1959 WL 101609 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Argyle R. MACKEY, Commissioner of Immigration and Naturalization, and William P. Rogers, Attorney General of the United States, Appellants,
v.
Francisco MENDOZA-MARTINEZ, Appellee.

No. 29.
October Term, 1959.
October 24, 1959.

On Appeal From the United States District Court for the Southern District of California, Northern Division

Brief of American Civil Liberties Union as Amicus Curiae

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***1 Statement of Interest**

This brief *amicus curiae* is submitted with the consent of the parties, filed with the Clerk of this Court.

The American Civil Liberties Union, a national nonprofit organization established in 1920, is committed to the inseparable purposes of preserving the democratic principles for which our government was established and to maintaining our civil liberties. Together with all Americans who prize the blessings of United States citizenship and the privileges of freedom which it brings, it seeks to guard against arbitrary deprivations of our birthrights.

***2** It believes that there has been an increasing tendency on the part of Congress, through expatriation laws, to encroach upon the right of American citizenship given to individuals under the Fourteenth Amendment to our Constitution. It submits this brief in an effort to assist the Court in its analysis of this encroachment and the constitutional problems thereby raised.

Statute Involved

The Nationality Act of 1940 as amended (54 Stat. 1137, 58 Stat. 4, 746; 8 U. S. C. 801) provided:
"Section 401. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(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."

Question Presented

Is the provision of 401(j) of the Nationality Act of 1940 decreeing forfeiture of citizenship by a native-born American who remained outside the United States to avoid military service, within the constitutional power of Congress?

Statement

Appellee, Francisco Mendoza-Martinez, born in the United States in 1922, became a citizen of the United States and of Mexico at birth. In 1942 he departed for Mexico for the purpose of evading service in the Armed Forces of the United States. His return to the United States in 1946, was followed by a conviction in 1947 upon a plea of guilty ***3** for violation of Section 11 of the Selective Service and Training Act of 1940 (50 U. S. C. App. 311). In 1953 appellee was ordered deported as an alien. This declaratory judgment action was filed in the United States District Court for the Southern District of California pursuant to 8 U. S. C. 903 to establish his claim to American citizenship. In a memorandum and order filed September 24, 1958, the District Court, following the reasoning of this Court in *Trop v. Dulles,* 356 U. S. 86, ruled that 401(j) of the Nationality Act of 1940 was unconstitutional and that the appellee was therefore entitled to a declaration of citizenship. Rejecting the contention that 401(j) was a reasonable exercise of the foreign affairs powers of Congress, the Court below said:

> "The petitioner's act in departing for Mexico for the purpose of evading training and service in the armed forces is to be condemned. It was an act for which he should have been and was punished. Such conduct, however, does not show a renunciation of his citizenship or an allegiance to a foreign power. While physically present in Mexico, the petitioner committed no act which would import a dilution of his American citizenship or which might conceivably embarrass our government. So far as the record shows, the conduct of the petitioner in Mexico was no different than the conduct of law-abiding American citizens who were lawfully in Mexico on visas or passports. It could not be contended that their physical presence there might be potentially embarrassing to the American Government. *I am unable to find any rational relationship between the power of Congress to regulate foreign affairs and the enactment by Congress of Section 401(j).*" (Emphasis supplied.)

The contention that there was a proper exercise of the war powers by Congress was likewise rejected. The Court said:
"If the plaintiff had remained in the United States and evaded service under the Selective Service and ***4** Training Act, he would have committed the same offense and would have suffered the penalty for such violation, but he would not have been subject to expatriation.

"It is my conviction that the enactment of Section 311 (50 U. S. C. App. 311) accomplished all legitimate purposes that Congress could have reasonably considered in the enactment of Section 401(j) and the war powers of Congress is extremely tenuous and ineffectively remote. *I am unable to find that the enactment of Section 401(j) could reasonably be calculated to implement war powers possessed by Congress.* (Emphasis supplied.)

"My views on Section 401(j) are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop v. Dulles.*"

The judgment of the District Court was entered on October 20, 1958, and a notice of a direct appeal to this Court, pursuant to 28 U. S. C. 1252, was filed on November 17, 1958. Probable jurisdiction was noted on March 9, 1959.

Summary of Argument

Section 401(j) of the Nationality Act of 1940 was constructed from the same mold as 401(g), which this Court found invalid in *Trop v. Dulles,* 356 U. S. 86. The Attorney General and Congress relied upon the Civil War statute of March 3, 1865 (13 Stat. 490, 37 Stat. 356) as amended, for precedent in the enactment of 401(j). House Report 1229, 78th Cong., 2nd Sess., p. 2. It likewise was the precedent for 401(g). The cases all recognize this Civil War statute as being highly penal. *Huber v. Reily,* 53 Pa. St. 112 (1866); *Kurtz v. Moffitt,* 115 U. S. 487, 501; *Trop v. Dulles,* 356 U. S. 86, 94, 108.

The specific legislative history of 401(j), moreover, reveals a distinct purpose on the part of Congress to ***5** punish the draft delinquent. Congressional leaders stated this as their objective in the debates leading to the passage of the statute, 90 *Cong. Rec.* 3261-2, 7629. The Department of Justice regarded expatriation and banishment from the United States as the proper substitute for criminal prosecution of the draft evader who absconded to foreign shores. Department of Justice Circular No. 3893, December 5, 1944, Appendix herein. In the instant case, by reason of appellee's return to the United States, appellants would visit him with expatriation, banishment and criminal punishment. However, the expatriation and banishment would be imposed not as part of the criminal conviction--because none is required under the statute--and without any of the safeguards of a civil or criminal trial.

