Return of the Native?
An Assessment of the Citizenship Renunciation Clause in Hamdi’s Settlement Agreement in the Light of Citizenship Jurisprudence

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I would like to thank Professor Margaret Taylor of the Wake Forest faculty for her thoughtful comments and suggestions for earlier drafts of this article, and Kevin McHugh and the staff of the Northern Illinois Law Review for their hard work and assistance. This article is dedicated to the United States and the American people, who have offered me every opportunity, and for which I remain ever grateful.
I. INTRODUCTION

On October 10, 2004, Yasser Hamdi was put aboard a chartered jet that plucked him from a navy brig in Charleston, South Carolina, and took him to his family in Dammam, Saudi Arabia. The agreement that put Hamdi on the flight ended a three year saga that had taken Hamdi from the dusty battlefields of Afghanistan to a Northern Alliance prison, the Joint Terrorism Taskforce detention center at Guantánamo Bay, a naval brig in South Carolina, and even to the United States Supreme Court.

The Justice Department explained that Hamdi no longer posed a threat to the United States, and that his potential as an intelligence source had been tapped out. Hamdi’s attorney, Federal Public Defender Frank W. Dunham, disagreed, believing that the impetus for the release came from an order from Federal District Judge Robert G. Doumar, who had ordered a hearing to enquire into the circumstances and justification for Hamdi’s continued detention.

This paper focuses on a single issue in Hamdi’s release. Part of the settlement agreement required Hamdi to report to an American consular official in Saudi Arabia within a week of his arrival in the kingdom and renounce his American citizenship. Hamdi appears to have complied with the requirement. This paper analyzes whether this clause — apparently unparalleled in American legal history — is valid and enforceable in the light of the Supreme Court’s citizenship jurisprudence. In other words, can the “native” return should he ever choose to? Is the clause enforceable, and does it matter? I conclude that Hamdi could return in the unlikely event he

5. Markon, supra note 1.
8. E-mail from David Cole, Professor of Law, Georgetown University, to Author (Jan 25, 2006, 22:51:01 EST) (on file with author) [hereinafter Cole].
wanted to, that the clause is unenforceable, and that, constitutionally, the stakes could hardly be higher.

This paper begins by exploring the broad contours of American citizenship jurisprudence and the Supreme Court's protective attitude toward it. In particular, it notes that though the Court has been careful to stress that naturalized citizens are not second-class citizens, the very possibility of denaturalization renders native-born citizenship, such as Hamdi's, more secure. Next, it explores the stringent tests established by the Supreme Court that the government must meet to strip an American of their citizenship by examining the landmark Supreme Court decisions in this area.

"The history of denationalization and expatriation in the United States shows a movement toward prohibiting the government from revoking citizenship unless the citizen himself manifests an intention to terminate citizenship." This burden is illustrated in the next section by evaluating the renunciation cases that appear to come closest to Hamdi's situation: the mass renunciations of American citizenship by some Japanese-Americans ("Nisei") at the Tule Lake internment camp in World War II.

Since these cases hinge largely on the circumstances of the renunciations, the paper next examines what is known about the conditions of the detention facilities at Guantanamo and Charleston, S.C., where Hamdi would have been held. It evaluates his likely state of mind by extrapolating from available accounts of observers. And it assesses the legal backdrop under which Hamdi made his decision.

It then concludes that under Supreme Court precedent, Hamdi surrendered his citizenship under a high degree of compulsion. Therefore, the renunciation is not valid. This does not mean that he is innocent of wrongdoing, or that the government erred in acting against him. It does mean, however, that he is still an American citizen.

10. Schneider v. Rusk, 377 U.S. 163, 165-69 (1964); Afroyim v. Rusk, 387 U.S 253, 267-8 (1967) (noting that it is "completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship").


12. The government has been able to successfully prosecute American citizens fighting for the Taliban in the regular criminal justice system, a fact that Justice Scalia found extremely significant. See Hamdi v. Rumsfeld, 542 U.S. 507, 561 (2004) (Scalia, J., dissenting) (citing United States v. Lindh, 212 F. Supp. 2d 541 (E.D.Va. 2002)). Justices Scalia and Stevens also identified at least fourteen statutes that either Hamdi or Lindh could have been charged with. Hamdi, 542 U.S. at 560-62. See also Jared Perkins, Note, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYU J. PUB. L. 437, 470 (2005); Frank Dunham, *Where Hamdi Meets Moussaoui in the*
II. BACKGROUND: Citizenship or the Right to Have Rights

"[T]his priceless right [U.S. citizenship] is immune from the exercise of governmental powers."

—Chief Justice Warren

Though the tone of some judicial analysis injected an element of dubiousness to his claim, the Supreme Court and most commentators did not question Hamdi's status as an American citizen. Hamdi was a citizen by virtue of the Fourteenth Amendment to the United States Constitution which states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." Hamdi's birth in Louisiana thus made him an American citizen.

War on Terror, 53 Drake L. Rev. 839, 845 (2005) (offering Hamdi's explanation for his presence in Taliban-controlled Afghanistan, subsequent capture by the Northern Alliance and transfer to U.S. custody). It must be noted that U.S. citizens can also be detained without charge in peculiar circumstances, albeit probably not indefinitely. See United States v. Salerno, 481 U.S. 739, 748 (1987) (holding that state interest in public safety can outweigh an individual's liberty interest in times of war, and the government may detain individuals whom it believes to be dangerous). See also Moyer v. Peabody, 212 U.S. 78, 84-85 (1909) (upholding the preemptive arrest of a labor leader during strife. "Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power.").


16. See, e.g., Pnina Lahav, The Republic of Choice, the Pledge of Allegiance, the American Taliban, 40 Tulsa L. Rev. 599, 623 (2005) (noting that the Supreme Court could have easily upheld Mr. Hamdi's detention by insisting that his claim to citizenship was impaired" but chose not to do so).

17. U.S. Const. amend. XIV § 1. The Amendment was enacted in the post-Civil War context for reasons far removed from immigration jurisprudence. See generally Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights (1986). Some scholars have challenged the notion that the Amendment confers citizenship to all children born on American territory, but the idea appears to be
Once acquired by birth, the loss of citizenship generally requires some affirmative action.\(^\text{19}\) During World War II and the immediate post war era, Congress enacted a number of statutes designating actions\(^\text{20}\) that would entail loss of U.S. citizenship.\(^\text{21}\) These statutes inevitably triggered a spate of constitutional challenges,\(^\text{22}\) which eventually led to the severe circumscription of the government’s ability to strip any American of U.S. citizenship.\(^\text{23}\) Sensitive to the constitutional underpinnings of citizenship as outlined by the Supreme Court, Congress wrote the current expatriation statute\(^\text{24}\) to expressly require that “a citizen can only lose his citizenship if he performs an expatriating act voluntarily with the intent to relinquish United States citizenship.”\(^\text{25}\)

Therefore, though the Supreme Court jurisprudence was once strongly deferential to Congress in determining which actions would trigger loss of citizenship,\(^\text{26}\) constitutional jurisprudence since \textit{Afroyim v. Rusk},\(^\text{27}\) has severely restricted governmental ability to involuntarily revoke U.S. citizenship.\(^\text{28}\) Justice Black, writing for the Court in \textit{Afroyim}, explained that under the Constitution, “the people are sovereign and the Government firm

\begin{footnotes}
\footnotetext{22}{Graham, supra note 11, at 598.}
\footnotetext{23}{See e.g., Trop v. Dulles, 356 U.S. 86, 104 (1958) (finding loss of citizenship for wartime desertion unconstitutional); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (invalidating Section 349(a)(10) of the Nationality Act of 1952, which imposed loss of citizenship for leaving the United States during wartime to avoid military service); Schneider v. Rusk, 377 U.S. 163, 168 (1964) (striking down section 352(a)(1) of the Immigration and Nationality Act of 1952, imposing loss of citizenship for a naturalized citizen who resided continuously for three years in their country of origin).}
\footnotetext{24}{See 8 U.S.C. § 1481(a) (2003).}
\footnotetext{25}{Graham, supra note 11, at 599 (citing 8 U.S.C. § 1481(a) (2003)) (emphasis added).}
\footnotetext{26}{See T. Alexander Aleinikoff, \textit{Theories of Loss of Citizenship}, 84 MICH. L. REV. 1471, 1478 (1986).}
\footnotetext{27}{387 U.S. 253 (1967).}
\footnotetext{28}{See Trop v. Dulles, 356 U.S. 86, 99-101 (1958) (stating that denationalization is prohibited as criminal sanction by the Eighth Amendment's bar on cruel and unusual punishment). See also Aleinikoff, supra note 26, at 1495 (arguing that when a state “strips an individual of her citizenship, it may well be tearing the self apart”).}
\end{footnotes}
cannot sever its relationship to the people by taking away their citizenship." 29 Such a severance power could not be found even in the attributes of national sovereignty, or in the power to conduct foreign affairs. 30

Justice Brennan later observed that Afroyim "held unequivocally that a citizen has 'a constitutional right to remain a citizen... unless he voluntarily relinquishes that citizenship.' " Furthermore, Afroyim required that "the only way citizenship... could be lost was by the voluntary renunciation or abandonment by the citizen himself.' " 31 This is premised on the constitutional view that "citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers." 32 Afroyim pointedly underlined this, specifically stating that the Fourteenth Amendment explicitly protected American citizens from the "forcible destruction" of their citizenship through Congressional action. 33

Therefore, having had the good fortune to be born in Louisiana, the only way Hamdi could lose his citizenship was if he voluntarily renounced it. Consequently, under Afroyim, a hypothetical future challenge by Hamdi to reclaim his citizenship would hinge almost entirely on the question of whether his renunciation of citizenship was truly voluntary. This is a question of fact, and must be determined by looking to the circumstances of the case. 34

III. LOSS OF CITIZENSHIP JURISPRUDENCE: "MORE PRIMITIVE THAN TORTURE" 35

Though Hamdi is apparently the first native born citizen ever asked to surrender his citizenship for national security reasons, 36 the Supreme Court previously addressed the ability of the government to denaturalize a citizen for unsavory political activities in Schneiderman v. United States, 37 the

30. Id.
32. Trop, 356 U.S. at 92. But see Aleinikoff, supra note 26 at 1494-95 (noting that under the Afroyim conception of citizenship as a "cooperative affair," people as citizens are "constituted by, and constitutive of, the society in which they are raised").
34. Afroyim, 387 U.S. at 267-68 (to determine whether citizenship has been voluntarily relinquished, one must look to the facts of each case).
35. Trop, 356 U.S. at 101 (noting that deprivation of citizenship "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development").
37. 320 U.S. 118 (1943). For an excellent analysis of the Schneiderman decision, including an assessment of Congressional efforts to strip alleged terrorists of U.S.
RETURN OF THE NATIVE?

