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**NAVAL  
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**MONTEREY, CALIFORNIA**

**THESIS**

**TERRORISM-RELATED LOSS OF CITIZENSHIP —  
A POLICY REVIEW**

by

James H. Martin

September 2016

Thesis Advisor:

Second Reader:

Carolyn Halladay

Christopher Bellavita

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**TERRORISM-RELATED LOSS OF CITIZENSHIP —  
A POLICY REVIEW**

James H. Martin

Associate Counsel, Litigation and National Security Coordination Division

Office of the Chief Counsel,

United States Citizenship and Immigration Services, Washington, DC

B.A., University of Maryland, 1993

J.D., George Mason University School of Law, 2002

Submitted in partial fulfillment of the  
requirements for the degree of

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**NAVAL POSTGRADUATE SCHOOL  
September 2016**

Approved by: Dr. Carolyn Halladay  
Thesis Advisor

Dr. Christopher Bellavita  
Second Reader

Dr. Erik Dahl  
Associate Chair of Instruction  
Department of National Security Affairs

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## **ABSTRACT**

Since September 11, 2001, a collection of bills have been submitted to Congress proposing to amend section 349 of the Immigration and Nationality Act to provide that an individual may lose United States citizenship for joining a terrorist organization, or engaging in or supporting terrorism. Although several of our allies, including the U.K., Australia, and France, have considered and in some instances passed similar legislation during the same period, Congress has not given these proposals serious consideration.

This thesis provides a policy analysis, assessing the viability of terrorism-related loss of citizenship under U.S. law. Following a review of the history of acquisition and loss of citizenship in the United States, including key laws and precedent decisions, and a comparative analysis of legislation considered and either passed or rejected by the U.K., Australia, and France, it provides a critical review of terrorism-related loss of citizenship bills submitted to Congress since 9/11. This thesis demonstrates that viable terrorism-related loss of citizenship legislation may be possible, but that bills submitted to date have been largely symbolic, rather than serious, efforts. This thesis provides drafting recommendations to legislators, but raises questions about the practical utility and necessity of such laws.



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## LIST OF ACRONYMS AND ABBREVIATIONS

BIA	Board of Immigration Appeals
ECPR	European Consortium for Political Research
ETA	Euskadi Ta Askatasuna (Basque separatist group)
FAM	Foreign Affairs Manual
ICE	United States Immigration and Customs Enforcement
ILPA	Immigration Law Practitioners Association
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
ISIS	Islamic State of Iraq and Syria
OHCHR	Office of the United Nations High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
SAFER	Securing America's Future through Enforcement Reform (A bill submitted to Congress)

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## EXECUTIVE SUMMARY

The momentous and tragic events of September 11, 2001, altered the course of our nation. Terrorism, and particularly terrorist violence perpetrated by Islamist groups, became the motivating force for a series of enormously consequential legislative, policy, and procedural changes reflecting the perception that a new and persistent threat to Americans at home, and to the homeland itself, had arrived. The balance of liberty and security in America seemed in need of adjustment, and the importance of protection and safety were prioritized. Congress undertook a variety of measures aimed at improving our homeland security and responding to the threat of global terrorism, the success and necessity of which remain debated issues.

One of the legislative efforts that began shortly after 9/11, and that has been persistently championed by a collection of Senators and Representatives through to the current Congress without evident success, has been the effort to amend U.S. law to allow for the possibility that a U.S. citizen could lose citizenship as a result of joining a foreign terrorist organization, or supporting or furthering the cause of terrorism. This thesis explores the modern pursuit of a new terrorism-related loss of citizenship law, and in doing so examines fundamental questions about the nature of United States citizenship. Is U.S. citizenship a privilege that entails a collection of duties and obligations, and that is subject to revocation? Or is it a protected legal status that guarantees the holder a collection of critically important rights and protections, and that cannot be forcibly withdrawn?

This thesis begins by tracing the history of acquisition and loss of citizenship in America back to the birth of the Republic. As a fledgling nation, America in the 19<sup>th</sup> century struggled to assert and defend the rights of naturalized citizens against the claims of perpetual loyalty and obligation asserted by their birth nations, even as we struggled to accept the notion that African slaves and their American-born children might have a claim to citizenship. Shortly after the end of the Civil War, the federal government took a collection of important steps that helped determine the fate of citizenship and loss of citizenship in the U.S.

In 1868, within weeks of each other, the 14th Amendment was adopted, and the Expatriation Act of 1868 was passed into law. The 14th Amendment guaranteed the birthright citizenship of people born in the United States, and put naturalized and natural born citizens of the U.S. on equal constitutional footing. Two weeks later, the Expatriation Act of 1868 declared publically to the world America's position on loss and acquisition of citizenship. Congress declared that people have a fundamental right to throw off the cloak of citizenship, with all attendant obligations, and naturalize as citizens of another nation. To that end, it further declared the expectation that foreign nations respect the citizenship of all U.S. citizens, including naturalized U.S. citizens who may have previously been citizens of foreign nations. Although this statutory declaration was intended to protect U.S. citizens, it had the notable effect of acknowledging the existence, in principle if not in law, of a right to lose citizenship that would become a longstanding component of our nation's general understanding of expatriation and renunciation.

But, even as these sweeping changes were taking hold in America regarding the very nature of citizenship, the government was taking action to restrict who could naturalize as a U.S. citizen. The need for more labor to help build our nation, and the promise of possible citizenship and a better life in America, drew more and more immigrants and potential immigrants to our shores. This in turn conflicted with persistent racial bias and protectionist concerns regarding the availability of work for Americans. Eventually, sweeping prohibitions on naturalization were enacted, denying citizenship to most individuals born in Asia. Those restrictions continued into the middle of the 20<sup>th</sup> century.

