 438 (2d Cir. 1965); *Peter v. Secretary of State*, 347 F. Supp. 1035 (D.D.C. 1972); *Cafiero v. Kennedy*, 262 F. Supp. 140 (D.N.J. 1966); *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962), *rev'd on other grounds*, 315 F.2d 673 (2d Cir. 1963), *aff'd*, 377 U.S. 214 (1964). In *Berenyi v. I.N.S.*, 385 U.S. 630 (1967), the stricter standard was also applied.

8. 8 U.S.C. § 1481(a)(2) (1976).

9. 100 S. Ct. 540 (1980).

10. *Id.* at 544.

11. See Gordon, *The Citizen and the State: Power of Congress to Expatriate American Citizens*, 53 GEO. L.J. 315, 333-38 (1965). Without directly so stating, the "absolutist view" is ascribed to in *Afroyim v. Rusk*, 387 U.S. 253 (1967). See Note, *Acquisition of Foreign Citizenship: The Limits of Afroyim v. Rusk*, 54 CORNELL L. REV. 624 (1969).

12. 387 U.S. 253 (1967).

zens. Thereafter, a corresponding right of Americans to relinquish their United States citizenship was recognized. The definition of expatriation evolved to include a statutory recognition of expatriating acts.¹³ By 1952 there were ten acts by which one could lose his citizenship.¹⁴ In 1967 the Court decided *Afroyim v. Rusk*, thereby invalidating a subsection of the Immigration and Nationality Act which provided that expatriation occurred when one voted in a foreign election.¹⁵ By that time the Court had already invalidated several other subsections of the Immigration and Nationality Act dealing with expatriation. Thus, expatriation could no longer result from such circumstances as desertion of military or naval service during time of war,¹⁶ evasion of military obligations during time of war,¹⁷ or residence of a naturalized citizen in the territory of the foreign state of his birth or former nationality.¹⁸

At the time, the *Afroyim* decision seemed to preclude Congress from defining any act as expatriating unless there was an express renunciation of citizenship by the individual.¹⁹ If Congress could not directly define an act as expatriating absent express renunciation, then how could it do so indirectly by altering the burden of proof? If by a mere preponderance of evidence an individual could be proven to have committed an act statutorily described as expatriating, would not a presumption of voluntariness limit the opportunity for the actor to offer evidence regarding his subjective intent? That is, gauged by *Afroyim*, does not any statutory presumption of intent limit the right of one to retain his citizenship by all acts other than express renunciation? Accordingly, after 1967 it was expected that the remaining expatriating statutes would be struck down by courts following the rationale of *Afroyim*.²⁰

In fact, this has not occurred. In *Kennedy v. Mendoza-Martinez*,²¹ the Court did strike down a subsection of the expatriation statute on the

13. For a history of the concept of expatriation, see Gordon, *supra* note 12, at 317-26; see also Schwartz, *American Citizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1003-13 (1975).

14. See Immigration and Nationality Act of 1952, Pub. L. No. 414, chap. 477, § 349(a)(1)-(10), 66 Stat. 267 (1952) (codified at 8 U.S.C. § 1481(a) (1976)).

15. 387 U.S. 253 (1967).

16. *Trop v. Dulles*, 356 U.S. 86 (1958).

17. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

18. *Schneider v. Rusk*, 377 U.S. 163 (1964).

19. In overruling *Perez v. Brownell*, 356 U.S. 44 (1958), the *Afroyim* Court found the government's interest in preventing embarrassment to the U.S. Government abroad whenever a U.S. citizen voted in an election in a foreign country did not provide sufficient justification for a concomitant loss of nationality by the actor unless there was attendant an express renunciation of nationality. See Black, *The Supreme Court—1966 Term*, 81 HARV. L. REV. 69, 139 (1967).

