CHAPTER I

Evolution of the Expatriation Question

Commentators on international law had long found expatriation and naturalization questions of many parts and intricate complexities. Did naturalization by one country absolve the new citizen of former allegiances? Did an individual have the right to expatriate himself without the permission of his sovereign? What rights and obligations did a country have to protect one of its naturalized citizens who returned to his native country? All these legal quibbles, of course, touched on the deeper question of citizenship, its inalienability and transferability, who was a citizen, and what obligations did a citizen owe his sovereign? The British based their doctrine of inalienable allegiance on a body of common law precedents that had been developing since the Middle Ages.

In Saxon times when people rarely travelled to foreign countries, especially to or from the island that is England, the question of who was a citizen was answered effectively with the statement that a citizen (or subject) was anyone

born within the king's realm. In the Middle Ages monarchs were not the strong national rulers that they would later become, allegiance meant fealty to a ruler rather than obedience, Fealty between ruler and subject had a reciprocal aspect to it--remaining in force only as long as the "other party kept faith." If a king did not hold up his end of the relationship a subject had the right and duty to declare diffidatio,a servering of allegiance preliminary to making war on the king. Such a declaration served a dual purpose--formally warning the king of the subject's intentions, and protecting the subject from later accusations of treason.[8]

The meanings of both citizenship and allegiance changed in the later Middle Ages. Increases in commerce and foreign possessions occurred at this time, raising again the issue of who was a citizen. As early as 1343, in the reign of Edward III, the question arose whether the king's sons born outside the country could inherit the throne. The lords answered unanimously in the affirmative; but whether the sons of lesser subjects born outside the realm could inherit gave the lords greater difficulties. Not until 1350 did they pass "A Statute for those that be born beyond the sea,"which gave to children of the king's subjects, no matter where the children were born, the same benefits and the same rights to inheritance as children born in England.[9]

During the later Middle Ages monarchs were attempting to solidify their power in central governments. In England, one way they attempted to do this was to foster the use of common law, that is law common to the whole country; this was different from the older customary law which varied from locality to locality. The kings themselves sought absolute power, above the law, harking back to Roman law in which the emperor was regarded as God's vicar. Toward this end, Richard II sought to make the unauthorized withdrawal of fealty an act of treason. The Tudors continually expanded the definition of treason. For instance, in 1581, during the reign of Elizabeth I, a time in which religion and international politics intricately mixed with each other, England passed a law, directed mainly at Roman Catholic priests, which made it treasonous to attempt to get people to convert from the established Anglican religion to Roman Catholicism. The act equated such conversion with promising obedience to a foreign potentate--the pope--and thus forswearing obedience to the queen. Thomas Hobbes gave a philosophical underpinning to the theory of divine right and certainly would have objected to any individual subject being able to expatriate himself without the king's permission. "Only the authority of the ruler," Hobbes asserted, "can found the political whole, and only through unlimited sovereignty can it be held together."[10]

By the 1760s William Blackstone, in his Commentaries on the Laws of England, placed the indefeasibility of what he called natural allegiance among the tenets of common law.

Blackstone differentiated natural allegiance from local allegiance, which was the set of obligations that a person owed to the sovereign of whatever country in which he found himself (e.g. a person must obey the criminal code of the country in which he was located.) Natural allegiance, on the other hand, was based strictly on the circumstances of a person's birth--the country in which the person was born or, in some cases, the citizenship of his parents. In theory, the sovereign protected the citizen from birth; natural allegiance was "a debt of gratitude; which can not be forfeited, cancelled, or altered, by any change of time, place or circumstance, nor by any thing but the united concurrence of the legislature." Blackstone argued that natural allegiance was "intrinsic and primitive." Alluding to the biblical prohibition against a man serving two masters, he asserted that such an obligation could not be tossed off at the pleasure of the individual.[11]