The 20<sup>th</sup> century saw further growth and development in U.S. law relating to the rights of U.S. citizens with regard to their citizenship, and the circumstances under which U.S. citizenship might be lost. Consistent with the law and practice in Europe and elsewhere, at the opening of the 20<sup>th</sup> century U.S. legislators and the judiciary didn't question the ability of the federal government to revoke U.S. citizenship for cause, or to pass laws under which some U.S. citizens might find themselves to have lost citizenship by operation of law for simply having lived outside of the U.S. too long. As a century defined principally by two world wars and their consequences progressed forward, by the

middle of the 20<sup>th</sup> century the fundamental questions regarding acquisition and loss of citizenship had been reframed. The problem of refugees and others displaced by war and the redrawing of the world map focused attention away from the ability of nations to reject their own citizens, and brought into focus the rights of individuals to obtain and retain citizenship, and the basic humanitarian obligations of nations. The nations of the world reacted to this change differently. In the U.S., the period between the late 1950s and 1980, when the Supreme Court decided the last major case regarding loss of citizenship, a sea change in the law took place. Relying heavily on the 14th Amendment, the Supreme Court recognized new constitutional protections relating to citizenship which prevented the federal government from engaging in punitive or involuntary withdrawal of citizenship in virtually all instances. In the two decades that followed, interest in loss of citizenship in the U.S., as measured by legislative and legal challenges, diminished. The 20<sup>th</sup> century ended with this area of law significantly changed as compared to a century earlier. A U.S. citizen could only lose citizenship by voluntarily undertaking a statutory expatriating act with the intention of losing citizenship.

At the dawn of the 21<sup>st</sup> century, international terrorism sparked renewed interest in loss of citizenship. Our allies in Europe and elsewhere considered changes to their loss of citizenship law in an effort to combat the threat of terror at home and abroad. This thesis reviews the legislative efforts of the U.K., Australia, and France relevant to terrorism-related loss of citizenship. Those efforts are enlightening if not entirely instructive. Both the U.K. and Australia changed their loss of citizenship law in response to this new perceived threat. Fundamental difference between the government of the U.K. and America, and the structure of our respective legal codes, meant the U.K.'s changes provided little in the way of useful guidance for U.S. legislators. Australia, on the other hand, with its federal system of government, made legislative changes more in keeping with U.S. legal traditions, providing some possible guidance for U.S. legislators. In particular, Australia's incorporation of a statutory presumption regarding the intent necessary for loss of citizenship to occur, as well as limitations regarding the creation of stateless people and the inability for loss of Australian citizenship to take place while a citizen is physically in Australia, are provisions that U.S. legislators might



consider. France, which attempted to expand extant terrorism-related loss of citizenship law by constitutional amendment so that it would permit application of the law to individuals born French—a change from existing constraints limiting that outcome to naturalized citizens—ultimately retreated from that effort. French civil law is quite different from U.S. law, as is the French Constitution. The lesson from the French effort is perhaps limited to a cautionary warning that significant legal changes intended to address transitory problems in a manner that affects the very character of the nation are likely best abandoned.

This thesis then reviews bills submitted to Congress in the U.S. since 9/11 proposing new terrorism-related loss of citizenship laws. Those bills are, as a group, difficult to characterize as serious efforts at legislation. While individually they may offer potential loss of citizenship solutions ranging from interesting, to misguided, to at times fatally flawed, none of these bills sufficiently answers the question, “Why is loss of citizenship a necessary or appropriate solution to the problem of terrorism?” Rather, as a group they seem intended to answer a different question: “Do you deserve to remain a citizen?” In many instances these bills could have been passed into law, in whole or part, and administered consistent with the Constitution; however, that fact alone does not make them serious legislative efforts. As a practical matter, key constitutional protections limiting loss of citizenship to voluntary acts committed with the intention of losing citizenship inform the analysis. For loss of citizenship to occur based, hypothetically, on joining a foreign terrorist organization, the agency administering that law would need to determine (a) that the individual joined the foreign terrorist organization voluntarily, and (b) that by joining the organization, the citizen intended to lose his U.S. citizenship. Absent express evidence of intent, agency administrators would need to rely on facts and circumstances from which it would be reasonable to infer intent. Both the voluntariness and intent determinations would be subject to rebuttal. Considering the forgoing, effective implementation of terrorism-related loss of citizenship in the U.S. would be challenging. A bill might be capable of being implemented within the basic structure and limitations imposed under U.S. law, and yet still the beneficial purpose of such a bill may remain elusive. No legislator to date has identified a serious deficit in existing U.S. law

that would be remedied through new loss of citizenship law, or demonstrated that loss of citizenship, as opposed to some other consequence or mechanism, is the best way to address a particular terrorism-related threat to the nation or its people.

In the final chapter, this thesis provides further analysis and conclusions. It is not an unreasonable notion that casting one's lot with a notorious foreign terrorist organization publicly bent on harming our nation and its people might reasonably be interpreted to reflect a comprehensive rejection of the United States sufficient to imperil one's citizenship. But legislators to date have failed to connect their legislative offerings to the necessary correction of anything other than a defect in loyalty and allegiance. Viewed in this manner, the post-9/11 terrorism-related loss of citizenship bills can be seen, in part, as revisiting a critical question. Is U.S. citizenship a privilege that entails a collection of duties and obligations, and that is subject to revocation? Or is it a protected legal status that guarantees the holder a collection critically important rights and protections, and that cannot be forcibly withdrawn?

The answer seems clear. By the end of the 20<sup>th</sup> century, control over loss of citizenship had been wrested from the federal government and invested in the citizen. Citizenship in the U.S. is more akin to a protected legal status. It cannot be forcibly withdrawn. Viewed in this light, new loss of citizenship legislation directed, either expressly or implicitly, at correcting little more than deficits of loyalty and allegiance will likely itself be deemed deficient. This is not to say that defects of loyalty and allegiance as expatriating acts are unknown in the history of our nation. But given current protections applicable to citizenship, absent identification of a genuine need for loss of citizenship to remedy a genuine weakness or deficiency in our homeland security apparatus, new terrorism-related loss of citizenship bills are likely to be little more than symbolic gestures.

