five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in an election in the other country of which he was a citizen.[1257] But at the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime.[1258] In the next case, the Court struck down another punitive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service.[1259] And, in the following year, the Court held unconstitutional a section of the law that expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years.[1260]

The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But, in *Afroyim v. Rusk*,[1261] a five-to-four ma-

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(7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional, as explained in the text.

[1257] Perez v. Brownell, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whittaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress' power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

[1258] Trop v. Dulles, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress' war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punishment and denied that it was punishment at all "in any valid constitutional sense." Id. at 124.

[1259] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress' war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.

[1260] Schneider v. Rusk, 377 U.S. 163 (1964).

[1261] 387 U.S. 253 (1967).