The punishment of expatriation and banishment sought to be meted out to appellee is the naked vengeance, the prescription of reprimand without rehabilitation, which is condemned in the *Trop* case. Trop might reenlist or become reactivated during wartime and regain his citizenship [8 U. S. C. 801(g), 8 U. S. C. 1481(a)(8)]. No statutory provision exists for restoration of citizenship for the draft delinquent who has departed to avoid military service or training. He is not only expatriated but permanently barred from the United States and all his ties here. 8 U. S. C. 136(d)(1); 8 U. S. C. 1182(a)(22).

The imposition of exile and expatriation for the draft delinquent find no justification in the foreign affairs powers. Neither the history of 401(j) nor the background of this case reveal any foreign involvement, any defection to a foreign power, or any political allegiance to another country other than the law-abiding presence of a dual national in the country of one of his nationalities. There is no more reasonable relationship to the war powers in expatriating the draft delinquent than the deserter. In each case punishment is the objective rather than the raising of an ***6** army. Expatriation and exile permanently preclude the draft delinquent from changing his mind or seeing the error of his ways. Expatriation and exile of the draft delinquent is not a proper exercise of sovereignty.

Finally, since the penalty of denationalization may be imposed without a prior conviction for the proscribed conduct, Section 401(j) comes within the ban of *Huber v. Reily, supra,* and *Kurtz v. Moffitt, supra.* None of the safeguards of a criminal trial are afforded an expatriated citizen before the sanction is imposed against him. And while he is not deprived of his right to assert his citizenship in the courts of the United States, the citizen abroad who has been denationalized will either be limited to a trial *in absentia,* or must submit himself as an alien in the administrative agencies and courts of the United States with all of the disabilities which that status entails. 8 U. S. C. 1227, 1503. Although the handicaps of the expatriated citizen who is in the United States are not as severe, the initial burden is upon him to prove his citizenship, as the appellants concede (Appellants' Brief, pp. 31-32) rather than upon the Government to establish denationalization.

The expatriation of a national of the United States, in these circumstances, is a denial of due process.

Argument

Before turning to the background of Section 401 (j) of the Nationality Act of 1940 and the constitutional issues it presents, we will first review the historical development of our expatriation laws for a fuller understanding of the concepts which gave rise to those laws. It will be seen that originally an individual was denied the right to expatriate himself without the consent of his sovereign. The right to become an expatriate, without regard to the ***7** sovereign's will, was thereafter proclaimed as a natural and inherent right of all people (15 Stat. 223). However, the right was denied during wartime and was also not extended to those under twenty-one. It was also denied to our citizens as long as they remained in the United States.

With the enactment of the Nationality Act of 1940, earlier limitations were cast aside. Congress authorized expatriation in several cases without departure to foreign shores. Wartime expatriation was sanctioned as was the expatriation of persons under twenty-one. Previously, the individual fought his sovereign for the right to cast off his citizenship. After 1940, it was the sovereign who fought for the right to impose expatriation upon the individual. Originally, expatriation was the voluntary abandonment of citizenship. Now it is asserted by appellants that performance of proscribed acts, even if it does not evince attachments to a foreign government, is the renunciation of American citizenship which spells expatration. How far may the

Government proceed in compelling a native-born citizen to become an expatriate against his will, under what circumstances may it do so, and to what constitutional safeguards is the citizen entitled? These are the issues posed by this litigation.

A. The American Doctrine of Expatriation

The American colonists came to these shores with a background of English common law which included the doctrine that citizenship was immutable. Under this doctrine, no man might abjure his native country nor the allegiance which he owed his sovereign. *Coke's Littleton,* 129(a); *MacKenzie v. Hare,* 239 U. S. 299; 9 *Op. Atty. Gen.* 356. This common law principle, of course, resulted in conflicting claims to the allegiance of individuals who became naturalized under our laws. It was the subject of ***8** controversy between the United States and Great Britain,[1] between Jefferson and Hamilton[2] and between members of the judiciary of the various state courts.[3]

Thomas Jefferson, the great exponent of the theory emphasizing the rights of the individual as against those of the government, was the first American to advocate the principle of expatriation. In 1779 he drafted the Virginia law code, in which expatriation was declared to be:

> "a natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able, or may hope to find them."[4]

In 1868; Congress acknowledged that the rights of the individual prevailed over the sovereign's claim to perpetual allegiance. The Act of July 27, 1868 (15 Stat. 223) declared that "the right of expatriation is a natural and inherent right of all people."

Responding to Presidential requests,[5] the Expatriation Act of 1907 (34 Stat. 1228) defined the methods by which expatriation might be accomplished. Naturalization in a foreign state and subscription to a foreign oath of allegiance were the two recognized means of expatriation under this law. Expatriation during wartime was forbidden. ***9** The theory behind this prohibition was that in time of war "the Government should be able to control the services of every citizen, and the right of changing allegiance should not exist when the State is in peril." *House Doc. 326,* 59th Cong., 2nd Sess., p. 28. Secretary of State Fish said:

"to admit the right of expatriation, 'flagrante bello', would be to afford a cover to desertion and reasonable aid to the public enemy."

The Nationality Act of 1940, as amended (54 Stat. 1137, 58 Stat. 4, 58 Stat. 677; 8 U. S. C. 802) expanded the grounds of expatriation for native-born citizens to include foreign military service, foreign civil service, voting in foreign elections, renunciation before a consul abroad, renunciation during wartime, draft dodging, treason and desertion. Wartime expatriation was no longer barred. On the contrary, expatriation for desertion, draft dodging and by renunciation in the United States [8 U. S. C. 801(g), (i) and (j)] might only take place during wartime or a national emergency. Expatriation for desertion, treason and by renunciation during wartime [8 U. S. C. 801(g), (h) and (i)] was not dependent upon departure from the United States. Congress, however, acknowledged that "Ordinarily, departure from the country of which a person has been a national is regarded as an essential element of expatriation". *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., p. 492. The age of expatriation was reduced from twenty-one to eighteen, *Hearings, supra,* p. 492, 493. The Immigration and Nationality Act of 1952 (66 Stat. 267; 8 U. S. C. 1481) substantially reenacted the expatriation provisions of the 1940 Act. Provision is now made for the expatriation of dual nationals at birth who remain abroad for three years and claim the benefits of the foreign nationality without taking an oath of allegiance to the United States. 8 U. S. C. 1482. Under the 1952 Act violation of the Selective Training and Service Act creates a presumption that ***10** departure from the United States was for the purpose of evading the draft. 8 U. S. C. 1481(a)(10). By amendment in 1954, conviction for communist activity has been added as a ground of expatriation. 68 Stat. 1146; 8 U. S. C. 1481(a)(9).