English courts and the English government adhered to Blackstone's position on expatriation and naturalization--"Once an Englishman always an Englishman." But by the time Blackstone was writing his Commentaries, Enlightenment philosophers had developed a set of principles that challenged accepted political thinking. These ideas disputed divine right monarchy, and redrew the relationship of a person to his sovereign. According to such thinkers as John Locke, a natural law existed which predated any civil or religious law; such a natural law entitled man to life, liberty and property.[12]

In his Law of Nations Emerich de Vattel, a Swiss philosopher, jurist and diplomat, discussed expatriation and naturalization from an Enlightenment point of view. Vattel argued that a citizen might leave his native society for another provided that he did it without doing that society a "visible injury." Vattel did not take such a move lightly--a "good citizen," he said, would have "strong reasons" for leaving his country; it was "dishonorable" to forsake a society on slight pretense after having taken advantage of its protection. Vattel linked protection and allegiance. He declared that a citizen or subject might "renounce his allegiance when his government fails to protect him." Exactly when this happened Vattel left up to the citizen, but he did provide examples--if a state enacted a law "relative to matters in which the social compact could not oblige every citizen into submission," (for instance the establishment of a state religion). On a more basic level, Vattel suggested a citizen might rightly leave his society if he was unable to procure a subsistance. Vattel and Locke had great respect for the law and did not simply dismiss it; their writings did have the effect, however, of cracking Blackstone's monument.[13]

Both Vattel's Law of Nations and Blackstone's Commentaries were published within the two decades before the American Revolution, and educated Americans had read them. The leaders of the revolution drew heavily on both the common law, which was adopted as the basis for the American legal system, and Enlightenment philosophy, much of which found its way into

the Declaration of Independence. For instance, among the complaints against George III listed in the declaration, Jefferson included one that the king had slowed the population of America by "obstructing the Laws of Naturalization of Foreigners; and refusing to pass others to encourage their migration hither." It is not surprising, then, that the history of expatriation and naturalization in the United States was an often shifting, sometimes contradictory story.[14]

In the area of American legal theory and practice there was little disagreement. Right through the Civil War, American judges and commentators on jurisprudence upheld the common law position on naturalization and expatriation, making only practical modifications to fit a nation of immigrants. James Kent, in his Commentaries on American Law, exemplified this view. After stating the English position on expatriation, Kent said it was a question whether this applied to the United States. Citing Vattel and Hugo Grotius, Kent observed that many writers favored a person's right to leave his native land. Some of these authors used the word expatriation synonymously with emmigration. Used in this sense, Kent found no problem with the idea of expatriation. If, however, expatriation was taken to mean an absolute withdrawal of allegiance, Kent had doubts; the judiciary, he noted, had not definitely settled the question. Kent then reviewed a number of cases that touched upon the question, starting with Talbot v. Janson in 1795 and ending with the case of the Santissima Trinidad in 1822. In summarizing the findings in these cases

he said that an American citizen could not renounce his allegiance "without the permission of government, to be declared by law;" barring the existence of such legislative regulation the common law rule must be accepted.[15]

Justice Joseph Story in his Commentaries on the Conflict of Laws, Foreign and Domestic (1833) took a position similar to Chancellor Kent's. While he agreed with the principle that a sovereign had authority over his subjects and their property within his domain, Story said also that no nation was "bound to respect the laws of another nation made in regard to the subjects of the latter, who are non-residents." In conclusion Story argued that a country's right to "bind its own native subjects everywhere" only applied when they returned to that nation's jurisdiction. It could not require other countries to obey its laws; on the contrary, nations had exclusive right to regulate the activities of residents, citizens and aliens within their jurisdiction.[16]

The views of the third commentator, Henry Wheaton, complemented those of Kent and Story. Wheaton differentiated between a person's "national character" and his domicile. National character pertained to political status, by which the person was a subject of a particular country, to which he owed allegiance; domicile had to do with civil status--municipal rights and obligations. While domicile was almost entirely up to the individual, Wheaton said, national character depended on "the will of the state." Just as a person needed the consent of his adopted country to acquire a new

national character, he needed the consent of his native country to throw off his old national character.[17]