It is hard to overstate the importance of the Schneiderman decision. David Fontana argues that in its practical impact on the evolution of the nation, Schneiderman belongs with the other giants of the constitutional pantheon along with Marbury v. Madison, McCulloch v. Maryland, Dred Scott v. Sandford, Plessy v. Ferguson, Brown v. Board of Education, and Roe v. Wade. Such was the gravity of the case that Republican Presidential nominee Wendell Wilkie argued – pro bono – on Schneiderman’s behalf before the Supreme Court.

Schneiderman had come to the United States at the age of three, and became a citizen approximately twenty years later. Both before and after his naturalization, Schneiderman was active in Communist Party activities, running for Governor of Minnesota as the Party’s candidate in 1932. He insisted that his communist beliefs were not incompatible with respect for the constitution, and professed a willingness to bear arms against his native Russia if necessary.

For its part, the Government alleged, and the lower courts agreed, that Schneiderman’s political beliefs were incompatible with the requisite attachment to the constitution required for naturalization, and that furthermore, his naturalization had been obtained by willful concealment of his beliefs and activities. At argument, Solicitor General Fahy pointed out that Schneiderman was not only a member of the Communist Party, but an “intellectual revolutionary” who held leadership positions in the famously disciplined communist movement.

The government’s position had proven persuasive at trial, and indeed “gained traction” with several Justices. However, the Court had granted citizenship, see Charles H. Hooker, Comment, The Past as Prologue: Schneiderman v. United States and Contemporary Questions of Citizenship and Denationalization, 19 EMORY INT’L L. REV. 305-381 (2005).


39. Id. at 68-69.

40. Hooker, supra note 37, at 322; see also Fontana, supra note 38, at 45.

41. Schneiderman, 320 U.S. at 125.

42. In being a Russian-born communist of German Jewish extraction in World War II, Schneiderman’s identity lay at the confluence of many of the era’s prejudices. See Fontana, supra note 38, at 42-43.

43. Schneiderman, 320 U.S. at 127.

44. Id. at 127-128.

45. Id. at 121-122, 129.

46. Id. at 147 (quoting Brief for the United States at 25-26). See also Hooker, supra note 37, at 323.

47. Hooker, supra note 37, at 321, 323.
certiorari because it recognized its potentially momentous impact on "freedom of thought." Against this backdrop, the Court held that because the stakes of citizenship were so high, its loss could only be countenanced with "the clearest sort of justification and proof"—evidence so "clear, unequivocal and convincing" that it could not leave "the issue in doubt." In Schneiderman's case, the Court found the government had failed to carry its burden; therefore, he retained his citizenship.

Though concerns about Schneiderman's lecturing and writing socialist tracts may strike us as anachronistic or even quaint compared to the contemporary threat of terrorist annihilation, these opinions result from hindsight. Hooker notes that "the Schneiderman Court treated the threat of Communism extremely seriously." The case was decided during some of the fiercest fighting in World War II, and the Court noted that the principles Schneiderman subscribed to were "distasteful to most of us." Analogously, the threat from international terrorism is high, and the principles that Hamdi might espouse (he has chosen to remain silent) as a potential member of the Taliban would be distasteful to most Americans. Nevertheless, under the Schneiderman rationale, defense of Hamdi's U.S. citizenship would be even more critical than Schneiderman's because he was a native born, not naturalized citizen. Schneiderman's citizenship was challenged because of an alleged defect in the underlying naturalization process, but the Court believed defense of political rights outweighed the import of the defect. Though Hamdi's political views are equally repugnant, the government has not pointed to an analogous defect in his citizenship acquisition.

"If the Court had decided Schneiderman the other way, it would have been likely that millions more Americans would have been deported, and many more in the future might not have come to the United States, knowing how easily they could be deported for advocating 'un-American' ideas." Even if an undertone of exaggeration is perceptible in Professor Fontana's rhetoric, his basic argument is unassailable. As Justice Rutledge pointed

48. Schneiderman, 320 U.S. at 119.
49. Id. at 122.
50. Id. at 158.
51. Schneiderman, 320 U.S. at 160-61.
52. See e.g., Bill Maher, When You Ride Alone You Ride With Bin Laden passim (2005).
53. Hooker, supra note 37, at 321 n.68.
54. Schneiderman, 320 U.S. at 136.
56. Fontana, supra note 38, at 70.
out, a citizen at risk of deportation would be forced to exercise ceaseless vigilance with respect to his association and speech: "His best course would be silence or hypocrisy. This is not citizenship."\(^{57}\)

This underlying rationale to Schneiderman – that "rights once conferred should not be lightly revoked"\(^{58}\) – is equally applicable to Hamdi, however venal his crimes, as to any "undesirable other."\(^{59}\) In words that ring as true today as they did during World War II, the Court stressed that the very nature of the right of U.S. citizenship required exacting a heavy burden of proof from the government:

Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times. Those are consequences foreign to the best traditions of this nation and the characteristics of our institutions.\(^{60}\)

If the Schneiderman Court was concerned about the imposition of hypocrisy on naturalized citizens by penalizing them for their political views by detecting flaws in their naturalization, it is a vastly greater concern that native born citizens not be required to choose between apparently endless imprisonment and their citizenship. The fact that those concerns cannot be ignored despite active hostilities was confirmed by a unanimous Supreme Court in \textit{Baumgartner v. United States},\(^{61}\) handed down a year after Schneiderman. Baumgartner established that Schneiderman represented the rule, not the aberration in citizenship cases.\(^{62}\)

Carl Wilhelm Baumgartner was a naturalized American citizen of German descent who appears to have gone out of his way to antagonize his American peers by extolling the virtues of Hitler and Nazism and celebrating German invasions in Europe.\(^{63}\) He bemoaned the lack of militancy among German-Americans and indicated that he would be proud to live

\(^{57}\). \textit{Schneiderman}, 320 U.S. at 167 (Rutledge, J., concurring).
\(^{58}\). \textit{Schneiderman}, 320 U.S. at 125.
\(^{59}\). Some scholars argue that measures against foreign "undesirables" invariably migrate to the larger body politic. \textit{See}, \textit{e.g.}, DAVID COLE, \textit{ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM} 85 (2003) ("Virtually every significant government security initiative implicating civil liberties—including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention—has originated in a measure targeted at noncitizens.").
\(^{60}\). \textit{Schneiderman}, 320 U.S. at 159.
\(^{61}\). 322 U.S. 665 (1944).
\(^{62}\). \textit{Id.} at 670-71.
\(^{63}\). Hooker, \textit{supra} note 37, at 331.
under Hitler. 64 When asked by the trial court if he had harbored these sentiments at the time he took his citizenship oath, he affirmed that this had been the case. 65 Nevertheless, at the height of the combat effort in World War II, the Supreme Court reversed the district court and the Eighth Circuit’s decisions to revoke Baumgartner’s citizenship. 66 The Court underlined that even this outspoken Nazi 67 was entitled to stringent protections before being deprived of his citizenship. 68

Justice Frankfurter, who had dissented in Schneiderman, wrote the opinion in Baumgartner. 69 Stressing that “[n]ew relations and new interests flow, once citizenship has been granted,” 70 the Court said that “citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired.” 71

Justice Murphy’s concurrence was even more explicit: “American citizenship is not a right granted on a condition subsequent that the naturalized citizen refrain in the future from uttering any remark or adopting an attitude favorable to his original homeland or those there in power, no matter how distasteful such conduct may be to most of us.” 72

If these citizenship rights were sacrosanct for naturalized citizens who appeared to present a threat at the height of World War II, they must carry equal gravity for citizens such as Hamdi in the War on Terror. This comparative historical context is helpful in evaluating the current threat of Hamdi-terrorism with the contemporary threat of Schneiderman/communism and Baumgartner/Nazism.