To the extent that legislators remain interested in offering new terrorism-related loss of citizenship legislation, this thesis offers a variety of drafting suggestions for consideration. They include the recommendation that legislators do a better job defining key terms, such as what constitutes a terrorist organization. Legislators are also advised to consider new appropriate limitations, including avoiding the creation of stateless ex-

citizens at home or abroad, and avoiding the possibility of that loss of citizenship will occur while an individual is still in the U.S. It is also recommends that legislators consider incorporating a statutory presumption regarding intent, which may facilitate adjudication and review. Finally, legislators are reminded that the key constitutional decisions recognizing modern citizenship protections applicable under law were close decisions, and that the opportunity to revisit those decisions may arise as a result of changes in the membership of the Supreme Court.

## **ACKNOWLEDGMENTS**

This thesis would not have been possible without the love and support of many people. Chief among them are my wife, Kathy, and my patient and wonderful children, whose lives have been disrupted by my pursuit of a master's degree.

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## I. INTRODUCTION

“The only title in our democracy superior to that of President is the title of citizen.”  
—Justice Louis D. Brandeis

“Perfect freedom is as necessary to the health and vigor of commerce as it is to the health  
and vigor of citizenship.”  
—Patrick Henry

“If you have joined an enemy of the United States in attacking the United States and  
trying to kill Americans, I think you sacrifice your rights of citizenship.”  
—Senator Joseph Lieberman

Since September 11, 2001, members of the Congress of the United States have introduced a variety of bills that would permit the withdrawal of citizenship<sup>1</sup> from U.S. citizens who join, support, or travel to fight with or support foreign terrorist organizations. Two such bills are currently pending before the 114<sup>th</sup> Congress. Comparable legislation has been passed, or considered and rejected, by many of our closest allies, including the United Kingdom, Australia, and France.

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\* This work is a product of the author’s independent research and analysis as part of an academic program of study. It does not reflect the analysis, opinions, conclusions, or recommendations of U.S. Citizenship and Immigration Services or the Department of Homeland Security.

<sup>1</sup> For purposes of this thesis, the term “citizen” or “citizenship” is used to mean both citizenship and nationality. In the law, where reference is made to “loss of nationality” or related concepts, loss would divest a citizen of both citizenship and nationality, and as applied to a national would divest the individual of nationality. There is no situation related to the loss of citizenship or nationality issues addressed in this thesis under which a citizen might lose his or her United States citizenship, but retain his or her United States nationality. Under United States law a person who is a citizen is also a national of the United States, but there are a small number of individuals who are nationals of the United States but who are not citizens. They generally include individuals born in an “outlying possession” of the United States, and their children. Immigration and Nationality Act, §§ 301, 308, 8 U.S.C. §§ 1401, 1408 (1952)(as amended). The phrase “outlying possession of the United States” is defined to include American Samoa and the Swains Islands. Certain residents of the Commonwealth of the Northern Mariana Islands may also be nationals but not citizens of the United States. Immigration and Nationality Act, § 101(a)(29), 8 U.S.C. § 1101(a)(29)(1952)(as amended). See also, “Citizenship and Nationality,” Commonwealth of the Northern Mariana Islands Law Revision Commission, Article 3, §§ 301–304, accessed September 10, 2016, <http://www.cnmilaw.org/article3.html>. A non-citizen national of the United States is entitled to live and work in the United States, and may transmit national status to his or her children. Non-citizen nationals of the United States are not presently entitled to vote in federal elections, including presidential elections. They are entitled to travel on a special United States passport identifying them as nationals and not citizens.

The U.S. Constitution, statutory law, and Supreme Court precedent provide a variety of protections to U.S. citizens that may affect, limit, or prevent the Congress from imposing loss of citizenship as a consequence for overseas terrorist activities. This thesis reviews U.S. law regarding the withdrawal of citizenship from U.S. citizens, foreign terrorism-related loss of citizenship laws, and post-9/11 legislative efforts in the United States to pass terrorism-related loss of citizenship laws. The goal of this thesis is to provide a review of relevant efforts, foreign and domestic, to implement loss of citizenship as a tool to address the problem of citizens travelling to join or support terrorist organizations. This thesis concludes with a collection of recommendations to legislators and leaders regarding the legal, policy, and practical hurdles that may exist should Congress continue to pursue terrorism-related loss of citizenship in the United States.

#### **A. PROBLEM STATEMENT**

Upon submission of this thesis, almost exactly 15 years will have elapsed since the 9/11 attacks. During that time, the nature of the terrorist threat, and the understanding of that threat have changed. Individuals from nations around the world have left their homes in unprecedented numbers and travelled to receive training and to support the ongoing combat and terrorist operations of international terrorist organizations. This population includes U.S. citizens. In February of 2016 the House of Representatives Homeland Security Committee produced a “Terror Threat Snapshot,” which reported that approximately 250 Americans have travelled or attempted to travel to Syria to join in that conflict.<sup>2</sup>

The consequences of U.S. citizens travelling to support the ongoing operation of foreign terrorist organizations are manifold. United States citizens travel internationally under U.S. passports, which guarantee them the rights and privileges accorded U.S. citizens in the context of international travel. As a general matter, international travel is

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<sup>2</sup> U.S. House of Representatives Homeland Security Committee, *Terror Threat Snapshot*, February 2016, accessed September 10, 2016, <https://homeland.house.gov/wp-content/uploads/2016/02/Feb-HSC-Terror-Threat-Snapshot-1.pdf>.

impossible without a passport. In this way, U.S. citizenship is at least indirectly contributing to these individuals' ability to further the cause of terrorist organizations.<sup>3</sup>

Also, terrorist organizations can and do use the U.S. citizenship of their members to promote their terrorist brand. In their article *Tools and Tradeoffs: Confronting U.S. Citizen Terrorist Suspects Abroad*, Daniel Byman and Benjamin Wittes noted, "For propaganda purposes, they enable [a terrorist organization] to play up its appeal and underscore its claim to be a global organization. And the cultural and personal connections these Americans have to their home make them more effective propagandists and recruiters—and as operators, potentially better able to avoid suspicion."<sup>4</sup>