As late as 1856 United States Attorney General Caleb Cushing took a position on expatriation substantially in agreement with those of Kent, Story, and Wheaton. Cushing's opinion, notable for illustrating the historical distance the United States had travelled from the revolutionary period, argued that, despite the years that have passed, popular American opinion on the subject of expatriation had been "a little colored" by "necessary opposition" to Britain's stand in favor of indefeasible allegiance. Americans had tended to regard the question as one between a king and his subjects. Cushing asserted that it really concerned the relationship of citizen to his society. He lamented that "ideas of right, which belong to revolutionary epochs, still predominate over those of duty." In his discussion Cushing tended to blur the distinction between emmigration and expatriation. He appeared to favor the right of emmigration, but retained the common law view on expatriation. In summary, Cushing quoted D. Antonio Riquelme to the effect that even if a person naturalized himself in an adopted country, if he returned to his native land, the adopted country could not protect the person from claims of service made by the native land.[18]

These interpretations, however, conflicted with the naturalization laws passed by Congress. The Naturalization Act of 1802 required that as part of his oath of citizenship

the prospective citizen forswear all other allegiances. A question of America's position on naturalization and expatriation arose during the conflict over the British impressment of American seamen during the two decades preceding the War of 1812. American commerce grew rapidly after the revolution, and many British seamen deserted for the better conditions and pay in the American merchant fleet. Many of these seamen naturalized or purchased "certificates of citizenship," available for a price at most American ports. When the British boarded an American vessel, they often did not pay strict attention to the nationalities of those they impressed. Along with British subjects, they took American citizens both native and naturalized. The American government made representations for its citizens, but knowing that both English and American law agreed that its citizens could not expatriate themselves, it did not try to protect naturalized Americans who were impressed.[19]

The major issue in the impressment controversy was not so much impressment of American seamen as it was American objections to the British enforcing their municipal law on ships of a neutral country in international waters. In his war message of 1 June 1812 President James Madison mentioned impressment but emphasized the violation of sovereignty involved in boarding American ships on the high seas. From almost the beginning of the impressment controversy Americans tried to figure ways to deprive Britain of the pretext that it was just reclaiming its own subjects. Many people in New

England, which thrived on commerce, proposed that a law be passed forbidding the hiring of British seamen on American ships. In 1792, William Knox, American consul in Dublin, suggested that Americans of British origin not be allowed to sail on merchants ships bound for British ports. Fifteen years later, Secretary of State Madison suggested that in return for British promises to stop impressment and return Americans already taken, the United States would promise to stop employing British sailors and return those already working on American ships. When Secretary of Treasury Albert Gallatin found that returning all bonafide English sailors would cripple American commerce, the plan was quashed. Burton Spivak suggests that "America wanted its sailors, and England's as well." Again, toward the end of the War of 1812, President Madison proposed a modified version of his earlier plan. He asked Congress to pass a law which would have allowed only native Americans and naturalized citizens already naturalized when the bill passed to sail on American ships, eliminating from the American merchant marine any citizen naturalized after the bill passed. The measure never became law. Until Henry Clay became secretary of state the United States continued to be open to a deal on impressment which would have impaired the privileges of naturalized citizens. The Treaty of Ghent ending the War of 1812 did not mention impressment, and, as Britain entered into a long period of peace, the issue of impressment diminished in importance.

Over the next half century, however, the question of how much protection the government of the United States would provide for its naturalized citizens popped up with increasing frequency. These incidents, along with the growing influence of the immigrant vote, finally helped focus the attention of the American government on this problem.