64. Id.
65. Id.
66. Lewis Woods, High Court Upsets Convictions in Two Appeals on Civil Liberty: Basic Rights of Individual Despite Charges of Disloyalty are Upheld in Hartzel and Baumgartner Cases, N.Y. TIMES, June 13, 1944, at 21. See also Hooker, supra note 37, at 332.
67. Baumgartner, 322 U.S. at 667-68:
Evidence of statements made by Baumgartner over a period of about seven years beginning in 1933 indicated oft repeated admiration for the Nazi Government, comparisons between President Roosevelt and Adolf Hitler which led to conclusions that this country would be better off if run as Hitler ran Germany, “that regimentation, as the Nazis, formed it (sic) was superior to the democracy,” and that “the democracy of the United States was a practical farce”. One witness of German extraction testified that Baumgartner told him he was “a traitor to my country” because of the witness’s condemnation of Hitler.
68. Id. at 676-77.
69. Schneiderman, 322 U.S. at 665.
70. Id. at 675.
71. Id. at 676.
72. Id. at 679 (Murphy, J., concurring). See also Hooker, supra note 37, at 333.
Commentators have pointed out that proposed citizenship loss legislation, suggested to deal with the current threat of terrorism, might founder on the constitutional rocks of Schneiderman and Baumgartner. It is instructive that the Supreme Court continues to cite Schneiderman in immigration cases. The next section analyzes the implications of applying the doctrine to loss of citizenship litigation for both native born and naturalized citizens.

IV. NATURALIZED OR NATIVE: SECOND CLASS OR THE BITTER BREAD OF BANISHMENT

A. PERPETUAL FEAR: NATURALIZED CITIZENS

"To lay upon the citizen the punishment of exile for committing murder, or even treason, is a penalty thus far unknown to our law and at most but doubtfully within Congress' power."

In analyzing Schneiderman and its progeny, it is important to note that they pertain to denaturalization proceedings, and thus, by definition, to naturalized citizens. Justice Rutledge protested that the very ability of naturalized citizens to lose their status creates precisely what Schneiderman was supposed to guard against: "two classes of citizens in this country, one secure in their status and the other subject at every moment to its loss by proceedings not applicable to the other class."

In an earlier case, Knauer v. United States, concerning the denaturalization of a Nazi against a factual backdrop very similar to Baumgartner, Justice Rutledge had opposed the very possibility of denaturalization as creating an inferior class of citizens: "any process which takes away [naturalized citizens'] citizenship for causes or by procedures not applicable

73. H.R. 5440, 107th Cong. §1 (2d Sess. 2002). See also Hooker, supra note 37, at 310.
74. See Fontana, supra note 38, at 64-68 (arguing that Schneiderman needs to be taught in the constitutional canon as a case of judicial independence in wartime: "Schneiderman was by any measure an act of bold judicial independence, resisting executive wartime efforts in the middle of a war."). Id. at 68. "One year later, the Court prevented the denaturalization of a proclaimed Nazi, citing Schneiderman." Id.
78. Id. at 619 (Rutledge, J., concurring).
to native-born citizens places them in a separate and inferior class."\textsuperscript{80} Opposing the existence of a denaturalization power,\textsuperscript{81} he wrote:

\begin{quote}
In my opinion the power to naturalize is not the power to denaturalize . . . . Otherwise there cannot but be two classes of citizens, one free and secure except for acts amounting to forfeiture within our tradition; the other, conditional, timorous and insecure because blanketed with the threat that some act or conduct, not amounting to forfeiture for others, will be taken retroactively to show that some prescribed condition had not been fulfilled and be so adjudged.\textsuperscript{82}
\end{quote}

With urgency as applicable to Hamdi today it was for the "thorough-going Nazi . . . Paul Knauer"\textsuperscript{83} in 1946, he warned that "if one man's citizenship can be thus taken away, so can that of any other."\textsuperscript{84} He argued that "[u]nless it is the law that there are two classes of citizens, one superior, the other inferior," the citizenship status of all should be unassailable once conferred.\textsuperscript{85} The alternative would be to create citizenship "with strings attached," with the naturalized citizen always on tender-hooks at the possibility of having their status revoked due to a retroactive change in the law.\textsuperscript{86}

The majority in the Knauer Court agreed that extreme caution was warranted in proceeding against naturalized citizens, lest the good faith exercise of citizenship rights, such as unpalatable free speech, be used to deprive the naturalized citizen of their rights.\textsuperscript{87} "Ill-tempered expressions, extreme views . . . are not to be given disloyal connotations in absence of solid, convincing evidence that that is their significance."\textsuperscript{88} The only alternative would be antithetical to the American constitutional ethos "and make denaturalization proceedings the ready instrument for political persecutions."\textsuperscript{89}

\begin{flushleft}
\textsuperscript{80} Id. at 677 (Rutledge, J., dissenting).
\textsuperscript{81} The unconstitutional nature of denaturalization is a striking and recurring motif in Justice Rutledge's writings. See, e.g., Schneiderman v. United States, 320 U.S. 118, 165-170 (1943) (concurring opinion); Knauer, 328 U.S. at 675-679 (1946) (dissenting opinion).
\textsuperscript{82} Knauer, 328 U.S. at 678 (Rutledge, J., dissenting).
\textsuperscript{83} Id. at 675.
\textsuperscript{84} Id. at 676.
\textsuperscript{85} Id. at 677.
\textsuperscript{86} Id. at 677-78.
\textsuperscript{87} Knauer, 328 U.S. at 658.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\end{flushleft}
Nevertheless, explicitly sidestepping "the question of what limits there may be to conditions for denaturalization which Congress may provide" the Supreme Court found for the government.90 Underscoring the fact specific nature of denaturalization analysis, they reiterated the heavy Schneiderman and Baumgartner burdens, but held that while the government had failed to meet the high burden of proof in those cases, it had met the burden in Knauer.91 The key distinctions were factual:

The character of the evidence, the veracity of the witnesses . . . the corroboration of challenged evidence presented by the Government, the consistent pattern of Knauer's conduct before and after naturalization convince us that the . . . standard of proof, not satisfied in either the Schneiderman or Baumgartner cases, is . . . met here92

It is striking that the factual backdrops of Baumgartner and Knauer were very similar: both involved outspoken Nazis with apparently fanatical devotion to Hitler. Yet, Baumgartner found for the citizen during the trauma of World War II, but in peacetime Knauer found for the government. Therefore, the Schneiderman requirement of "clear, equivocal and convincing" evidence "which cannot leave the underlying issue in doubt" poses a high, but not insurmountable burden.93 Perhaps as a reflection of Schneiderman echoes through the ensuing years, though Congress has replaced the high Schneiderman standard with respect to expatriation proceedings,94 it has not disturbed this standard for denaturalization cases.95

B. THE EXILE: THE POSSIBILITY OF STATELESSNESS AND EXPATRIATION PROCEEDINGS

Though the Supreme Court has emphasized the value of citizenship for native born and naturalized citizens alike -- "Citizenship obtained through naturalization is not a second-class citizenship"96 -- its "opinions suggest the right of citizenship is more precious for native-born citizens."97 While the Court has held that there can be no differentiation between native born

90. Id. at 673.
91. Knauer, 328 U.S. at 660.
92. Id.
96. Knauer, 328 U.S. at 658.
and naturalized citizens in expatriation proceedings, the very possibility of denaturalization renders native-born citizenship more secure.

Justice Stevens notes that for “the nativeborn citizen [U.S. citizenship] is a right that is truly inalienable. For the naturalized citizen, however, Congress has authorized a special procedure that may result in the revocation of citizenship.” Nevertheless, naturalized citizens have two advantages: they are likely to at least have another nation to turn to upon losing their U.S. citizenship. The native born citizen may have nowhere to go. Second, expatriation proceedings tend to have the evidentiary deck stacked against the citizen far more than denaturalization proceedings, as governed by Schneiderman and its progeny.

1. Banished: People Without A Country

Alluding to one case, Professor Heyman wrote that “the spectacle of the person without a country is deeply troubling.” If the Hamdi agreement sets a precedent for the loss of citizenship in terror prosecutions for native-born citizens, the future could conceivably present the specter of such troubling spectacles. The plight of the stateless has recently broached American popular consciousness with a popular Tom Hanks movie using the issue as a plot device.

The problem of the stateless is not that they are “deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever.” Their plight “is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants

103. THE TERMINAL (DreamWorks SKG 2004). For an analysis of the movie, see A. O. Scott, An Emigre’s Paradise Lost and Found, N.Y. TIMES, June 18, 2004, at E1 (noting statelessness is “a kind of living death, a nerve-racking state of perpetual limbo”). For an account of the odyssey of Mehran Nasseri, the real life inspiration for the movie, see Craig S. Smith, 16 Years on an Airport Bench, and 15 Minutes of Fame, N.Y. TIMES, Aug. 21, 2004 at A4.
even to oppress them." For these reasons, international humanitarian law strongly discourages statelessness, a fact that the Supreme Court has alluded to in its citizenship jurisprudence. Tragically, notwithstanding the posture of international humanitarian law, the United Nations estimates that hundreds of thousands of people worldwide are stateless.

The Supreme Court has not been oblivious to the historical overtones of loss of citizenship as analogous to banishment and the constitutional dilemma this poses. In Delgadillo v. Carmichael, it held that deportation, presumably a lower burden than statelessness, is "the equivalent of banishment or exile." Other federal courts have held that banishment is prohibited as cruel and unusual punishment. Judge Augustus Hand declared that such banishment was a "dreadful punishment, abandoned by the common consent of all civilized peoples ... cruel and barbarous" and a "national reproach." Indeed, the Romans considered banishment worse than "taking poison or the gentle death in a hot bath with a cut artery."