U.S. law regarding the targeting of U.S. citizens in the context of military actions is at best complicated. When citizens are members or leaders in overseas terrorist organizations, that fact has the ability to affect mission goals and objectives. In an example drawn from one of our closest allies, in 2010 the U.K. stripped British citizenship from a collection of individuals involved in overseas terrorism, including Bilal al-Berjawai, and Mohamed Sakr, who were later killed by U.S. drone strikes. A link between these events was hypothesized: "It appears that the process of deprivation of citizenship made it easier for the U.S. to then designate Mr. Sakr as an enemy combatant, to whom the U.K. owes no responsibility whatsoever," Saghir Hussain said. Mr. Macdonald added that depriving people of their citizenship 'means that the British government can completely wash their hands if the security services give information to the Americans who use their drones to track someone and kill them.'<sup>5</sup>

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<sup>3</sup> The Secretary of State has the authority to revoke an individual's passport without depriving that person of citizenship. See generally *Haig v. Agee*, 453 U.S. 280 (1981) ("Revocation of a passport undeniably curtails travel, but the freedom to travel abroad with a "letter of introduction" in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation.") But exercising that power deprives a citizen of a right he or she otherwise possesses—access to a passport.

<sup>4</sup> Daniel Byman and Benjamin Wittes, "Tools and Tradeoffs: Confronting U.S. Citizen Terrorist Suspects Abroad," The Saban Center for Middle East Policy at Brookings, June 17, 2013, <http://www.brookings.edu/~media/research/files/reports/2013/07/23%20us%20citizen%20terrorist%20suspects%20awlaki%20jihad%20byman%20wittes/toolsandtradeoffs.pdf>.

<sup>5</sup> Chris Woods, Alice K. Ross, Oliver Wright, "British Terror Suspects Quietly Stripped of Citizenship... Then Killed by Drones," *Independent*, February 27, 2013, <http://www.independent.co.uk/news/uk/crime/british-terror-suspects-quietly-stripped-of-citizenship-then-killed-by-drones-8513858.html>.



Finally, U.S. citizens have a right to return to the United States. U.S. citizens who obtain terrorist indoctrination and training overseas can nevertheless resume residence in the U.S. under color of their U.S. citizenship, permitting them to engage more easily in terrorist activities, including recruitment, here in the United States. For these and other reasons, U.S. and allied legislators have long considered loss of citizenship to be a potential tool to address these challenging problems.

This research is significant because it provides a review of the current state of loss of citizenship law in the United States, and reviews the terrorism-related loss of citizenship options implemented by our allies. This work will serve to inform legislators and leaders in the United States of the legal, policy, and practical benefits and limitations that a terrorism-related loss of citizenship solution might provide in the United States.

Interest in loss of citizenship as a tool to address post-9/11 concerns arising from the growth of terrorism reflects a common if not universally held belief that citizenship is not an entitlement unfettered by standards, obligations, and limitations. Citizenship is the most valuable status our nation can bestow. The collection of rights and benefits associated with U.S. citizenship is vast, and the obligations are few. But historically and continuing to this day, Congress has established actions that, if committed by a citizen, could result in loss of citizenship.

U.S. citizenship is quite difficult to lose. The federal government cannot involuntarily strip citizenship from an individual. Rather citizenship, once obtained, can only be lost based on a voluntary act committed with the intention of losing citizenship. But Congress is empowered to establish, under law, the list of acts that, if committed voluntarily and with the necessary intent, can result in loss of citizenship. Voluntariness can be presumed and intent can be inferred.<sup>6</sup> The result is that, although punitive or involuntary loss of citizenship may be a thing of the past, loss of citizenship remains a viable consequence, and voluntariness and intent are not insurmountable hurdles. It must certainly be the case that a person's voluntary actions and reasonably-inferred intent are not rendered ineffective by regret, or a post-hoc reimagining of one's prior actions. If a

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<sup>6</sup> Vance v. Terrazas, 444 U.S. 252 (1980).

U.S. citizen voluntarily joins the forces of a terrorist organization that has directed its members to kill Americans and to oppose America, it is not unreasonable to draw certain conclusions from that act.<sup>7</sup>

Historically and continuing through to today, voluntarily joining the forces of a foreign nation at war with the United States can cost you your citizenship, and that consequence has engendered little if any controversy. There is no reasonable argument that joining the army of a foreign nation at war with the United States is anything other than a quintessential example of rejecting one's ties to the United States, including the ties of citizenship binding an individual to our nation, in favor of furthering the belligerent purposes and goals of a foreign power. But the nature of modern warfare has changed. International warfare is no longer a tool reserved for the exclusive use of nation states. Modern advances in technology and tactics allow non-state actors to exert force and engage in conflict on the world stage in a manner previously unknown. And in response to the changing face of international conflict, it may be necessary and appropriate to overhaul the law to ensure that it can be brought to bear against new adversaries. Of course, any legislative changes should be tempered and informed both by the reasonable goals associated with loss of citizenship proposals, as well as by existing limitations under law.

Joining a terrorist organization in the 21<sup>st</sup> century, or choosing to act under the direction or for the benefit of a terrorist organization, is an obvious modern analog to joining the forces of a nation engaged in hostilities with the United States. But there are differences. A terrorist organization is not a state. Examples of terrorist organizations that come to mind immediately are Al Qaeda and Daesh (ISIS), but there are many more. For many Americans, modern terrorism is largely synonymous with Islamist terrorism; however, terrorism has not been exclusively appropriated by Islamists. The U.S. State Department's list of "Designated Foreign Terrorist Organizations" includes 60 different groups, some of which have been in existence for more than 50 years and many of which

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<sup>7</sup> Senator Lieberman has made this point. Kasie Hunt, "Lieberman bill would strip citizenship."

have nothing to do with the modern wave of Islamist terror.<sup>8</sup> And those are just the officially designated foreign terrorist organizations. Domestic groups have also used and will continue to use the tactic of terrorism as a tool to achieve their goals.