Throughout the years, we have, therefore, steadily increased the statutory grounds for expatriation. Today, we have more stated grounds for expatriation than any other country in the world.[6] Other countries, particularly the dictatorships may be more arbitrary in depriving their citizens of their birthright.[7] We, on the other hand, have recognized that expatriation is a natural right of the individual and that it is his "voluntary renunciation or abandonment of nationality and allegiance" which is the essence of this natural right. *Perkins v. Elg,* 307 U. S. 325, 334.

B. Background of Enactment of 401 (j) of the Nationality Act of 1940

On March 3, 1865, before the right of expatriation was recognized as natural and inherent right of all people, Congress enacted a bill providing:
"That, in addition to the other lawful *penalties* of the crime of desertion * * * all persons who have ***11** deserted the military or naval service of the United States, * * * shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship * * * and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which he is enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service, duly ordered, shall be liable to the *penalties* of this section." (Emphasis supplied.) 13 Stat. 490.

In *Trop v. Dulles,* 356 U. S. 86, 89, this Court observed that the meaning of the phrase "rights of citizenship" was not entirely clear. No case was ever presented under the 1865 Act in which an attempt was made to deport a violator of its provisions.

What is clear, however, is that the 1865 Act prescribed penalties. The language of the Act so states. The first and leading case under the Act was *Huber v. Reily,* 53 Pa. St. 112 (1866) in which Judge (later Mr. Justice) Strong noted that the Act was "highly penal" and that the penalty of forfeiture of citizenship could not be imposed without providing the constitutional safeguard given the accused in a criminal proceeding. He said:

> "It (the act) means that the forfeiture which it prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by court-martial, and sentence approved."

The decision was later approved, and its result adopted by this Court. *Kurtz v. Moffitt,* 115 U. S. 487, 501. In submitting the draft of the 1940 Nationality Act to Congress, the Secretary of State, the Attorney General and the Secretary of Labor referring to Sections 1996 and 1998 of the Revised Statutes which replaced the Act of March 3, 1865, stated:
"The provisions of Sections 1996 and 1998 are distinctly penal in character." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., p. 492.

***12** In 1912 the 1865 statute was amended to make it inapplicable in time of peace (37 Stat. 356) and it remained in effect until repealed by the Nationality Act of 1940 (54 Stat. 1172).

During World War II, the Department of Justice discovered:
"that in the western district of Texas, in the vicinity of El Paso alone, there were over 800 draft delinquents recorded in the local Federal Bureau of Investigation office, born in this country and, therefore, citizens who had crossed the border into Mexico for the purpose of evading the draft * * *." *House Report 1229,* 78th Cong., 2nd Sess., p. 2.

Beset with the problem of punishing these draft delinquents, the Attorney General determined to expatriate and banish them from the United States by permanently barring their return. This would both punish such persons for their crime as well as eliminate the expense incident to criminal prosecution and the inconvenience of keeping their files open. J. P. Sharon of the

Immigration and Naturalization Service writing on *Loss of Citizenship by Draft Dodgers* in the Monthly Review of the Service for February, 1948, page 97, makes this clear:
"In the Fall of 1943, the Department of Justice took stock of the numerous cases of citizens who had registered with their local draft boards and departed from the United States. They declined to return to this country when called upon to do so. * * * By such action, these individuals sought to elude United States military service and to escape prosecution for violation of the Selective Training and Service Act of 1940 as amended. The Attorney General noted that these persons could not be extradited and that prosecutions for violation of the 'draft' act would have to wait upon the return of these draft dodgers to our jurisdiction. It was felt that such draft delinquents were unworthy of citizenship.

"In a report to Congress, the Attorney General brought the above situation to its attention and ***13** recommended legislation looking to the expatriation of such draft delinquents, as well as to their exclusion from the United States when they attempted to return. By such action, the expense incident to their prosecution for 'draft' violations would be obviated."

On February 16, 1944, the Attorney General addressed a letter to the Chairman of the Senate Immigration Committee, calling his attention to the many citizens who had left the country to avoid military service. He stated:
"While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much less worthy of citizenship than are persons who become expatriated on any existing grounds.

"Adequate precedent exists for the suggested legislation in that during the First World War a statute was in force which provided for the expatriation of any person who went beyond the limits of the United States with intent to avoid any draft into the military or naval service (37 Stat. 356)."[8] *House Report 1229,* supra, pp. 2-3.

Thus, the Attorney General invoked the "highly penal" 1865 Act (as amended in 1912) as precedent for the statute which became 401 (j) of the Nationality Act of 1940. Neither in the reports of the Immigration Committees (House Report 1229, Senate Report 1075, 76th Congress, 2nd Session) nor in the Congressional debates is a word mentioned about foreign involvements or the exercise of the ***14** war powers. On the contrary, members of Congress affirmatively indicated that punishment of the draft delinquent was the objective sought.

Chairman Dickstein of the House Immigration Committee who piloted the bill through the House of Representatives stated:
"I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who left this country knowing that there was a possibility that they might be drafted in this war * * *.

"Any man, any American, who leaves this country for the purpose of not serving in time of war is a traitor, in my judgment." 90 Cong. Rec. 3261-2.