Justice Douglas contended that the Founders were familiar with banishment and deliberately withheld the power from the federal govern-

105. Id. Professor Arendt may have been too sanguine. See Paul Lewis, U.N. Sending Envoy to Aid Burmese Refugees, N.Y. TIMES, Mar. 19, 1992, at A7 (recounting "a campaign of torture, killing and forced evictions by the Burmese Army" against its Rohingya minority, which it insists are not Burmese citizens. "Myanmar’s junta maintains that the Rohingyas are not ethnic Burmese and asserts that those fleeing to Bangladesh are really illegal immigrants without official identity papers. But many of those crossing the border say the army forcibly confiscated their papers before expelling them."). See also Edward A. Gargan, Even Bleak Bangladesh is a Haven to Muslims Fleeing the Burmese Army, N.Y. TIMES, Feb. 7, 1992, at A6.

106. CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 11.3e (Supp.1990). See also Heyman, supra note 102, at 410.


110. Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962).

111. United States ex rel. Klonis v. Davis, 13 F.2d 630, 630-31 (2d Cir. 1926). See also Lupe S. Salinas, Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause, 22 B.U. INT’L L. J. 245, 246 (2004) ("In many respects, deportation can be viewed as a punishment that is more severe than confinement because removal from home, family, and country can mean permanent exile, in some cases to a country the deportee may have never actually known.").

112. HANS VON HEN'TIG, PUNISHMENT 198 (1973).
Justice Stevens believed that the loss of citizenship was "tantamount to exile or banishment . . ." The Supreme Court has recognized the possibility of statelessness in its own citizenship jurisprudence: "The stateless person may end up shunted from nation to nation, there being no one obligated or willing to receive him . . ." Even Congress has alluded to the parallels.

At least one state court has found that a condition of probation entailing banishment from the United States was unconstitutional as a violation of equal protection and due process requirements. Further, at least fifteen states have explicit constitutional prohibitions on the use of banishment as a punishment. Such provisions might strike the reader as anachronistic, deriving from ancient fears of Biblical scenes of banishment into the burning sands of the desert, or the plight of the medieval exile, rather than from modern American jurisprudence.

Any such smugness would be misplaced; however, it is instructive that less than half a century ago, some Southern states actively explored the possibility of using banishment to deal with their civil rights problems. Native American tribes continue to experiment with the use of banishment as a punitive measure. The fact that modern jurisprudence continues to wrestle with this seemingly antiquated issue is an indicator that stripping citizens of their U.S. citizenship is more than an arcane issue.

113. Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) ("History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely . . . they gave to this government no general power to banish.").
115. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("An expatriate who, like Cort, had no other nationality becomes a stateless person - a person who not only has no rights as an American citizen, but no membership in any national entity whatsoever.").
116. Id. at 161.
121. Sarah Kershaw & Monica Davey, Plagued by Drugs, Tribes Revive Ancient Penalty, N.Y. TIMES, Jan. 18, 2004, at 1 (noting Native American tribes use of banishment, and deeming it "severe" and "excessive").
122. See, e.g., State v. Doughtie, 74 S.E.2d 922, 923 (N.C. 1953) (holding that no North Carolina court has the power to pass a sentence of banishment); Weigand v. Commonwealth, 397 S.W.2d 780, 781 (Ky. 1965) (declaring that the court has no power to
2. **Burden of Proof**

The Supreme Court has held that the Fourteenth Amendment is "most reasonably . . . read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it."\(^{123}\) Indeed, early in the nation's history, many Congressmen doubted whether citizenship could be given up at all, even voluntarily.\(^{124}\) Against this backdrop, the Court has indicated that the "fundamental right of citizenship is secure" as long as a person does not voluntarily renounce or abandon his citizenship.\(^{125}\)

The problem is that the *Afroyim* decision and its progeny never demarcated the contours of what constituted voluntary assent.\(^{126}\) The Court did suggest that the determination of voluntary assent required a factual determination and that it was within the power of Congress to provide rules of evidence to indicate assent.\(^{127}\) Visiting the issue in *Vance v. Terrazas*, which pertained to a native born U.S. citizen of Mexican ancestry who had renounced but then sought to regain his U.S citizenship, the Court held that "*Afroyim* imposed the requirement of intent to relinquish citizenship on a party seeking to establish expatriation."\(^{128}\) However, *Vance* went on to hold that voluntary relinquishment could be inferred from the performance of a designated expatriation act.\(^{129}\)

If the government did establish that an expatriation act had occurred, it could presumably be voluntary, unless the expatriating citizen proved otherwise.\(^{130}\) Congress has designated a list of such actions that will lead to the loss of citizenship absent some other factor.\(^{131}\) Some lower courts have gone further than *Vance* and required an element of intent along with

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order exile as an alternative to imprisonment); State v. Charlton, 846 P.2d 341, 343 (N.M. Ct. App. 1992) (holding that the court could not enter even a consensual decree of banishment).


124. See *James*, supra note 19, at 872 (noting that early expatriation bills were defeated on this basis).


129. *Id.* at 270.

130. *Id*.

voluntary performance of the expatriating act.\(^\text{132}\) This seems to be closer to the language of the statute than *Vance*.\(^\text{133}\)

The Supreme Court has not yet determined whether the government can strip citizens of their citizenship for voluntarily performing an expatriation act while simultaneously avowing their intention of retaining their U.S. citizenship.\(^\text{134}\) Nevertheless, when faced with this issue, at least one court has found that the expressed intent to retain American citizenship controls.\(^\text{135}\) Therefore, a hypothetical suit by Hamdi to regain his citizenship would operate in the *Vance* burden-shifting framework.

If the government could prove that he had performed the expatriating act – in this case renouncing his citizenship – then its voluntariness and hence efficacy is presumed unless he could prove otherwise. Duress would void any expatriating act, but it is an affirmative defense that would have to be proved by the party alleging duress, in this case Hamdi.\(^\text{136}\)

The question of his citizenship would thus hinge on the voluntariness of his action. Since he has renounced his citizenship to a consular official, an expatriating act under the statute,\(^\text{137}\) he would have to prove duress.\(^\text{138}\) To determine whether he could prove duress, the next section examines circumstances where the courts have evaluated renunciations to determine whether sufficient duress underlies the decision to void the renunciation.

V. THE VIEW FROM TULE LAKE

At the same time that *Schneiderman* was working its way through the courts, the federal government had incarcerated thousands of West Coast Japanese Americans in internment camps. Some of the internment cases would eventually generate jurisprudence that is perhaps the most closely analogous to Hamdi’s renunciation. Many of these originated at Tule Lake Camp in Northern California where thousands of Japanese Americans...
renounced their U.S. citizenship in the final months of World War II and then sought to regain it on the ground that they had renounced under duress. The Tule Lake internees, their spouses, parents, and children, as opposed to the internees at the other camps, were those who had answered a “loyalty questionnaire” incorrectly. Consequently, they were considered the “worst of the worst,” or the most suspect internees among the entire Japanese American West Coast population.

“Within the Tule Lake Camp, discontent was much higher and the Camp officials were much harsher in their administration than the other nine camps.” Perhaps as a consequence, the Tule Lake facility was racked by strikes, demonstrations, and finally, military occupation. As the war wound down and the government announced the closure of the camps, many of the internees, embittered by their experiences and shaken by rumors concerning alleged reprisals and atrocities against Japanese Americans leaving the internment camps, found themselves at the end of their tether.

The Renunciation Act of 1944 seemed to offer an avenue of safety; internees believed it might be their only option to keep their families


140. Neil Gotanda, Race, Citizenship, and the Search for Political Community among “We the People,” 76 OR. L. REV. 233, 243 (1997) (“There were two critical ‘loyalty’ questions on the registration questionnaire, one involving the willingness to serve in the armed forces and the second asking for allegiance to the United States and renunciation of any allegiance to Japan … Internees, distrustful of authorities who had just completed their incarceration, resented the implication that they had previously been loyal to Japan. For first generation immigrants, racially barred from becoming American citizens, ‘yes’ answers threatened loss of Japanese citizenship, which would have left them state-less. Those failing to answer the two critical questions in the proper manner were labeled ‘disloyal.’ Most of these so-called ‘disloyal’ persons, along with their spouses, children and parents were transferred to the Tule Lake Camp in California, near the Oregon border.”).

141. Id.

142. Id.

143. Id.

144. Id.

145. Id. at 244. See also John Christgau, Collins Versus the World: The Fight to Restore Citizenship to Japanese American Renunciants of World War II, 54 PAC. HIST. REV. 1, 19 (1985) (citing the case of an internee who hammered her child to death, as well as slave labor and secrecy “as evidence of the atmosphere of fear and terror out of which renunciation emerged”).

together and avoid violence from a hostile American public.\textsuperscript{147} Passed while over a hundred thousand Japanese Americans were still interned, the "Act was intended to facilitate a final resolution of the Japanese-American problem by allowing ethnic Japanese to 'voluntarily' choose to renounce American citizenship."\textsuperscript{148} Until December 1944, there had been only 600 applications for the renunciation of U.S. citizenship.\textsuperscript{149}

The closure of the camps and the prospect of an uncertain future beyond its fences "changed attitudes."\textsuperscript{150} Some Japanese militarists were happy to shed their unwelcome allegiances.\textsuperscript{151} But most of the applications "came from the panicked reaction of the troubled Tule Lake Camp residents."\textsuperscript{152} The applicants believed that their actions would enable them to "keep their families together, stay in Tule Lake, and avoid the draft."\textsuperscript{153} Many soon realized the repercussions of their actions, and, even before the end of the war, sought to reverse their applications, by "pleading duress, hysteria, and temporary insanity."\textsuperscript{154}