A successful terrorism-related loss of citizenship bill would establish under law that joining or supporting a terrorist organization engaged in hostilities against the United States, or that directs its members to engage in hostilities against U.S. citizens, is inconsistent with maintaining U.S. citizenship, much in the same way that joining the armed forces of a foreign state at war with the United States can cost an individual his or her citizenship. But the devil, as always, is in the details. At a bare minimum, a successful bill should be drafted with an understanding of existing statutory and other legal limitations affecting loss of citizenship. A successful bill must be carefully considered and worded to avoid unintended consequences that could adversely affect homeland security, or that endanger fundamental rights or protections under U.S. law. It is an extreme consequence that must be brought to bear judiciously. However, it may be an appropriate consequence in some circumstances, and should not be discounted merely because it is extreme.

This thesis is fundamentally a policy analysis. As such, it does not affirmatively argue in favor of a particular outcome. This research demonstrates that a terrorism-related loss of citizenship provision in the United States could pass constitutional muster, but will require more thoughtful and detailed drafting than bills to date have demonstrated. This research also identifies problems related to the use of loss of citizenship as a consequence for overseas terrorist activity, the implications of which may not be entirely predictable.

## **B. LITERATURE REVIEW**

Citizenship describes the relationship between an individual and the sovereign nation (or nations) to which she is deemed to hold allegiance. It is a relationship characterized by mutual obligation as between citizen and nation, encompassing all of the

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<sup>8</sup> For Example ETA, the Basque separatist group, has roots in the Basque Nationalist Party which dates back to the end of the 19<sup>th</sup> century. *Encyclopedia Britannica Online*, s.v. "ETA," Encyclopedia Britannica, accessed September 10, 2016, <https://www.britannica.com/topic/ETA>.

obligations, rights, privileges, and immunities attendant to citizenship.<sup>9</sup> Hannah Arendt described citizenship as the “right to have rights.”<sup>10</sup> Citizenship is essential to an individual’s right to live and work under the protection of and according to the laws of a nation without fear of being forcibly removed.<sup>11</sup> The United Nations Office of the High Commissioner of Human Rights holds that “nationality is a fundamental human right.”<sup>12</sup> The indispensable nature of citizenship to an individual’s place in modern society is evidenced by the conditions and consequences of statelessness.

In 1961, the United Nations adopted the Convention on the Reduction of Statelessness in an effort to address the growing international problem of statelessness.<sup>13</sup> It is difficult or impossible for a stateless person to travel, reside, or work lawfully in any nation, and in many instances to ensure that his or her children acquire a nationality. Although United States citizenship can be acquired simply by being born in the United States, that is not the case throughout the world. Many children are born into statelessness and face significant hurdles acquiring an education, and other basic human rights.<sup>14</sup> The

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<sup>9</sup> For a discussion of rights and responsibilities attendant to United States citizenship see generally, “Citizenship Rights and Responsibilities,” U.S. Citizenship and Immigration Services, accessed September 10, 2016 <https://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities>; see also, Theodore Roosevelt, “The Duties of American Citizenship,” January 26, 1883, <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/tr-citizen/>.

<sup>10</sup> Hannah Arendt, *The Origins of Totalitarianism* (Cleveland: Meridian Books-The World Publishing Company, 1962), 296–97.

<sup>11</sup> A non-citizen in the United States may live and work here with permission, and under a variety of restrictions. Violation of law may result, in addition to appropriate criminal penalties, in that person’s involuntary removal from the United States. A citizen may commit a crime, pay the consequences, and return to normal life in the United States.

<sup>12</sup> “Right to a Nationality and Statelessness,” OHCHR, accessed September 10, 2016, <http://www.ohchr.org/EN/Issues/Pages/Nationality.aspx>.

<sup>13</sup> “1961 Convention on the Reduction of Statelessness,” UNHCR, <http://www.unhcr.org/en-us/protection/statelessness/3bbb286d8/convention-reduction-statelessness.html>. It was ratified and or otherwise entered into force by, inter alia, the United Kingdom (1966) and Australia (1973). France signed the convention in 1962, but it never ratified the convention. The United States was involved in the drafting of the document, but neither signed nor otherwise joined or acceded to the 1961 Convention. “Status of Treaties – Convention on the Reduction of Statelessness,” United Nations, accessed September 10, 2016, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=_en).

<sup>14</sup> Michael Pizzi, “A stateless child is born every 10 minutes, UN refugee agency says,” *Al Jazeera America*, November 3, 2015, <http://america.aljazeera.com/articles/2015/11/3/unhcr-stateless-child-born-every-10-minutes.html>.

deplorable consequences of statelessness are far reaching, which serves to underline the importance of citizenship.<sup>15</sup>

In the United States, loss of citizenship for reasons other than fraud or illegality associated with naturalization or the acquisition of documents evidencing U.S. citizenship<sup>16</sup> occurs pursuant to 8 U.S.C. § 1481 (Immigration and Nationality Act (INA) § 349). The law governing loss of citizenship is statutory, originating from Congress, but as modified or constrained by binding court precedent. In particular, the Supreme Court has recognized constitutional protections against the involuntary withdrawal of United States citizenship. The last major overhaul of U.S. immigration law, under which loss of citizenship provisions are organized, occurred with the passage of the Immigration and Nationality Act of 1952. In 1952 Congress included in the INA ten actions that could cause loss of citizenship.<sup>17</sup> Resulting from subsequent litigation, binding precedent, and

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<sup>15</sup> “Impact of Statelessness,” Institute on Statelessness and Inclusion, accessed September 10, 2016, <http://www.institutesi.org/world/impact.php>.