Senator Russell, Chairman of the Senate Immigration Committee, likewise observed on the floor of the Senate (90 Cong. Rec. 7629):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country or subject themselves to the Selective Service Act, should be penalized in some measure."

From these statements, it is evident that the Congressional sponsors of the legislation were intent on punishing persons who committed the crime of draft evasion. They were not concerned with means of raising and maintaining armies or with avoidance of foreign embarrassments.

The bill became Public Law No. 431 of the 78th Congress and on December 5, 1944, the Attorney General dispatched Department of Justice Circular No. 3893 to all United States Attorneys, to the field offices of the Federal Bureau of Investigation and to the Immigration and Naturalization Service. The text of this circular is set forth in the appendix. In substance, it advised that with the enactment of Public Law 431, draft delinquents of dual nationality who ***15** had left our shores were "ineligible for reentry, either as debarred aliens or expatriates" and their cases "may be closed in the offices of the United States Attorneys and the Federal Bureau of Investigation." The circular ended:
"Where any doubt is entertained as to the disposition of any delinquency case which may fall within the purview of Public Law No. 431, the matter should be taken up with the *Criminal Division* in the Department." (Emphasis supplied.)

Thus, to avoid the expense of criminal prosecution and the inconvenience of maintaining cases in a pending status, files were closed and American citizenship was terminated.

I

Section 401 (j) imposes a punishment barred by the Eighth Amendment.

In *Trop v. Dulles,* 356 U. S. 86, this Court held that denationalization could not be inflicted as punishment for desertion, that substance rather than the form of the statute controlled, that the nature of the statute depended upon the evident purpose of the legislature, and that "denationalization as a punishment is barred by the Eighth Amendment." Mr. Chief Justice Warren observed in his opinion at pages 93-94:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of nationality for evading the draft by remaining outside the United States. * * * While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguard of an adjudication o guilt by court martial."

***16** In answer to the distinctions which appellants attempt to make between the instant case and *Trop v. Dulles,* we submit the following comments:

1. The Civil War and World War history of 401(j) is identical with that of 401(g). As this Court recognized in the case of *Trop v. Dulles,* these antecedents were highly penal and loss of citizenship, like other penalties, only followed a conviction.

2. With the codification of the Nationality Laws in 1940, the paths of the two sections parted. While expatriation was continued for deserters in 401(g), the Cabinet Committee which submitted the proposed codification to Congress omitted that section of the Act of March 3, 1865 (13 Stat. 490) which provided for expatriation of draft evaders. Although Congress enacted the Selective Training and Service Act on September 16, 1940, and adopted the codification of the Nationality Laws a month later in the same session on October 14, 1940, it did not at that time provide for the expatriation of draft delinquents.

Thus, whatever significance may attach to the fact that the "expert Cabinet Committee on which Congress quite properly and responsibly relied * * * stated that the provision in question 'technically is not a penal law' " [See *Trop,* Dissenting Opinion of Mr. Justice Frankfurter, 356 U. S. at 125 (fn. 4)] is not available here. Section 401(j), as we have noted above, became a part of the Nationality Act at the request of the Attorney General whose concern was solely to impose an additional penalty upon draft evaders. The Congressional debate reaffirmed this purpose.

The history of 401(j), therefore, as detailed above in Point B, reveals a distinct and definite Congressional purpose to punish the draft evader, even were one to assume that 401(g) had no such purpose. Extradition was not possible for draft evaders who went to foreign shores. Accordingly, in lieu of extradition and criminal prosecution ***17** in the United States, they were to be punished by denationalization and permanent exclusion from the United States. Under Section 3 of the Immigration Act of 1917, as amended [58 Stat. 746, 8 U. S. C. 136(d) (1)] and Section 212(a) (22) of the Immigration and Nationality Act [66 Stat. 184, 8 U. S. C. 1182(a)(22)], persons who have been guilty of draft dodging by departure from the United States are permanently barred from entering the United States.

The language of Mr. Chief Justice Warren, in the *Trop* case is particulary pertinent here (356 U. S. at pp. 96-97):
"If the purpose of the statute imposes a disability for the purpose of punishment--that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal.

"* * * Plainly legislation prescribing punishment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute."

The imposition of loss of citizenship for the draft evader who leaves the United States is likewise clearly a penalty.

3. Although appellee, Mendoza-Martinez, was convicted of draft evasion, such conviction is not a necessary or essential prerequisite for a finding of expatriation. See *Perez v. Brownell,* 356 U. S. 44, *Matter of C. A.,* 2 I & N Dec. 378.

4. Expatriation was not imposed herein as a consequence of the draft evasion conviction but rather as a result of the administrative finding by the Board of Immigration Appeals that appellee had departed and remained outside the United States for the purpose of evading the draft.

The crime of draft evasion as defined in the statute (50 U. S. C. App. 311) does not include all of the elements ***18** required by Section 401(j). The appellee's conviction would not support his expatriation in the event Section 401(j) provided for a criminal trial.

5. Appellants seek to avoid the application of the *Trop* case, upon the ground that appellee in the instant case is a dual national, and the fact that the relatively few litigated cases (the number of which is not disclosed) all involved dual nationals.

The short answer to this contention is that the statute applies equally to dual nationals and to citizens who possess only American nationality. (See Circular No. 3893 of the Department of Justice, reproduced in the Appendix.) For those who are not dual nationals the statute produced statelessness, with all the fears and loss of rights noted by this Court in the *Trop* case. For both the dual national and those possessing American nationality alone, the statutory scheme would visit expatriation and exile. This naked vengeance, in the words of Mr. Justice Brennan:
"* * * constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into useful paths of society, it excommunicates him and makes him, literally, an outcast." 356 U. S. 86, at 111.

As in the *Trop* case, therefore, it stretches the imagination to establish a rational relation of mere retribution to the ends purported to be served by the expatriation of the draft dodger.