An unsympathetic Justice Department rebuffed the withdrawal efforts,\textsuperscript{155} designated the renunciants enemy aliens under the Alien Act of 1798, and declared that they were to be deported.\textsuperscript{156} Large-scale deportations were only averted at the last minute, largely due to the efforts of a single attorney, Wayne Collins.\textsuperscript{157} The renunciation cases eventually culminated in two significant cases: \textit{Acheson v. Murakami}\textsuperscript{158} and \textit{McGrath v. Abo}\textsuperscript{159} both came before the Ninth Circuit.\textsuperscript{160}

The \textit{Acheson} Court found that the treatment of the renunciants effectively stripped them of an intelligent choice, and this element of coercion

\begin{itemize}
\item \textsuperscript{147} Christgau, supra note 145, at 6 (noting conviction that in order to "stay in the security of the Tule Lake Center, renunciation was necessary").
\item \textsuperscript{148} Gotanda, supra note 140, at 242.
\item \textsuperscript{149} Id. at 244.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Gotanda, supra note 140, at 245.
\item \textsuperscript{155} Christgau, supra note 145, at 26 (noting that the government acknowledged that "parental pressure, mass hysteria, and fear of deportation had created 'neuroses' at Tule Lake" but "insisted that it had not sought to 'entrap' the renunciants").
\item \textsuperscript{156} Gotanda, supra note 140, at 245.
\item \textsuperscript{157} Id. To reflect the atmosphere in which the cases would have been litigated, one account indicates that an FBI agent offered to go through Collin's trash to alert the Justice Department to his litigation strategy. \textit{See} Peter Irons, \textit{Justice at War} 197 (1983). There is no indication that the Justice Department accepted the offer. \textit{Id.}
\item \textsuperscript{158} 176 F.2d 953 (9th Cir. 1949).
\item \textsuperscript{159} 186 F.2d 766 (9th Cir. 1951).
\item \textsuperscript{160} Gudridge, supra note 139, at 82-83.
\end{itemize}
voided their renunciations. 161 Further, *McGrath* held that the treatment of the Tule Lake renunciants created a rebuttable presumption that they had acted under duress, but it offered the government a chance to overcome the presumption by evaluating each case on its merits. 162 Chief Judge Drennan of the Ninth Circuit would later explain the *Acheson* decision in one of its progeny, *Fukumoto v. Dulles*: 163

American officers . . . treated the Nisei as “outcasts” in the full sense of that word. They were cast out of their homes for over two years, their families often separated, with a huge loss of property sold under the evacuation pressure of from one to ten days notice, and they had destroyed their businesses, their established professions and the earning power of mechanics and laborers. Over four thousand such Nisei under pressure of that outrageous treatment gave up their citizenship. We held . . . that such acts of denaturalization were involuntary. 164

The key seems to have been that the deprivations of the internment regime, particularly at Tule Lake, 165 were so intense that the applications could not be voluntary. 166 Again, in *McGrath*, Chief Judge Denman seemed to highlight the difficulty of the circumstances at the time of the renunciations as undercutting the voluntariness, and thus the legal effectiveness, of the renunciation:

The evidence . . . shows the oppressive conditions prevailing there [at Tule Lake] were in large part caused or made possible by the action and inaction of those government officials responsible for them during their internment. Because of the oppressiveness of this imprisonment by the

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161. *Acheson*, 176 F.2d at 954 (“Underlying all the particular factors so found as leading to a condition of mind and spirit of the American citizens imprisoned at Tule Lake Center, which make the renunciations of citizenship not the free and intelligent choice of appellees, is the unnecessarily cruel and inhuman treatment of these citizens (a) in the manner of their deportation for imprisonment and (b) in their incarceration for over two and a half years under conditions in major respects as degrading as those of a penitentiary and in important respects worse than in any federal penitentiary, and (c) in applying to them the Nazi-like doctrine of inherited racial enmity . . . .”).

162. *McGrath*, 186 F.2d at 773.

163. 216 F.2d 553, 554 (9th Cir. 1954).

164. *Id*.

165. DONALD E. COLLINS, NATIVE AMERICAN ALIENS 126 (1985); Gotanda, *supra* note 140, at 244 n.40 (“In the summer of 1944 Tule Lake had become Hades.”) (quoting Richard Drinnon, Keeper of Concentration Camps (1987)).

government officials, a rebuttable presumption arises as to those confined at Tule Lake that their acts of renunciation were involuntary.\textsuperscript{167}

"The oppressiveness of this imprisonment" in the case of Hamdi is evaluated in the next section. It is pertinent, however, that Chief Judge Denman's view of the circumstances of internment and their consequent effect on the validity of renunciations came to be widely accepted. By 1959, of the 5,766 Japanese Americans who had renounced their citizenship, 5,409 had sought to have it restored. Of these, 4,987 ultimately succeeded.\textsuperscript{168}

A. CIRCUMSTANCES LACKING DURESS

[T]he cases make it abundantly clear that a person's free choice to renounce United States citizenship is effective whatever the motivation. Whether it is done in order to make more money, to advance a career or other relationship, to gain someone's hand in marriage, or to participate in the political process in the country to which he has moved, a United States citizen's free choice to renounce his citizenship results in the loss of that citizenship.\textsuperscript{169}

The Tule Lake cases do not mean that the act of renunciation is one that can be taken lightly. The Ninth Circuit noted that it would not "accept a test under which the right to expatriation can be exercised effectively only if exercised eagerly."\textsuperscript{170} In\textit{ Abo}, Chief Judge Brennan noted the Supreme Court's admonishment in\textit{ Savorgan v. United States}\textsuperscript{171} that "the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress."\textsuperscript{172}

\textit{Savorgan} concerned an American citizen who had married an Italian diplomat.\textsuperscript{173} She could not secure the royal blessing for her wedding without becoming an Italian citizen and renouncing her U.S. citizenship.\textsuperscript{174} She did so but later sought to regain her citizenship, claiming that her

\begin{thebibliography}{99}
\bibitem{167} McGrath, 186 F.2d at 773.
\bibitem{168} Christgau, supra note 145, at 30.
\bibitem{169} Richards v. Sec'y of State, 752 F.2d 1413, 1421 (9th Cir. 1985).
\bibitem{170} Id.
\bibitem{171} 338 U.S. 491 (1950).
\bibitem{172} Savorgan v. United States, 338 U.S. 491, 502 n.18 (quoting Doreau v. Marshall, 170 F.2d 721, 724 (1948)).
\bibitem{173} Savorgan, 338 U.S. at 494.
\bibitem{174} Id.
\end{thebibliography}
marital situation created undue stress. The case eventually reached the Supreme Court, which found the renunciation to be sufficiently voluntary to be valid.

Similarly, in *Jolley v. INS*, the plaintiff had moved to Canada to avoid the draft and renounced his citizenship. In denying his subsequent efforts to retrieve his citizenship by claiming that he had renounced under duress, the Fifth Circuit held that he could not rely on dislike of the Selective Service laws to argue that he had labored under a degree of compulsion so extreme as to constitute duress: "Dislike for the law does not in and of itself compose coercion; subjective detestation cannot be metamorphosed into duress." 

Finally, in *Kahane v. Sec'y of State*, the plaintiff had surrendered his U.S. citizenship in order to be eligible to take a seat in the Israeli Parliament. The plaintiff argued that he had acted under compulsion, and he characterized Israeli law as holding "a gun to my head." The court found that the desire to further his political career was insufficient to constitute duress: "Plaintiff had the chance to consider the several options and make a choice. Renouncing his American citizenship may have been difficult, but he did so voluntarily." Therefore, the mere fact that Hamdi found his situation unpleasant is insufficient to constitute duress. In terms of the *Kahane* analysis, the key issue is whether he had sufficient options to constitute a meaningful choice. The availability of choices is what makes the renunciation voluntary and, hence, effective.

B. CIRCUMSTANCES REFLECTING DURESS

There does not appear to be a Supreme Court case finding a citizen renunciation void due to undue duress. However, in *Savorgan* the Court, with apparent approval, listed several that met the requisite threshold in for sufficient undue duress to void the underlying renunciation. The facts of these cases – *Dos Reis v. Nicolls*, *Schioler v. United States*, and *In re Gogal* – presumably delineate the contours of the "duress doctrine." For

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175. Id.
176. Id. at 502.
178. Id. at 1250.
180. Id. at 1167.
181. Id.
183. 161 F.2d 860 (1st Cir. 1947).
184. 75 F. Supp. 353 (N.D. Ill. 1948).
instance, the plaintiff in *Don Reis*, Joao Camera had potentially lost his U.S. citizenship after enlisting in the Portuguese Army. He had been told that the only alternative to conscription was a concentration camp. The court held that his actions were insufficiently voluntary to constitute a valid renunciation.

Similarly, Andrew Gogal, the citizen in *Gogal*, was drafted into the Czech Army under analogous circumstances. The trial court determined that he had acted out of compulsion and thus remained a U.S. citizen. Finally, in *Schioler*, the plaintiff, Marie J. Periolat, had applied for Danish citizenship during World War II to protect her family during the Nazi occupation of Denmark; the occupation and the desire to protect her family was held to constitute sufficient duress to enable her to retain her citizenship.