20. See Black, *supra* note 19, at 139.

21. 372 U.S. 144 (1963). *Mendoza-Martinez* invalidated a subsection of the Immigration and Nationality Act of 1952 that based expatriation on avoidance of the draft during time of war or a period of national emergency by departing from or remaining outside the United States. See Immigration and Nationality Act of 1952, Pub. L. No. 414, chap. 477, § 439(a)(10), 66 Stat. 267 (1952).

ground that it constituted a penal rather than regulatory action. On the other hand, the *Rogers v. Bellei*²² Court averted a similar determination by distinguishing Fourteenth Amendment, first sentence citizens, that is, those born in the United States or naturalized, and upholding the expatriation of any others born abroad of an American parent who do not between the ages of fifteen and twenty-seven come to the United States and reside here continuously for at least five years. The erosion of the equal right of each nonnaturalized citizen to his citizenship thus had begun, and *Terrazas* expands that erosion.

Born in this country, recognized as a dual national, Terrazas was, by virtue of an oath of allegiance to his "other" nation, deemed to have expatriated himself upon the showing of a mere preponderance of evidence that he committed the act. The Court denied the existence of an opportunity for a showing of subjective intent on his part. While he would have been allowed to rebut the presumption of voluntariness on remand, this opportunity is questionable as he had not previously raised the issue. To the contrary, Terrazas had always argued that he never intended to expatriate himself. That is, by upholding the constitutionality of section 1481(c), the Court arguably allows Congress to do indirectly that which *Afroyim* found it could not do directly. Furthermore, a separate class of "Fourteenth Amendment, first sentence citizens" may now exist. If Terrazas had not been a dual national, and had taken the "oath" described under the circumstances conceded,²³ and the Mexican Government had refused to grant him the application he sought, would the Court have ruled that he had thus expatriated himself?²⁴

Section 1481(c) became law on September 26, 1961. In assessing the legislative history of section 1481(c) it is striking to note that the purpose was "to enact evidentiary rules governing adjudication of cases arising . . . where it is claimed an act or conduct causing loss of nationality was involuntary."²⁵ The efficacy of the standard may be argued in a case where voluntariness was at issue. It was not dealt with in this case.²⁶ It is also pointed out that these rules of evidence are specifically aimed at ob-

22. 401 U.S. 815 (1971).

23. For a discussion of the distinction between "dramatic" and "dull" oaths, and the requisites of each, see Note, *supra* note 11, at 631-32. In Duvall, *Expatriation Under United States Law, Perez to Afroyim: The Search for a Philosophy of American Citizenship*, 56 VA. L. REV. 404, 438-43 (1970), the "meaningfulness" of the oath is discussed.

24. See Duvall, *supra* note 23, at 439-41, which discusses the cases of a dual national who was found not to have expatriated himself upon affirmation of allegiance to Mexico in order to secure a Mexican passport necessary for travel in connection with his law practice; and an American raised in Canada who, after taking the oath required for admission to the Canadian bar, was found not to have relinquished his American citizenship.

25. See S. REP. No. 646, 87th Cong., 1st Sess. (1961), reprinted in [1961] U.S. CODE CONG. & AD. NEWS 2984 (emphasis added).

26. As has been pointed out, Terrazas did not argue that his actions to procure the certificate of nationality were involuntary. He did argue that his subjective intent was not to expatriate himself.

viating the rules established in *Nishikawa* and *Gonzales v. Landon*,²⁷ but will "not affect the rules of evidence applicable to denaturalization cases laid down in 1943 in *Schneiderman v. United States*"²⁸ It may have been an oversight or misstatement in the legislative history, but it is difficult to understand how the less strict standard of section 1481(c) will circumvent the problem of the application of *Nishikawa* leading to "vitiating outright not only the intent of the statute . . . but doing violence to its very letter . . . by ascribing involuntariness to absences from the United States for business purposes or in order to avoid military service."²⁹ On the other hand, the State Department can and did deny a Certificate of Loss of Nationality when an individual was "naturalized in Canada in order to qualify for admission to the Quebec Bar"³⁰ Will officials responsible for expatriation proceedings ever be able to completely ignore the subjective intent of the actor? Is it arguably discriminatory or unfair to state that subjective intent is immaterial in expatriation proceedings once they reach the level of the courtroom?