6. The factor which distinguishes *Trop* from the present case reinforces our position that denationalization here violates the

Eighth Amendment as a cruel and unusual punishment. The dissenting opinion of Mr. Justice Frankfurter (*Trop,* 356 U. S. at 125) suggests that denationalization cannot be said to be a cruel and unusual punishment for an offense that is capital. If this is true, it seems clear that to impose statelessness and exile upon the appellee is ***19** indeed a punishment, and one that is cruel and vengeful, in relation to an offense for which the maximum penalty is five years confinement and $10,000 fine. (Section 11, Selective Training and Service Act of 1940, 54 Stat. 894; 50 U. S. C. App. 311.) *Weems v. United States,* 217 U. S. 329; *O'Neil v. Vermont,* 144 U. S. 323; "The Expatriation Act of 1954", 64 Yale Law Journal 1164, fn. 131 at p. 1188.

II

Expatriation and Exile of the Draft Delinquent Is Not Justified by the Exercise of the Foreign Affairs Powers

Perez v. Brownell, 356 U. S. 44, sustained the expatriation of an individual who voted in a foreign political election upon the ground that the statute was a valid exercise of the foreign affairs powers of Congress. The statutory history revealed Congressional concern over participation by Americans in the politics of foreign countries. "Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States * * *." *Hearings Before House Immigration Committee on H. R. 6127, superseded by H. R. 9980,* 76th Cong., 1st Sess., p. 491.

Unlike the legislative background of 401(e), the history of Section 401(j) discloses no concern at all by Congress or by the Executive with any impact the problems of fugitive draft evaders might have had upon our international relations. The guidance which Congress received from the Executive, and upon which it relied, came not from the State Department, which one might suppose to be its source were the problem a matter of foreign affairs (*Perez v. Brownell,* 356 U. S. 44, 56), but came rather from the Attorney General.

***20** The letter which Attorney General Biddle wrote to Congress referred to draft delinquents "who had crossed the border into Mexico for the purpose of evading the draft" but it contained no reference to any issues this may have posed for United States-Mexican relations. No suggestion at all is made that "international complications" (Appellants' Brief, p. 19) had been caused by the fugitive draft evaders. Although many of the fugitives, like the appellee, were dual nations, the question of foreign allegiance of the draft evaders was not even mentioned (H. Rep. 1229, 78th Cong., 2nd Sess., pp. 2-3).[9]

The Attorney General's sole concern, as we have observed above, was to impose a penalty upon the fugitive draft evader *in addition* to the punishment provided by the Selective Service and Training Act, *ibid.*

Appellants nonetheless argue that the "potentiality of foreign embroilment through fugitive draft evaders is not fanciful", and they suggest that the statute is reasonably related to the foreign affairs power because "the termination of citizenship terminates the (international) problem." (Appellants' Brief, pp. 22-24, citing *Perez,* 356 U. S. at 60.)

The impediment in the appellants' argument is that whatever embroilment may follow from the problem of fugitive draft evaders is neither caused by their United States citizenship nor is it solved by expatriation. The obligation to serve in the armed forces was imposed not merely upon citizens but upon "every other male person residing in the United States", within certain age limits. Selective Training and Service Act of 1940, Section 3(a); 54 Stat. 885; ***21** 50 U. S. C. App. 303(a). Cf. *McGrath v. Kristensen,* 340 U. S. 162.

The fugitive who flees the United States to escape the draft may, therefore, be a resident alien as well as a citizen. 32 Code of Federal Regulations, 611.12. International problems might well arise, as appellants suggest, if other nations became "refuges or centers for American draft evaders" (Appellants' Brief, p. 20). But the basis for protest would be the grant of refuge for draft delinquents whether citizens or not. Such does not exist here.

The possible repercussions upon United States relations with a foreign country which harbored violators of our laws would not be different if the fugitives were rumrunners (see especially *Ford v. United States,* 273 U. S. 593) or tax evaders, bank

robbers, narcotic offenders (see concurring opinion of Mr. Justice Brennan in *Trop,* 356 U. S. at 113), spies (Cf. *Rosenberg v. United States,* 346 U. S. 273), saboteurs and manufacturers of defective war material (Cf. 18 U. S. C. 2151-2156), persons who obstruct the draft or interfere with the armed forces (Cf. *Schenck v. United States,* 249 U. S. 47), plotters against friendly foreign governments (Cf. *Wiborg v. United States,* 163 U. S. 632, and *Gayon v. McCarthy,* 252 U. S. 171), or pirates (Cf. *United States v. Smith,* 5 Wheat. 153), none of whom is denationalized by flight from the jurisdiction of the United States.

The nationality of the criminal is irrelevant to the offense. So, too, is the nationality of the draft delinquent. The offender's nationality is equally irrelevant to the effect which a foreign refuge for American law violators would have upon our relations with the country which offered such refuge. Clearly, it is the harboring of violators of our laws which would impair the relations, not the grant of refuge merely to those among the fugitive offenders who happened to be United States nationals.

***22** The problem is not solved by denationalization. The fugitive draft evader is not relieved of his obligation to serve in the armed forces by his flight. Nor is he absolved of guilt for his crime, as the appellee's experience witnesses.[10]

The issue here, then, is not at all like that in *Perez,* where "termination of citizenship terminates the problem" because the expatriate's obligation to the United States is thereby dissolved and his involvement in foreign political elections is thereafter of no concern to this country. Termination of the appellee's citizenship terminates no international problem if in fact one exists. Termination of the appellee's citizenship performs one sole function-- the one which Congress and the Attorney General intended--that of imposing upon him an additional punishment.