Other cases on point seem to reflect the *Savorgan* requirement of a high degree of deprivation and lack of a meaningful choice. For instance, *Takehara v. Dulles* held that a citizen who had voted in a Japanese election because he feared that the only alternative was loss of his ration card and consequent famine had acted under a compulsion. Therefore, he had not effectively expatriated himself. Similarly, *Fukumoto v. Dulles* dealt with a “reverse Tule-Lake” scenario; the citizen was residing in Japan at the outbreak of World War II and renounced his Japanese citizenship in September 1941. However, finding himself trapped in Japan by the war, he sought and retrieved his Japanese citizenship in 1943, an act that the government contended cost him his U.S. citizenship. As an American he had been harassed by the police and had his ration and clothing allowances slashed. Drawing the parallels to the Tule Lake experiences, and, noting that the courts had restored the

186. 161 F.2d at 861.
187. Id.
188. Id. at 865-66.
190. Id. at 271.
192. Id. ("Where an American citizen finds himself and his family, as Paul Schioler did, in a theatre of war, their safety threatened, facing the gravest of dangers, even possible death or internment, and in this extremity ... makes application for foreign citizenship in an effort to preserve the lives and safety of his family ... I am of the opinion that under such circumstances the joinder of the wife is not such a voluntary renunciation or abandonment of her nationality as to forfeit her American-born citizenship.").
193. 205 F.2d 560, 561 (9th Cir. 1953).
194. Id.
195. Id. at 562.
196. 216 F.2d 553, 553 (9th Cir. 1954).
197. Id. at 553-54.
198. Id. at 555.
citizenship of Japanese Americans who had renounced under analogous pressure, the Ninth Circuit restored his citizenship stating, "it is well in cases of human motivation of people of other races that we consider our own psychology." 199

Finally, in *Doreau v. Marshall*, 200 the plaintiff claimed that her application for foreign citizenship was intended to forestall internment in a concentration camp. 201 The Appeals Court held that proof of duress would be a complete defense: "No case has been called to our attention nor have we found any which holds that duress is not a defense [to alleged loss of U.S. citizenship]." 202 It therefore remanded the case for a trial court deliberation of the facts. 203

C. CITIZEN HAMDI: A DURESS ANALYSIS

The pivotal question for Hamdi, therefore, appears to be on which end of the Savorgan spectrum he falls. Was he, like Mrs. Savorgan, making a deliberated decision to suit his convenience? Or, like the Tule Lake and the World War II renunciants, was he under so much compulsion that he could plausibly reclaim his citizenship down the road? The question is necessarily one of fact—a "totality of the circumstances" test based on an individualized assessment of his situation.

That the final determination is fact intensive is underscored by the different outcomes of cases that appear to differ only at the margins in their facts. In *Stipa v. Dulles*, the plaintiff accepted employment with the Italian police in the aftermath of World War II, an act that would have constituted renunciation at the time. 204 He argued that his dire financial straits and the absence of work in post war Italy meant that he had acted under economic compulsion and duress should void any renunciation. 205 Holding that "[t]he means of exercising duress is not limited to guns, clubs or physical threats," the court agreed with him. 206 Finding that he had acted under unacceptable duress, it found that he had retained his citizenship. 207

The facts of *Richards v. Sec'y of State* were apparently similar, but the court assessed a lesser degree of compulsion, and thus arrived at a different outcome. 208 Richards argued that he had been forced to obtain Canadian

199. *Id.* at 554.
200. 170 F.2d 721, 722 (3d Cir. 1948).
201. *Id.*
202. *Id.* at 724.
203. *Id.*
204. 233 F.2d 551, 554 (3d Cir.1956).
205. *Id.*
206. *Id.* at 555.
207. *Id.* at 556.
208. 752 F.2d 1413, 1419 (9th Cir. 1985).
citizenship in order to accept a job to alleviate his financial stress, and that this constituted duress.209 The Ninth Circuit rejected his argument, differentiating his case from Stipa in that he had not shown the requisite degree of hardship.210 Noting that there was no evidence that Richard “was under any particularly onerous financial obligations” the court held Richard had fallen far short of proving economic duress.211

Finally, the efforts of feminist poet Margaret Randall to recover her citizenship are instructive.212 She had expatriated herself by marrying a Mexican citizen and taking Mexican citizenship to obtain employment to support her family.213 The government viewed this as a renunciation and determined that she had lost her U.S. citizenship.214 The Board of Immigration Appeals, however, determined that Randall’s straitened circumstances at the time of the renunciation constituted de facto economic duress.215 Therefore the renunciation was ineffective.216

So, to which end would Hamdi be closer? On one hand, “[t]he law does not exact a crown of martyrdom as a condition of retaining citizenship.”217 On the other hand, there is no requirement that in order to be effective, the citizen renounce their citizenship with a smile on their face.218 To apply the fact intensive duress analysis in Hamdi’s case, the next section explores what is known, or can be reasonably extrapolated from accounts of Guantanamo and Charleston.

VI. INSIDE THE WIRE219 – HAMDI AT GUANTÁNAMO AND CHARLESTON

“I wanted to sign anything, everything, just to get out of there”220

Yaser Hamdi has been reticent regarding the conditions of his captivity.221 Professor Lahav noted recently that “[i]t appears that after his

209. Id.
210. Id.
211. Id. at 1419-1420.
213. Id.
214. Id.
216. Id.
218. Richards v. Sec’y of State, 752 F.2d 1413, 1421 (9th Cir. 1985).
221. Robertson, supra note 55 (“He would not give specifics on his treatment during his time in U.S. custody”).
release, Mr. Hamdi has refrained from talking to the press." 222 Since first hand information on the conditions of his confinement is limited, an evaluation of Hamdi's motivation requires assembling a picture from multiple sources — Hamdi's own limited narratives, other contemporary accounts, U.N. documents, Erik Saar's description of life at Guantanamo in his book *Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantanamo*, and Captain James Yee's account in *For God and Country: Faith and Patriotism Under Fire*. 227

A. "THE LEAST WORST PLACE": CONDITIONS AT GUANTÁNAMO AND CHARLESTON

Both Sergeant Saar and Captain Yee agree that conditions at Guantanamo were difficult. Outside observers have come to the same conclusion. A U.N. report went so far as to characterize the conditions and practices at the detention facilities as tantamount to torture, a characterization vigorously disputed by the U.S. Government. Hamdi stated that he

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223. *But see* Brinkley, *supra* note 220 (containing an interview shortly after his release, in which Hamdi talked about conditions of detention).
224. *Id.*
225. *See, e.g.,* Kate Zemike, *Newly Released Reports Show Early Concern on Prison Abuse,* N.Y. TIMES, Jan. 6, 2005, at A1 (discussing military reports and other documents that showed how abuse involved multiple service branches in Guantanamo and other military detention facilities). *See also* Josh White & Carol D. Leonnig, *U.S. Cities Exception in Torture Ban,* WASH. POST, Mar. 3, 2006 at A4 (citing a federal judge observing that the plaintiff's allegations "describe disgusting treatment, that if proven, is treatment that is cruel, profoundly disturbing and violative of U.S. and foreign treaties banning torture.").
226. *See generally, SAAR, supra note 219.*
229. Anthony Lewis, *Give Me Liberty: Individual Rights in a Time of War,* 13-SUM MEDIA L. & POL'Y 6, 10 (2004) ("From what we know, which is not much, the prisoners are held in stringent conditions, in solitary confinement, and are subject to frequent interrogation.").
231. *Id.* at 53.
found the solitary confinement in Charleston far worse. Since these detention facilities formed the mental and physical backdrop under which Hamdi made his decision, they are worth examining. The underlying reasoning, derived from the Tule Lake cases, is that an American citizen should not be put in a position where renunciation of citizenship appears to be the only reasonable option.

President Bush has ordered that the detainees in the war on terror must be treated humanely in accordance with the Geneva Convention, but only "to the extent appropriate and consistent with military necessity." Critics have complained that the caveat effectively eviscerates the preceding directive, or at the very least, subordinates humane treatment considerations to military needs.

Though Hamdi has remained reticent, conditions at Guantánamo under Major General Geoffrey Miller, whether at the original "Camp X-Ray," or later Camp Delta, appear to have been difficult. An FBI investigation determined that some prisoners were losing their minds: "Some [detainees] were found to have urinated or defecated on themselves and one detainee was found curled in a ball, a pile of hair on the floor next to him, that he had pulled from his own head." Temperatures were high, guard patience low and the "stench was unbearable."


233. Gudridge, supra note 139, at 99.


235. Commission, supra note at 230, at 23.

236. See Editorial, A General's Dishonor, WASH. POST., Jan 15, 2006, at B6 (noting that the General had invoked his right to avoid self-incrimination, and was sanctioned for his command at Guantánamo).

237. Camp X-Ray was the original and temporary detention facility at Guantánamo that the public often (mistakenly) believes to be the current facility, Camp Delta. Hamdi would likely have been held there. See SAAR, supra note 219, at 42 ("It was a jumble of razor wire, with cells open to the elements and buckets in place of toilets. It looked more like an animal shelter in a bad neighborhood than a place to keep people.").

238. YEE, supra note 227, at 99 (noting that "conditions inside Camp Delta were becoming less tolerable").

239. Id. at 113.

240. SAAR, supra note 219, at 65 (noting that the cell blocks "could be brutally hot").

241. Id. at 136 (noting one commander "who believed in payback, ordered up good old-fashioned beatings").

242. Id. at 51 (noting that the stench inside the prison was unbearable).
Muslim feeling\textsuperscript{243} might have contributed to the severity of the treatment.\textsuperscript{244}

The State Department has sanctioned other nations for the same practices that were used at Guantanamo.\textsuperscript{245} Many practices are considered unacceptable under humanitarian law.\textsuperscript{246} In addition to the threat of "extraordinary rendition," or transfer\textsuperscript{247} to a nation that openly practiced torture,\textsuperscript{248} and aggressive questioning tactics at the facility itself,\textsuperscript{249} violence was frequent.\textsuperscript{250} In one instance Military Policemen undergoing prisoner-subduing training were not informed that their practice subject was a fellow American soldier.\textsuperscript{251} During the training session, the guards injured their fellow soldier so badly that he had to be evacuated off the island, and was left with permanent brain damage.\textsuperscript{252}

These conditions and the fear they undoubtedly generated "led to serious mental health problems"\textsuperscript{253} on the part of the detainees.\textsuperscript{254} There were multiple suicide attempts,\textsuperscript{255} and, at any single time, a minimum of ten to twenty prisoners were considered to be at risk of committing suicide.\textsuperscript{256} With at least a third of the prisoners on anti-depressants, "depression was common."\textsuperscript{257} Some of the detainees were clearly at the end of their tether.\textsuperscript{258} The U.N. documented "over 350 acts of self-harm in 2003 alone, 

\textsuperscript{243.} YEE, \textit{supra} note 227, at 41, 43 (quoting Chaplain O'Keefe, an American Muslim officer of Irish descent warning him that "Guantanamo was the most hostile environment he'd ever experienced.").