<sup>16</sup> An individual who naturalized, but who during the naturalization process failed to disclose facts or circumstances that would have rendered her or him ineligible to naturalize (i.e., prior disqualifying criminal activities), may be stripped of citizenship by revocation. Immigration and Nationality Act § 340, 8 U.S.C. § 1451 (1952)(as amended). Another means by which individuals unlawfully acquire citizenship is by unlawful acquisition of a Certificate of Citizenship or Certificate of Naturalization. A Certificate of Citizenship is lawfully obtained by individuals who are able to document that they already acquired U.S. citizenship (for example, individuals born outside of the United States to a U.S. citizen under circumstances that convey U.S. citizenship.) A Certificate of Naturalization is lawfully obtained through the naturalization process. An unlawfully acquired Certificate of Citizenship or Certificate of Naturalization can be cancelled. Immigration and Nationality Act § 342, 8 U.S.C. § 1453 (1952)(as amended). A U.S. passport is also indicia of U.S. citizenship. The Department of State, which is the issuing authority for U.S. passports, has the authority to revoke an improperly issued passport. 22 U.S.C. § 211a. See also 22 C.F.R., § 51.60-62.

<sup>17</sup> The original 1952 loss of nationality provisions are here summarized: (1) obtaining naturalization in a foreign state; (2) taking an oath or making a declaration of allegiance to a foreign state; (3) entering the armed forces of a foreign state; (4) accepting a significant position in the government of a foreign state; (5) voting in a political election of a foreign state; (6) renouncing citizenship overseas before a U.S. consular officer; (7) renouncing citizenship in the U.S. while the U.S. is in a state of war and subject to other limitations; (8) deserting the U.S. military in a time of war; (9) committing any act of treason upon conviction by a court martial or other court of competent jurisdiction; and (10) departing from or remaining outside of the U.S. during a time of war. *An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality; and for Other Purposes*, Public Law 82–414, 66 Stat. 267 (1952), also known as the Immigration and Nationality Act of 1952.

legislative amendment, only seven remain, and the predicate conditions under which loss of citizenship can take place in the United States have also changed.<sup>18</sup>

Today, loss of U.S. citizenship can only take place if a statutory expatriating act is committed voluntarily and with the specific intention of losing citizenship.<sup>19</sup> Under current law, the voluntariness prong is presumed, which means that simply committing one of the enumerated acts raises the presumption that it was committed voluntarily, subject to rebuttal. No such statutory presumption exists under law regarding the specific intention required. Intent can therefore be a more challenging part of the analysis when considering a loss of citizenship case.

A key constitutional protection related to citizenship is found in the 14th Amendment, which states in pertinent part, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside.” In 1967, a sharply divided (5-4) Supreme Court held that the 14th Amendment “withdrew from the government of the United States the power to expatriate United States citizens against their will for any reason.”<sup>20</sup> Although this language seems definitive, United States citizens continued to lose citizenship for a variety of reasons as the courts and the federal government came to understand how the law operated under this new restriction.<sup>21</sup>

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<sup>18</sup> Immigration and Nationality Act § 349, 8 U.S.C., § 1481 (1952)(as amended). Current loss of nationality provisions are here summarized: (1) obtaining naturalization in a foreign state; (2) taking an oath of allegiance to a foreign state ; (3) entering or serving as a commissioned or non-commissioned officer in the armed forces of a foreign state engaged in hostilities against the United States; (4) serving in a position in a foreign government where such positions requires naturalization or an oath of allegiance; (5) renouncing citizenship overseas before a U.S. consular officer; (6) renouncing citizenship in the U.S. while the U.S. is in a state of war and subject to other limitations; (7) treason or related crimes when convicted by a court martial or other court of competent jurisdiction.

<sup>19</sup> Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (1952)(as amended); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980).

<sup>20</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>21</sup> Loss of U.S. citizenship has been determined and upheld, over the objection of the individual, and despite court challenge, in a variety of cases decided after 1967’s *Afroyim v. Rusk*. See e.g., *King v. Rogers*, 463 F.2d 1188 (9th Cir. 1972)(U.S. citizen who naturalized as a British citizen, and later an Israeli citizen was deemed to have lost of U.S. citizenship); *Davis v. District Director, Immigration & Naturalization Service*, 481 F. Supp. 1178 (D.D.C. 1979)(“World Citizen” and U.S. World War II veteran Gary Davis was deemed to have loss his citizenship through his own voluntary renunciation); *U.S. v. Schiffer*, 831 F. Supp. 1166 (E.D. Pa. 1993)(U.S. born individual who returned to a German enclave in Romania as a boy and served as a concentration camp guard in Nazi Germany deemed to have lost his U.S. citizenship).

Shortly thereafter, another similarly divided Court reached a potentially conflicting decision, concluding that some citizens who acquire citizenship through statutory naturalization provisions fall outside of the scope of 14th Amendment.<sup>22</sup> The case, *Rogers v. Bellei*, did not involve application of the loss of nationality provisions of the INA at section 349, but rather involved section 301 of the INA, the statutory section that determines whether and under what circumstances an individual acquires citizenship at birth.<sup>23</sup> As originally enacted, INA § 301 imposed certain residency requirements on individuals born outside of the United States to a U.S. citizen parent and a non-citizen parent.<sup>24</sup> The *Rogers v. Bellei* court held that certain statutory citizenship laws, such as the one at issue before the court, fall outside of the scope of the 14th Amendment, which only applies to individuals born or naturalized in the United States.

Ultimately, *Rogers v. Bellei* didn't signal a significant Supreme Court retrenchment. While it may be possible under existing Supreme Court precedent to subject U.S. citizens who acquire citizenship in a manner other than having been "born or naturalized in the United States" to reasonable additional conditions for purpose of acquiring citizenship, *Rogers v. Bellei* does not stand for the proposition that once citizenship is in fact acquired, it would be constitutional to treat some citizens differently than others for purposes of expatriation, or for any other purpose. As such, *Rogers v. Bellei* has not played a significant role in the development of loss of citizenship law.