III

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of the War Powers

We have noted in our historical summary that for many years expatriation could not take place during wartime. Secretary of State Fish feared that it would encourage desertion and aid to the enemy. Under 401(j) of the Nationality Act of 1940, instead of encouraging the citizen to return to the United States, instead of giving him another opportunity to serve his country, we denationalize and banish him forever. Under 401(g) restoration to active duty during wartime or reenlistment during wartime restored nationality. No comparable provision is made in 401(j). It is, therefore, obvious that rehabilitation was less a concern of Congress in the instant situation.

***23** The Congressional debates and the history of 401(j) indicate beyond any doubt that Congress desired to punish the draft evader. The language of Mr. Justice Brennan with regard to the deserter in *Trop v. Dulles,* 356 U. S. 109, 113, is equally applicable here to the draft evader:
"It is difficult, indeed, to see how expatriation of the deserter helps wage war except as it performs that function when imposed as punishment. It is obvious that expatriation cannot in any wise avoid the harm apprehended by Congress. After the act of desertion, only punishment can follow, for the harm has been done. * * *

"* * * it stretches the imagination excessively to establish a rational relationship of mere retribution to the ends purported to be served by the deserter. * * * As citizens we are also called upon to pay our taxes and to obey the laws, and these duties appear to me to be fully as related to the nature of our citizenship as our military obligations. But Congress' asserted power to expatriate the deserter bears to the war powers precisely the same relation as its power to expatriate the tax evader would bear to the taxing power."

Appellants' argument that Section 401(j) is valid because of "its close and direct connection with the war power" (Appellants' Brief, p. 25) is necessarily foreclosed by the decision of this Court in *Trop.* As the opinion of the Chief Justice declared, even if the statute is an exercise of war power, it must be judged as a penal law "because it imposes the sanction of denationalization for the purpose of punishing transgression of a standard of conduct prescribed in the exercise of that power." *Trop,* 356 U. S. at 97.

The contention, therefore, that expatriation of the draft evader may be sustained as a valid exercise of the war power should be rejected.

***24 IV**

Expatriation and Exile for Draft Evasion Is Not a Proper Exercise of Sovereignty

Apart from the powers to regulate foreign relations and to conduct war, the appellants seek to sustain Section 401(j) because it is said to derive from the "inherent rights of sovereignty." (Appellants' Brief, pp. 25-30.)

The Government's argument, we believe, is based upon erroneous premises. As to its first premise that the right to expatriate flows from the right to enforce military duty, the power to raise an army by conscription is not the power to denationalize an unwilling conscript, any more than the power to tax is the power to expatriate. The opinions of Mr. Chief Justice Warren and of Mr. Justice Brennan in *Trop* dispose of the contention repeated here by the appellants that denationalization here "cannot be deemed arbitrary" because the "fugitive draft evader reject(s) the highest duty of citizenship--a call to service--(and) also refuses to submit to this country's jurisdiction over him." (Appellants' Brief, pp. 28-29.)

What applies to the express war power necessarily governs the powers which are inherent in sovereignty. Section 401(j) has no greater "rational relation" (*Trop,* concurring opinion of Mr. Justice Brennan, 356 U. S. at 114) to the power of sovereignty than Section 401 (g) has to the war power.

Appellants' second premise--that "one who removes himself physically from the jurisdiction of the country in order to elude the grasp of our law * * * terminates the contract" (of citizenship)--(Appellants' Brief, p. 29), is rebutted by the footnote on page 27 of their brief (Footnote 18, citing *Blackmer v. United States,* 284 U. S. 421), as well as by their citation of *Kawakita v. United States,* 343 U. S. 717, 736, in which it was said: "An American ***25** citizen owes allegiance to the United States wherever he may reside."

The power which the Federal Government concededly has to compel citizens abroad to return to the United States "whenever the public interest requires it" (*Blackmer v. United States,* 284 U. S. 438), derives from the principle that the United States retains jurisdiction over its absent citizens.[11] The United States has the power to serve process over citizens abroad and can require them to attend its courts whenever properly summoned (*ibid*). As its ultimate power, the United States can enforce its penal laws against its citizens for violations of its laws (*ibid.* See also *United States v. Bowman,* 260 U. S. 94, 102). Cf. Section 11, Selective Training and Service Act (54 Stat. 894; 50 U. S. C. App. 311) which provides for imprisonment for not more than five years or a fine of not more than $10,000, or both.

In a word, the United States national who resides abroad is never "wholly beyond its jurisdiction and power." (Appellants' Brief, p. 34.) The severance of allegiance of a citizen is, therefore, not at all a recognition of any lack of power of the sovereign over the fugitive draft evader, as suggested by the appellants, but is, as described by Mr. Justice Brennan, nothing more than naked vengeance.

Moreover, the legislative history of Section 401(j) refutes appellants' contention. In his letter to the Chairman of the Senate Immigration Committee the Attorney General stated that:
"If and when they (draft delinquents) return to this country, it would seem proper that in addition (to the penalties under the Selective Training and Service Act) they should lose their citizenship." (*House Report 1229, supra,* page 2.)

***26** If expatriation is determined *if and when the draft evaders return to the United States* it cannot be argued that the United States is then without power over fugitive draft evaders.

Indeed, appellants concede that the initial determination that a national has been expatriated "will often be made by the Executive Branch, when it seeks to deport him as an alien illegally in the country, or to exclude him from entering the country (if he is outside), or to deny him a passport or some other right available to citizens". (Appellants' Brief, p. 31.) Thus, the nationals whom the government seeks to expatriate not only have not "eluded the grasp of our law", but they are within the direct control of various agencies of the Executive Branch. Appellants' argument that Section 401(j) is a valid exercise of the inherent power of sovereignty cannot be sustained.

V

Section 401(j) Violates Procedural Due Process

It has been noted that Section 401(j) "decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed". (*Trop,* Opinion of Mr. Chief Justice Warren, 356 U. S. at 94.)