\textsuperscript{244.} \textit{Id.} at 104 ("The environment at Guantanamo was incredibly hostile for Muslims, and it was impossible to ignore the palpable division that existed between many soldiers and the Muslim personnel.").

\textsuperscript{245.} SAAR, \textit{supra} note 219, at 249.


\textsuperscript{247.} Commission, \textit{supra} note at 230, at 26-27.

\textsuperscript{248.} SAAR, \textit{supra} note 219, at 247.

\textsuperscript{249.} \textit{Id.} at 243 (noting charges that "the military was using coercion tactics that were 'tantamount to torture' on Gitmo detainees, including exposure to extreme cold, loud noise and music, stress positions, solitary confinement, and 'some beatings.'").

\textsuperscript{250.} YEE, \textit{supra} note 227, at 109 (describing an incident where a "guard kept beating the prisoner's head... He beat him until his head was split open.").

\textsuperscript{251.} SAAR, \textit{supra} note 219, at 190.

\textsuperscript{252.} \textit{Id.}

\textsuperscript{253.} Commission, \textit{supra} note at 230, at 25.

\textsuperscript{254.} SAAR, \textit{supra} note 219, at 66 ("Clearly, some of the detainees were under a good deal of psychological stress.").

\textsuperscript{255.} \textit{Id.} at 66. \textit{See also} \textit{id} at 100, 104 (describing suicide attempts).

\textsuperscript{256.} YEE, \textit{supra} note 227, at 100.

\textsuperscript{257.} \textit{Id.}

\textsuperscript{258.} SAAR, \textit{supra} note 219, at 89 (noting that "some of them [detainees] had really reached the end of the rope").
individual and mass suicide attempts and widespread, prolonged hunger
strikes.”

Sergeant Saar observed that he could tell when detainees returned
from a tough interrogation session: “[t]hey often had a defeated look: head
held low and eyes lifeless. Sometimes it was more obvious; they’d sit
huddled in a fetal position in the corner of their cells, staring off into space
or even quietly crying.” Many of the prisoners were despondent and
some even went mute. Others regressed under the strain: “[m]any of
them acted like children . . . they would respond . . . in a childlike voice,
talking complete nonsense. Many of them would loudly sing childish songs,
repeating the song over and over.”

Many of the most severe tactics that contributed to the mental break-
downs, particularly the violations of religious norms, were prohibited by
military rules. Naval personnel protested that some of the techniques
prevalent at the facility were “repulsive and potentially illegal.” Military
lawyers vigorously protested the harsh treatment regimen, but were
overruled by civilian officials at the Pentagon. In addition, violations of
military rules were largely swept under the carpet. The U.N. complained
that no one had apparently been brought to justice for torture, and perpetra-
tors of torture and ill-treatment appeared to operate with impunity.

Distilling these various sources into a coherent account or estimate of
Hamdi’s condition is difficult at best. Indeed, among the myriad of
accounts now emerging from Guantanamo and other facilities, determining

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260. Saar, supra note 219, at 65.
261. Yee, supra note 227, at 100.
262. Id. at 101.
263. Id. at 110-26 (detailing the use of Islamic beliefs against detainees, including
desecration of scriptures, provocative handling by female guards, the playing of loud music
over prayer sessions, and distribution of evangelical literature attacking the Islamic faith).
264. Id. at 113.
265. Dana Priest & Bradley Graham, U.S. Struggled Over How Far To Push Tactics,
266. Id. (noting that “20-hour interrogations, light and sound assaults, stress
positions, exposure to cold weather and water” were approved). See also Jane Mayer, The
Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted,
THE NEW YORKER, Feb. 27, 2006, at 32 (detailing efforts at the Pentagon, led by Alberto J.
Mora, General Counsel for the Navy, to prohibit detainee mistreatment).
267. Yee, supra note 227, at 113 (stating that “these rules were being openly violated
and nobody seemed to care.”).
268. Commission, supra note 230, at 27. Later, however, the report noted the U.S.
government’s position that the U.N. did not consider evidence offered by the United States,
and in particular, refused to visit Guantanamo under conditions similar to those offered to
U.S. Congressional delegations. Id. at 53.
the veracity of each claim is virtually impossible. Nevertheless, the accounts all converge on one pivotal point: conditions at the prison were difficult – and apparently at least as stringent as the Tule Lake background that the Ninth Circuit found had denied the Japanese-American renunciants a meaningful choice in World War II.

B. KAFKA REVISITED: PROVING A NEGATIVE

Part of the concern about any mistreatment at Guantanamo is that it is apparently endless, and potentially outside the purview of judicial review. Indefinite detention alone is considered a form of abuse. The late Professor Fitzpatrick noted that "[i]ndefinite incommunicado detention itself may contravene human rights norms because of the debilitating psychological effects." At the time of his plea agreement, Hamdi had been under arrest for almost three years, and the hopelessness of his situation must have impressed itself on him. While Hamdi has been taciturn, other detainees who have been subsequently released have talked about the powerful psychological and mental impact of prolonged and indefinite solitary confinement.

269. White & Leonnig, supra note 225 (regarding Pentagon claims denying mistreatment at the camp, including causing a detainee to soil himself, Judge Kessler observed: "I know it's a sad day when a federal judge has to ask a DOJ attorney this, but I'm asking you – why should I believe them?").

270. Id. (quoting Human Rights Watch as saying “The law says you can't torture detainees at Guantanamo, but it also says you can't enforce that law in the courts.” Detainee attorney, Thomas Wilner, who represents several detainees agreed: “This is what Guantanamo was about to begin with, a place to keep detainees out of the U.S. precisely so they can say they can't go to court.”).


273. Hamdi’s attorney noted the problem. See Frank W. Dunham, Jr., Where Moussaoui Meets Hamdi, 183 MIL. L. REV. 151, 166 (2005) (the “government contended it could hold Hamdi indefinitely, in solitary confinement, incommunicado, without access to counsel and without charge or hearing of any kind as an ‘enemy combatant.’ ”).

274. Lahav, supra note 16 at 603 n.41.

275. Proulx, supra note 272, at 900.
When placed in a situation similar to Hamdi, Captain Yee retained a top-notch Washington attorney – Eugene R. Fidell, a Harvard law alum and president of the National Institute of Military Justice.\(^276\) However, despite his impeccable legal pedigree and years of experience, even Fidell struggled with the black-hole nature of the Yee case.\(^277\) So Byzantine was the opposing bureaucracy that despite his best efforts, he could not even determine at whose behest Yee was being held under exceptionally harsh conditions.\(^278\)

The inability of an elite military lawyer to handle even routine matters for a U.S military officer invokes grotesque scenarios from the pages of Kafka or Gogol in the average American mind.\(^279\) Recalling the Ninth Circuit’s admonition that in evaluating the mental state of others “[i]t is well . . . that we consider our own psychology,”\(^280\) it is sobering to recall that Captain Yee, a West Pointer familiar with America and military life, with the benefit of extensive psychological training, represented by multiple attorneys, including the President of the National Institute of Military Justice found himself struggling to cope after seventy-six days.\(^281\) Hamdi, a stranger in an unfamiliar land, would have been much further along the road after three years. Indeed, his access to counsel – as a courtesy, not a legal right – had come years, not weeks, into his detention, and with severe restrictions.\(^282\)

This is hardly a revelation. “[T]he prospect of indefinite detention, of not knowing when or if they will be released, of years of similarly impoverished routine, works unimaginable psychological hardship.”\(^283\) Apparently even American military personnel at Guantanamo Bay began to buckle under the fatigue of the indefinite and seemingly interminable nature of their tour of duty.\(^284\) Their seemingly perpetual tour of duty prompted them to make grim comparisons with the detainees.\(^285\)

\(^{276}\) YEE, supra note 227, at 174.

\(^{277}\) Id.

\(^{278}\) Id.


\(^{280}\) Fukomoto v. Dulles, 216 F.2d 553, 554 (9th Cir. 1954).

\(^{281}\) YEE, supra note 227, at 174.

\(^{282}\) Barron, supra note 3, at 36-37. See also John Yoo, COURTS AT WAR, 91 CORNELL L. REV. 573, 590 (2006) (“Hamdi, for example, approves of a detainee’s access to counsel, but does not explain when they may meet, whether their communications may be monitored for clandestine messages, or whether the lawyers may be military officers.” (Citing Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004))).

\(^{283}\) Nicole Fritz & Martin Flaherty, UNJUST ORDER: MALAYSIA’S INTERNAL SECURITY ACT, 26 FORDHAM INT’L L.J. 1345, 1430 (2003). See also Barron, supra note 3, at 36-37.