As mentioned, Secretary of State John Quincy Adams refused American protection to recently naturalized Americans who he thought returned to their native country with the idea that their naturalized status would protect them from the obligations and jurisdiction of that country. He admitted that in any country outside the United States "the status of a naturalized American might be different from that of a native," and asserted that America might be absolved of the necessity of protecting an adopted citizen if, shortly after naturalization, he left the United States for an extended period of time.[21]

Henry Clay, a strong nationalist, during his tenure as head of the State Department, reversed Adams's position. Clay stated flatly that any obligations of a naturalized citizen to his former sovereign were absolved; the rights of these adopted citizens, he continued, were "held to be everywhere, on ocean and on the land, the same as those of a native born citizen."[22] John Forsyth, who became secretary of state in 1835, returned to Adams's position, saying in reply to a question as to whether a naturalized citizen would have to perform military service if he returned to his native

country that it depended on the laws of that country. Henry Wheaton, at this time serving as American minister to Prussia, followed Forsyth's lead and withheld protection from naturalized Americans returning to their native Prussia, asserting that native domicile and national character reverted when a naturalized citizen returned to the fatherland.[23]

James Buchanan in 1845 became the first secretary of state to protect naturalized American citizens abroad. Ironically, in 1815, Buchanan had criticized the War of 1812 as one fought to protect naturalized Americans, an abstract issue in international law contrary to that held throughout Europe. The influx of immigrant voters into Buchanan's home state of Pennsylvania, no doubt, played a large part in his change of mind. Soon after Buchanan had committed America to the protection of naturalized citizens he began to take a more practical view of the issue. As many instances arose in which he was called upon for protection, he began to warn naturalized citizens that while the United States would do what it could to protect them, they might face much inconvenience if they left the United States. During the Young Ireland revolution of 1848 Buchanan stood firmly against any differentiation between naturalized and native citizens. Buchanan wrote to George Bancroft, American minister to London, urging him to make representations in the cases of two such naturalized citizens, Richard Ryan and James Bergen. After Bancroft helped secure their release, Buchanan urged the American minister to present a protest to the British govern-

ment concerning its failure to recognize American naturalization. Bancroft, satisfied that he had solved the problem, did not want to reopen the dispute over expatriation and hedged on presenting the protest. Buchanan, laying aside Bancroft's objections, wrote twice more before Bancroft obeyed his instructions. The situation soon passed, and the issue in Anglo-American relations again subsided.[24]

Expatriation and naturalization continued to be problems between the United States and Prussia, however, due to the latter's continued insistence that all male citizens perform military service. With the end of the administration of James K. Polk and the departure of Buchanan as secretary of state, Wheaton's restricted view of the protection to which naturalized citizens were entitled again gained ascendancy. Despite this, D. D. Barnard, who became American minister to Prussia in 1852, tried unsuccessfully to get an agreement which would protect persons who had returned to Prussia only as short-term visitors. Policy did another turnabout with the return of James Buchanan as president in 1857.[25]

With the protection of naturalized citizens abroad--as with a number of other segments of American foreign policy--the Civil War caused the United States government to lay aside principle in favor of the immediate goal of winning the war and saving the Union. During the war years Abraham Lincoln and Secretary of State Seward, although quietly maintaining Buchanan's position on protecting all American citizens abroad equally, instructed the new minister to Prussia, Norman

B. Judd, not to push the issue and to make no more applications in regard to this subject without specific orders. John Bassett Moore has suggested that Seward did this so as not to encourage naturalized citizens to return to their native countries with the intention of avoiding service in the Union army.[26] It might also be argued that during the war the Union was having a hard enough time with its diplomatic efforts in Europe without adding any extraneous problems. Only after the Civil War did Seward vigorously take up the issue. If the Civil War temporarily decreased American concern for the issue of expatriation, it also helped to set up a unique set of circumstances which brought together the Fenians and American domestic and international politics. It was this combination that led ultimately to a solution of the question of expatriation in which America scored a complete diplomatic victory.