The appellants, in response, concede as true that an administrative agency can determine that a citizen is guilty of draft evasion and has been expatriated, but maintain that the claimant to citizenship is not harmed because he is "entitled to bring a declaratory judgment action to establish his citizenship". (Appellants' Brief, p. 31.)

Even were this a complete statement of an expatriated citizen's procedural rights, it is clearly no substitute for the requirements which due process impose before a citizen of the United States may be denationalized.

***27** *Huber v. Reily, supra,* which this Court approved in *Kurtz v. Moffitt, supra* (see *Trop,* concurring opinion of Mr. Justice Brennan, 356 U. S. at 108), requires a trial and conviction upon the charge of desertion before expatriation can be imposed. The force of this opinion was recognized by the Cabinet Committee which proposed the enactment of 401(g), and that provision accordingly provided that expatriation could take effect only following a conviction. Codification of Nationality Laws, H. R. Comm. Print, Pt. I, 76th Cong., 1st Sess.

If due process requires that the deserter be convicted before he may be denationalized, no less can be required for the draft evader[12] Significantly, although appellants argue that 401(j) does not violate due process, nowhere in their brief do they seek to distinguish the present case from *Huber v. Reily.* The principle of the *Huber* case, having received the gloss of approval of this Court as early as 1885 in *Kurtz v. Moffitt, supra,* and direct approval in *Trop,* and the imprimatur of Congress when it enacted 401(g), must apply equally to an expatriation under Section 401(j).

Apart from this fundamental defect in Section 401(j), the citizenship claimant's rights in a declaratory judgment proceeding are not protected as fully as the appellants suggest. (Appellants' Brief, pp. 31-32.)

First, it should be noted that Section 503 of the Nationality Act of 1940, 54 Stat. 1137, 1171, 8 U. S. C. 903, was repealed by Section 403(a) (41) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 280, 8 U. S. C. 903. ***28** Therefore, unless the right of the citizen to bring a declaratory judgment action under that statute has been preserved by the savings clause of the latter statute, 66 Stat. 405, 8 U. S. C. 1101 [Cf. *Dulles v. Richter,* 246 F. 2d 709 (C. A. D. C. 1957); *Junso Fujii v. Dulles,* 224 F. 2d 906 (9th Cir., 1955)], Section 503 actions are no longer available to citizenship claimants.

This is especially significant for the expatriated citizen who is outside of the United States. While the declaratory judgment procedure is still available to the citizenship claimant under the general Declaratory Judgment Act, 28 U. S. C. 2201, and a review of an agency decision is available under the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. 1009 [see *Frank v. Rogers,* 253 F. 2d 889 (C. A. D. C. 1958), and *Tom Mung Ngow v. Dulles,* 122 F. Supp. 709 (D. C. 1954)], neither of these remedies assure to the national abroad, who has been ruled expatriated by administrative decision, the right to come to the United States and to appear personally in a judicial proceeding to enforce his claim. (Cf. *Rosasco v. Brownell,* 163 F. Supp. 45 (E. D. N. Y. 1958) and cases cited at 50-55.)

An expatriated citizen's right to appear in a court in the United States to testify in support of his nationality derives at present from the provisions of Section 360(b) of the 1952 Act, 66 Stat. 163, 273, 8 U. S. C. 1503. The issuance of a certificate of identity to enable the expatriated citizen to be admitted to the United States is there conditioned upon submitting "proof to the satisfaction of [a] diplomatic or consular officer that such action was instituted in good faith and upon a substantial basis * * *" (*supra*). Thus, the very ability to appear in a court in the United States to prove citizenship is made dependent upon satisfying the consular officer who has expatriated the citizen that the claim is "substantial". At present there is a division in the lower courts whether action lies to compel the Secretary of State to issue a certificate of ***29** identity to an expatriated citizen. Cf. *Dulles v. Lung,* 212 F. 2d 73 (9th Cir. 1954), and *Ling v. Dulles,* 119 F. Supp. 513 (D. C. 1954) (action does not lie), with *Sing v. Dulles,* 116 F. Supp. 9 (E. D. N. Y. 1953); *Avina v. Brownell,* 112 F. Supp. 15, 19 (S. D. Tex. 1953); *D'Argento v. Dulles,* 113 F. Supp. 933, 937 (D. C. 1953) (action lies if the refusal is arbitrary or capricious). Even the view most favorable to the expatriated citizen, however, accords the claimant only a review of the administrative refusal, which, needless to say, offers the expatriated citizen far less protection than either an absolute right to appear in court, or a *de novo* determination of his right to appear.

If the expatriated citizen should be unsuccessful in obtaining entry into the United States to testify on his own behalf, the result is the very "spectacle of a trial *in absentia*" which the appellants deplore (Appellants' Brief, p. 32).

But this is not all. If we assume that the expatriated citizen is able to obtain a certificate of identity, what then are his rights? They are set forth at Section 360(c) of the Act, *supra:*

> "A person who has been issued a certificate of identity under the provisions of subsection (b) and while in possession thereof, may apply to the United States at any port of entry, and shall be subject to all the provisions of this Act 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 and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States."

***30** The expatriated citizen, contrary to appellants' assertion, is not there entitled to a declaratory judgment action. Whether his habeas corpus proceeding entitles him to a *de novo* determination of his claim to citizenship, although appellee welcomes the present concession of the Solicitor General (Appellants' Brief, p. 31), has not yet been firmly settled by this Court. Cf. *United States v. Ju Toy,* 198 U. S. 253, and *Tang Tun v. Edsell,* 223 U. S. 673, with *Ng Fung Ho v. White,* 259 U. S. 276. Compare also *Medeiros v. Watkins,* 166 F. 2d 897 (2nd Cir. 1948) with *Carmichael v. Delaney,* 170 F. 2d 239 (9th Cir. 1948).