\(^{284}\) SAAR, supra note 219, at 203 (noting that camp personnel felt like the detainees. “[T]he uncertainty and the anxiety about whether we’d be able to leave Cuba, the sense of
For their part, multiple accounts indicate that the detainees were consumed by the apparently eternal purgatory they had been cast into. Saar noted that he was repeatedly asked “almost maniacally” virtually every day about their prospects for release. He attributed much of the mental toll that Guantanamo was extracting to the serpentine “Night Without End” nature of the experience. Hamdi’s account to CNN reflects Saar’s assessment of the detainees’ experiences: “I didn’t know what was going on – really I didn’t know anything. I was just in a big question mark, and I didn’t know any answers to any questions.”

Against this backdrop, any prospect of release would have been as welcome as manna from heaven. As Hamdi’s attorney, Frank Dunham explained: “When you’ve been in solitary confinement for three years and somebody puts a piece of paper in front of you that says you can get out of jail free if you sign it, you don’t really worry too much about the rest of the fine print.” In Hamdi’s case however, the “rest of the fine print” included renunciation of his U.S. citizenship.

VII. CONCLUSION

Both Captain Yee and Sergeant Saar agree that both innocent and guilty men have found their way into the nation’s “warehouse in the war on terror.” For Yaser Hamdi, the price of release from the “warehouse” was his U.S. citizenship. To be effective, his renunciation must have been voluntary. To be voluntary, Hamdi must have had choices. However, available accounts indicate that he acted under duress akin to that of the Tule Lake detainees sixty years ago. Ultimately, his statement that “I wanted to sign anything, everything, just to get out of there” drives home complete powerlessness that goes with not knowing when a really bad ordeal is going to end.

285. Id. at 29.
286. Id. at 53-54.
287. Id. at 54.
289. Saar, supra note 219, at 54.
290. Robertson, supra note 55.
291. Id.
292. Yee, supra note 227, at 96-97.
293. Saar, supra note 219, at 208 (“[T]hey had been locked up all that time for no good reason, and I knew there were many more like them.”).
294. Id. at 249.
295. Chris Mackey & Greg Miller, The Interrogator’s War: Inside the Secret War Against Al Qaeda 471(2004) (commenting on “the gravitational laws that govern human behavior when one group of people is given complete control over another in a prison. Every impulse tugs downward.”).
296. Brinkley, supra note 220.
the conclusion that an independent observer would likely arrive at: his renunciation was probably not voluntary, and thus not valid.

The Supreme Court had given Hamdi some rights—notice of charges, counsel, and the right to a hearing, but put the burden of proof on him to show that he was not, as the government claimed, an "enemy combatant." Professor Chemerinsky is greatly troubled by this requirement: "How can somebody prove a negative? How can I prove to you that I am not an enemy combatant? How could Hamdi show that?" While determining whether Hamdi had any meaningful choice, it is instructive to note that more than four years after the first prisoners were flown out of Afghanistan, "not a single habeas corpus petition has been decided on the merits by a United States Federal Court."

Professor Chemerinsky fears that America is reliving its worst impulses: "Throughout American history whenever there has been a crisis, especially a foreign-based crisis, the response has been repression. We have come to realize in hindsight that we were not made any safer." In evaluating the Court's likely disposition of a potential Hamdi petition to regain his citizenship, it must be remembered that the Court is neither oblivious to external realities nor unswayed by passion, a reality acknowledged by judges, media, and even fiction. The late Chief Justice William Rehnquist wrote that it was both inevitable and desirable that civil liberties not occupy as "favored" a position in wartime as in times of peace. Indeed, it is sobering to reflect and realize that not only does Korematsu remain valid law, but it continues to receive support from luminaries such as the late Chief Justice Rehnquist and Judge Posner.

297. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.").


300. Woods, Housing Expediter v. Cloyd W. Miller Co., 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (observing that judges were likely to fall victim to the same "passions and pressures" as the populace at large).


302. See, e.g., FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (R.H. Russell 1901) (observing that "no matter whether th' constitution follows th' flag or not, th' supreme coort follws th' iliction returns.").


304. Alissa Clare, Note. We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists, 18 GEO. J. LEGAL ETHICS 651,
Against this backdrop however, there is another, more hopeful recurring motif in American jurisprudence: a constant effort to defend liberty. Schneiderman remains a prime example that remains as valid today for an apparently Islamist Saudi-American as it was for a Russian immigrant of German Jewish extraction with socialist sympathies in 1944.

Schneiderman stands as a point of origin and coalescence for a denationalization jurisprudence that has time and again prioritized constitutional safeguards for citizenship over concern for efficiency in national security. More than anything, Schneiderman and its progeny have consistently raised the commonalities of our constitutional commitments, few though they may be, above our differences. In this way, Schneiderman holds an active role in our national future even as it harkens to the past.308

The preciousness of U.S. citizenship could hardly be more evident than in the Hamdi case itself.309 The Supreme Court held, 8-1, that American citizens were entitled to judicial hearings to evaluate the circumstances of their confinement.310 Though there is apparently no textual basis in the Constitution for the distinction311 between citizens and

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662 (2005). However, some have argued that the Japanese American cases are limited to their facts. See, e.g., Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (stating the cases are like “a restricted railroad ticket, good for this day and train only.”).

306. REHNQUIST, supra note 304, at 203-09, 211 (arguing that judicial review is inappropriate to determine “military necessity” and that there was real fear of a Japanese attack on the West Coast).


308. Hooker, supra note 37, at 381.

309. See Kevin R. Johnson, The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens, 28 ST. MARY’S L.J. 833, 840 (1997) (“Contrary to the concrete legal protections offered citizens, the courts generally have been unwilling to protect the political rights of noncitizens. For example, the courts have permitted the deportation of aliens who engaged in expression that would have been constitutionally protected if uttered by U.S. citizens.”). See also Rafeedie v. INS, 688 F. Supp. 729, 744, 752 (D.D.C. 1988) (permitting citizens to return from conference in Syria, but placing resident aliens at the same conference in exclusion proceedings), aff’d in part, rev’d in part, 880 F.2d 506 (D.C. Cir. 1989).


311. Commentators have long warned that dubious measures judged constitutional in the immigration context tend to flow over into other arenas. See e.g. Margaret H. Taylor, Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine, 22 HASTINGS CONST. L.Q. 1087, 1155-56 (1995) (noting that plenary power doctrine has a “porous border;” consequently the sweeping doctrine tends to pollute “outside the immigration law realm”).
non-citizens, it seems to have become pivotal. By the time Yaser Hamdi renounced his citizenship in Saudi Arabia, he had spent three years in custody without charges. Without the protections of his citizenship, he might have spent many more.

Since Hamdi is unlikely to ever challenge his renunciation, the issue of his individual citizenship will likely remain an academic one. Nevertheless, broader concern of citizenship rights will likely acquire far greater import. Proposed revisions to the Patriot Act grant the government the power to strip a citizen of U.S. citizenship if it determines that the citizen has "joined or provided material support to terrorist organizations." Such legislation would find involvement with a terrorist group prima facie evidence of "intent to relinquish citizenship."

If such legislation does ever become the law of the land, the status of a terrorist's citizenship could become anything but academic. Indeed, the stakes could scarcely be higher. As Aharon Barak, Chief Justice of Israel wrote: "Terrorism does not justify the neglect of accepted legal norms . . . ."


Justice Scalia's argument, in which Justice Stevens joined, merits serious attention because it addresses the central question of whether citizens deserve greater protection than the foreigners confined in Guantánamo Bay. Scalia needed this argument in order to justify his switching sides between the Hamdi and Rasul cases. He voted in favor of relief for Hamdi, together with Justice Stevens, but the two divided in the Rasul case on the rights of foreigners confined in Guantánamo Bay...

There is only one problem with this way of distinguishing between citizens and aliens. There is no apparent basis either in the text or the historical tradition for limiting the writ of habeas corpus to citizens. In the course of Scalia's 8600-word opinion in Hamdi, he cites no explicit authority and he makes no convincing arguments about why the Constitution should be read in the narrow way that he takes to be self-evident.

313. Crook, supra note 7.


316. Interestingly, the late Chief Justice Rehnquist believed that discussions of internment were "very largely academic. There is no reason to think that future wartime Presidents will act differently from... Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors." REHNQUIST, supra note 304, at 224. Lest one dismiss his views as partisan grist, it is instructive to recall that another Chief Justice, this one famously liberal, arrived at the same conclusion. See Earl Warren, The Bill of Rights and the Military, 37 N.Y.U. L. REV. 181, 192 (1962) ("[T]here are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity.").
[A] democratic state acts within the framework of the law . . . It is, therefore, not merely a war of the State against its enemies; it is a war of the Law against its enemies."

Seen in that light, Hamdi's citizenship stands for something far more significant: it is the linchpin of the rule of law, and represents it for millions of American citizens. After all, the contention that "the innocent have nothing to fear" is cold comfort and poor constitutional argument. The very principle that imprisons the guilty can be used to seize the innocent." Our nationhood demands "communality of dignity as well as communality of fate." As John Donne put it 400 years ago:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.

318. Gene Healy, Can the President Imprison Anyone, Forever? Cato Institute, Apr. 28, 2004, http://www.cato.org/dailys/04-28-04.html (last visited Jan. 28, 2006). But see Aleinikoff, supra note 26, at 1495, n.106 (In certain cases, denationalization may be necessary as the "removal of a malignant cancer."). But cf id. at 1498 ("[G]iven the range of heinous crimes that this nation regularly experiences, it is not easy to say what acts would be so outré as to be 'un-American.'").