Under current Supreme Court precedent, Congress cannot strip citizenship involuntarily from United States citizens; however, the relevant Supreme Court decisions constraining Congress in this regard were not the product of unanimous courts or even

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<sup>22</sup> U.S. Const. amend. XIV. See also *Rogers v. Bellei*, 401 U.S. 815 (1971). Between 1967 when *Afroyim v. Rusk* was decided and 1971 when *Rogers v. Bellei* was decided, the composition of the court changed. Two members of the *Afroyim* majority (Earl Warren and Abe Fortas) and one the dissenters (Tom Clark) were replaced by three new justices (Harry Blackman, Warren Burger, and Thurgood Marshall). In 1971, the remaining *Afroyim* dissenters (John Harlan, Potter Stewart, and Byron White) were joined by two of their new colleagues (Harry Blackmun and Warren Burger) to form the majority in *Rogers v. Bellei*. Harry Blackmun, the most junior member of the court at that time, wrote the majority decision in *Rogers v. Bellei*. The remaining members of the *Afroyim* majority (Hugo Black, William O. Douglas, and William Brennan) along with another new colleagues (Thurgood Marshall) were now dissenters.

<sup>23</sup> *Rogers v. Bellei*, 401 U.S. 815 (1971).

<sup>24</sup> Immigration and Nationality Act § 301, 8 U.S.C. § 1401 (1952)(as amended).

strong majorities, suggesting that changes to the ideological make-up of the Supreme Court could have an outcome determinative effect should this issue come before the court again. In 1967, Justice Harlan's dissent (joined by justices White, Clark, and Stewart) in *Afroyim v. Rusk* began by noting, "The Court today overrules [prior precedent], and declares [a loss of citizenship provision] unconstitutional, by a remarkable process of circumlocution. First, the Court fails almost entirely to dispute the reasoning in [the prior case]; it is essentially content with the conclusory and quite unsubstantiated assertion that Congress is without 'any general power, express or implied,' to expatriate a citizen 'without his assent.'"<sup>25</sup> The dissent then went on at length to note Congress' long history of passing loss of nationality laws that resulted in involuntary withdrawal of citizenship under some circumstances, and prior Supreme Courts' approval of those laws.

Justice Harlan's dissent concludes by arguing, not without some force, that the 14th Amendment served the laudable functions of overruling the repugnant *Dred Scott* decision, and declaring, "to whom citizenship initially attaches."<sup>26</sup> It did not, according to the dissent, serve to entirely withdraw from Congress the authority to strip citizenship. The closeness of these decisions leaves open the possibility that the Court could revisit the government's power to expatriate U.S. citizens against their will. A new terrorism-related expatriation provision could provide a strong vehicle to challenge this precedent. In addition, the creation of new statutory presumptions that allow courts to find voluntary relinquishment as a result of intent inferred from the act of travelling to join or support a foreign terrorist organization may allow loss to take place consistent with existing constitutional and statutory protections.

Loss of citizenship is an issue that arises in other contexts as well. In the context of criminal litigation, some federal prosecutors have utilized loss of citizenship as a bargaining chip, negotiating and obtaining agreements from defendants to leave the

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<sup>25</sup> *Afroyim v. Rusk*, 387 U.S. 253, 269 (1967).

<sup>26</sup> *Afroyim v. Rusk*, 387 U.S. 253, 292 (1967). *Dred Scott v. Sanford*, 60 U.S. 393 (1857) was the Supreme Court decision which held that individuals brought to the United States from Africa as slaves, even if later released from slavery, could not be or become American citizens and had no standing to bring suit in U.S. federal courts.



United States and voluntarily renounce their citizenship overseas.<sup>27</sup> Some commentators have also argued that punitive use of loss of citizenship has survived.<sup>28</sup>

Some review of post-9/11 loss-of-citizenship bills has also taken place. At least one commentator, Ben Herzog, as part of an extensive review of the history of expatriation in the United States, reviewed both a draft version of the Patriot Act II that was never submitted to Congress, as well as legislation submitted by Senator Joseph Lieberman proposing to amend the INA to add a terrorism-related loss of citizenship provision. Herzog concluded that the lack of general support for these measures may indicate that “the ideas expressed by the Supreme Court since 1958 have permeated Congress,” but have not necessarily been universally accepted.<sup>29</sup>

### C. RESEARCH DESIGN

This research examines the nature of U.S. citizenship and the associated legislative and constitutional protections that have developed to inform loss of citizenship. It then examines terrorism-related expatriation laws that have been adopted or considered and rejected by the United Kingdom, Australia, and France. It then reviews the various terrorism-related expatriation bills that have been introduced in Congress since 9/11, concluding with bills currently pending before Congress.

Based on this research, this thesis assesses the viability of loss of citizenship solutions to the problem of U.S. citizens travelling to join or support foreign terrorist organizations, as well as problems or deficiencies in previously-proposed and existing legislative options. Finally, this thesis offers a collection of recommendations regarding matters that should be included or considered in any future loss of citizenship laws proposed or considered by legislators.

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<sup>27</sup> See e.g., Abigail D. Lauer, “The Easy Way Out: The Yaser Hamdi Release Agreement and The United States Treatment of the Citizen Enemy Combatant Dilemma,” *Cornell Law Review* 91, no. 4 (2006): 927–956, accessed September 10, 2016, <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3031&context=clr>.

<sup>28</sup> For example, Ben Herzog has argued that the use of denaturalization proceedings may in some instances constitute a punitive use of loss of nationality. Ben Herzog, *Revoking Citizenship: Expatriation in America from the Colonial Era to the War on Terror* (New York: New York University Press, 2015), chapter 8.

<sup>29</sup> *Ibid.*

## **II. ACQUISITION AND LOSS OF CITIZENSHIP IN THE UNITED STATES — A SURVEY OF THE BACKGROUND**

This chapter provides a survey of the historical growth and development of United States law relevant to expatriation and loss of citizenship. Although this review will touch on some aspects of the historical growth and development of U.S. law regarding citizenship and naturalization, the breadth and scope of this review is by no means exhaustive, particularly with respect to naturalization. The evolution of U.S. law pertaining to loss of citizenship is inexorably tied to early efforts to clarify and define when and under which circumstances an individual might acquire U.S. citizenship. For this reason, the following review may stray down a legal side road from time to time in the interest of establishing a sufficiently detailed picture of the general topic for the reader. This chapter ends with a short discussion of relevant international law, reviewing three key sources from the post-World War II era that may affect loss of citizenship decisions.