But not even this problem is the end of the expatriated citizen's difficulties. Appellants admit (Appellants' Brief, p. 31) that even in a *de novo* trial, the plaintiff has the initial burden of establishing "the fact of his having been a citizen". Thus, at the very threshold of his case the expatriated citizen, whether abroad or in the United States, like the appellee, is met with a burden, which is upon the Government in all other judicial proceedings involving loss of citizenship. Cf. denaturalization proceedings, *Schneiderman v. United States,* 320 U. S. 118, 158; *Baumgartner v. United States,* 322 U. S. 665, 675; *Nowak v. United States,* 356 U. S. 660, 663; *Maisenberg v. United States,* 356 U. S. 670, 672.

In bald words the national who has been expatriated for draft evasion without any prior conviction, without any final sanction by a court, must nonetheless, if he seeks to maintain his right to citizenship, submit himself to the jurisdiction of the courts and agencies of the United States as though he were an alien. If he is an expatriated citizen outside the United States, his posture is that of an alien seeking admission to this country for the first time. Cf. *Shaughnessy v. Mezei,* 345 U. S. 205.

It is said that the "alien in this country has very substantial rights and privileges." (*Trop,* dissenting opinion, ***31** Mr. Justice Frankfurter, 356 U. S. at 127.) This may be so, but they are not the rights and privileges which are accorded to citizens as this Court has declared repeatedly from *Fong Yue Ting v. United States,* 149 U. S. 698, to *Harisiades v. Shaughnessy,* 342 U. S. 580, and *Galvan v. Press,* 347 U. S. 522.

What is perhaps more relevant is that whatever rights and privileges aliens may have in this country, this Court, with the exception of its decision in *Chew v. Colding,* 344 U. S. 590, from *United States v. Ju Toy, supra,* to *Shaughnessy v. Mezei, supra,* and *Leng Ma May v. Barber,* 357 U. S. 185, has held, although closely divided, that due process is what Congress says it is for aliens who are not "in the United States".

The United States citizen, who has been denationalized "by the initial determination" of an administrative agency, may therefore, like Mezei, *supra,* be held in detention and afforded no constitutional guaranty of due process at the threshold of the United States, while attempting to vindicate his right to citizenship. It scarcely need be argued that a citizen in such a posture is not able to protect his rights fully. Unlike an accused criminal in the United States, he is not even assured the right to make bail. His proceeding to enforce his claim to citizenship may, in these circumstances, become an empty form. If the slate of this Court in regard to decisions affecting aliens is "not clean" (*Galvan v. Press,* 347 U. S. at 531) there seems little justification for eroding the rights of citizens of the United States by marking them down upon the slate which the decisions of this Court have hitherto reserved for aliens.

For the reasons we have given we believe that Section 401(j) is invalid on its face as a violation of the due process clause of the Fifth Amendment. *Stromberg v. California,* 283 U. S. 359. *Lovell v. Griffin,* 303 U. S. 444.

***32 CONCLUSION**

The appellants seek, in effect, to reargue the case of *Trop v. Dulles,* 356 U. S. 86, which has recently been the subject of two presentations to this Court. Upon the authority of that case, equally strong, if not stronger, considerations should lead to the invalidation of 401 (j) of the Nationality Act of 1940.

Appendix not available.

Footnotes

1 The impressment of British seamen who had become Americans was one of the causes of the War of 1812. *II Richardson, Messages and Papers of the Presidents,* p. 485.

2 *Tsiang, The Question of Expatriation in America Prior to 1907,* p. 28. Hamilton believed that the right of expatriation would encourage desertion and was, therefore, subversive of government. *IV Works of Alexander Hamilton,* p. 256.

3 *Tsiang, supra,* pp. 69-70.

4 *Tsiang, supra,* pp. 25-56.

5 See annual messages of Presidents Grant, Cleveland and Theodore Roosevelt in 1873, 1884, 1885 and 1904. *Richardson, Messages and Papers of the Presidents,* Vol. VII, pp. 239, 291, Vol. III, p. 336, Supp. 2 (Lewis), p. 851.

6 Under the 1952 Immigration and Nationality Act (8 U. S. C. 1481, 1482) there are twelve stated grounds for the expatriation of native-born citizens. Most foreign countries recognize foreign naturalization as a ground of expatriation. Only Liberia and the Philippines appear to recognize the taking of a foreign oath as a basis for expatriation. Andorra alone authorized expatriation for participation in a foreign election. Only four countries (Bulgaria, Greece, Poland and Turkey) sanction expatriation upon the

ground of draft evasion. *Laws Concerning Nationality* (United Nations Legislative Series, 1954).

7 In the Union of the Soviet Socialist Republics expatriation may be decreed by order of the Presidium of the Supreme Council. *Laws Concerning Nationality, supra,* p. 463.

8 Identical language was employed in a letter of the Attorney General to the Director of the Bureau of the Budget on September 18, 1944.

9 In contrast to the State Department and Congressional silence on any international implications arising from the flight of fugitive draft delinquents between 1940, when the Nationality Act went into effect, and 1944, when Section 401(j) was enacted, both the Secretary of State and Congress directed attention to other aspects of the Selective Training and Service Act which did have international repercussions. Cf. *Moser v. United States,* 341 U. S. 41.

10 Appellee, in the Government's view then an alien, was prosecuted and convicted for violation of the Selective Training and Service Act following his return to the United States.

11 This is to be distinguished, of course, from the power of extradition which goes to the relation of the United States to a foreign government rather than to a citizen abroad, *supra,* at page 21.

12 It should be noted that appellee's conviction under Section 11 of the Selective Training and Service Act could be solely for "evad(ing) registration or Service" in the armed forces, whereas, the expatriating conduct under 401(j) is for "departing from or remaining outside of the jurisdiction of the United States in time of war * * * or national emergency for the purpose of evading or avoiding training and service." Cf. 54 Stat. 894 with 58 Stat. 746.