The Court could have espoused cogent reasons to follow *Nishikawa* and *Gonzales* and to set forth stricter standards of proof in expatriation cases. Because *Nishikawa* was not grounded on constitutional principles, however, there is no reason to assume that Congress was absolutely free to enact the much less strict standard of proof of section 1481(c). To state that an expatriation proceeding is civil rather than criminal in nature and therefore that a stricter standard of proof is not necessary may be an exaltation of form over substance. As Mr. Justice Marshall pointed out in his dissent in *Terrazas*, the Court in *Addington v. Texas*³¹ found the "clear, convincing and unequivocal" standard of proof necessary in a case involving the commission of an individual to a mental hospital.³² Thus, one's "liberty" arguably is affected by a loss of nationality only if the Court can abide by more than the most narrow definition of liberty.

By upholding section 1481(c), the Court arguably ignored an incongruity it created. Whereas the stricter "clear, convincing and unequivocal" evidence standard exists to prove the fraudulent attainment of nationality in a denaturalization proceeding,³³ a mere preponderance of

27. 350 U.S. 920 (1950). *Nishikawa* established the "clear, convincing and unequivocal" evidence standard in expatriation cases. See note 6 *supra*. *Gonzales* equated denaturalization and expatriation proceedings.

28. See [1961] U.S. CODE CONG. & AD. NEWS, at 2984. See also *Schneiderman v. United States*, 320 U.S. 118 (1943). Further discussion of *Schneiderman* appears in note 33 *infra*.

29. [1961] U.S. CODE CONG. & AD. NEWS, at 2985. If there is an expatriation question in the matter referred to in the legislative history, it is not stated therein.

30. Duvall, *supra* note 23, at 441; PRACTICING LAW INSTITUTE, TENTH ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 379, 394 n.51 (1977).

31. 441 U.S. 418 (1979).

32. *Id.* at 432.

33. In *Schneiderman v. U.S.*, 320 U.S. 118 (1943), it was determined that the strict standard of proof was necessary because "citizenship rights are 'precious and . . . conferred by solemn adjudication,' not to be 'lightly revoked.'" (Citations omitted.) See generally Liss, *The Schneiderman Case: An Inside View of the Roosevelt Court*, 74 MICH. L. REV.

evidence standard to prove loss of citizenship in the case of a natural-born or naturalized citizen is sufficient in a determination of status proceeding involving the purported commission of an act deemed expatriating by statute. As policy, the Court may have argued that subjective intent, which is difficult of proof, should not in an expatriation case become an affirmative defense as it is in a tort case. Yet, it did not. In this writer's view, the Court should have adopted Chief Justice Warren's argument that the right involved is paramount,³⁴ and decided that to allow the less strict standard of proof was unconstitutional:

Whenever there is a radical upheaval in the Supreme Court's personnel in a relatively short time, the possibility of a retreat from the principles enunciated in a closely divided decision occurs. Such a retreat from the principles of *Afroyim* seems to [have been] implied by the Burger Court's decision in *Rogers v. Bellei*.³⁵

By the time of *Terrazas*, the "Burger Court" was missing not only Chief Justice Warren and Justice Fortas, who were in the majority in *Afroyim*, but also the late Justice Black who wrote that opinion.³⁶ As indicated by *Terrazas*, the current Court soundly rejects the earlier rationale of *Afroyim* which was extremely critical of a policy that would leave a right as fundamental as citizenship "in the hands of virtually invisible administrative bodies."³⁷ At least in the case of dual nationals, the diminution of the right of citizenship can be perceived.

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500, 551 (1976).

34. Chief Justice Warren first espoused the right of citizenship as the "right to have rights" in his dissent in *Perez v. Brownell*, 356 U.S. 44, 64 (1958), which was overruled by *Afroyim*.

35. See Schwartz, *supra* note 13, at 1020-21.

36. *Id.* at 1020 n.68.

37. See Roche, *The Expatriation Cases: "Breathes There the Man, With Soul So Dead . . . ?"*, 1963 SUPREME COURT REV. 325, 355-56 (Kurland ed. 1963).