### **A. CITIZENSHIP AT THE BIRTH OF AMERICA**

The United States Constitution contains no express language concerning loss of citizenship. The Constitution references related issues in two places. First, Article I, Section 8, states that Congress shall have the power to “establish a uniform rule of naturalization.” Then, Section 1 of the 14th Amendment states, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” The amendment goes on to limit the ability of the states to “make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>30</sup>

Although the United States Constitution lacks any express reference to expatriation or loss of citizenship, acquiring and losing citizenship were important issues beginning in the infancy of the United States. Early U.S. law reflected the importance of acquiring new citizens. In 1790 Congress adopted the first legislation regarding

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<sup>30</sup> U.S. Const. amend. XIV, § 1.

naturalization, titled *An Act to Establish An Uniform Rule of Naturalization*.<sup>31</sup> The 1790 Act provided that any free white alien who had resided in the United States for two years or more could apply to be a citizen.<sup>32</sup>

Great Britain historically asserted that British subjects held perpetual allegiance to Great Britain unless and until released from that obligation by the King.<sup>33</sup> Obviously, the United States challenged this allegiance during the American Revolution. The Treaty of Paris, by which the United States and Great Britain ended the Revolutionary War, implicitly acknowledged the existence of the people of the United States at that time...i.e., former citizens/subjects of Great Britain, and is generally held to have served the purpose of releasing prior British subjects (who became Americans after the war) from their obligations to the crown. It did not, however, touch on the question of future naturalization of British subjects or the reciprocal possibility that citizens of the newly created United States might return to Great Britain. Great Britain's continued reliance on the notion of perpetual allegiance quickly became evident.

When Great Britain went to war with France in 1803 (the Napoleonic Wars), British warships began intercepting American ships on the high seas and impressing into British service individuals found on board who may have had some prior connection with

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<sup>31</sup> *An Act to Establish An Uniform Rule of Naturalization*, 1 Stat. 103 (1790).

<sup>32</sup> Periodic revisions of this law took place subsequently, including in 1795, 1798, and 1802. *An Act to Establish An Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject*, 1 Stat. 414 (1795); *An Act Supplementary to and to Amend the Act, Instituted "An Act to Establish An Uniform Rule of Naturalization;" and to Repeal the Act Heretofore Passed on that Subject*, 1 Stat. 566 (1798); *An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts Heretofore Passed on that Subject*, 2 Stat. 153 (1802).

<sup>33</sup> "Great Britain long adhered to the rule of perpetual allegiance, and her impressment upon the high seas of naturalized American citizens of British birth was the chief cause of the war of 1812." George F. Tucker, "Naturalization," in *Modern American Law: A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms* (Chicago: Blackstone Institute, 1911), Vol. 11, Part VI, 447-451, [https://books.google.com/books/download/Modern\\_American\\_Law.pdf?id=AW4aAAAAYAAJ&output=pdf&sig=ACfU3U04PNHjPL8wB2D4GuF4K7G5AjuwKQ](https://books.google.com/books/download/Modern_American_Law.pdf?id=AW4aAAAAYAAJ&output=pdf&sig=ACfU3U04PNHjPL8wB2D4GuF4K7G5AjuwKQ). For a thorough review of the law relating to acquisition and loss of nationality as viewed from a late 19<sup>th</sup> century lens, see also *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

Great Britain.<sup>34</sup> This practice formed a significant cause of the War of 1812 between England and the United States.<sup>35</sup>

## **B. THE CIVIL WAR PERIOD AND ITS AFTERMATH**

Problems related to allegiance and nationality continued through and beyond the U.S. Civil War, when conflict again arose between the United States and Great Britain regarding the effect and consequences of U.S. naturalization on former British subjects. American citizens, some naturalized and some native, travelled to Ireland and England to participate in the Fenian movement for Irish independence in the 1860s. Some were captured and tried amid questions about their nationality. These questions were of importance, as the answers determined whether participating in the Fenian movement constituted treason, as well as the protections under British law to which individuals were entitled during prosecution for alleged crimes. Procedures differed depending on whether the defendant was a British subject or a foreign national.<sup>36</sup> For example, in the case of John McCafferty, a U.S. citizen and Civil War veteran who was tried in Ireland for treason after having been apprehended in Cork in possession of Fenian literature, the fact that he was determined to be an alien and not a native Irishman entitled him to a trial with a jury composed half of aliens.<sup>37</sup> These cases raised concern in the United States about the rights of individuals and the arguments the U.S. government was making or wanted to make forcefully in foreign courts, such as those of Great Britain, that upon naturalization in the U.S. allegiance to one's birth nation, and all duties and obligations appertaining there to, were severed. In addition, even as the federal government was taking assertive steps to protect the rights of recently naturalized Americans born in Europe, and despite the fact that African slaves were

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<sup>34</sup> "Napoleonic Wars and the United States, 1803-1815," U.S. Department of State Office of the Historian, accessed September 10, 2016, <https://history.state.gov/milestones/1801-1829/napoleonic-wars>.

<sup>35</sup> "Great Britain long adhered to the rule of perpetual allegiance, and her impressment upon the high seas of naturalized American citizens of British birth was the chief cause of the war of 1812." George F. Tucker, "Naturalization."

<sup>36</sup> Niamh Howlin, "Fenians, Foreigners and Jury Trials in Ireland, 1865-1870," *Irish Jurist* 45 (2010): 51-81.

<sup>37</sup> The Jury in the McCafferty case was composed of 6 Irishmen, 4 Frenchmen, and 1 each from Switzerland and Italy. *Ibid.*

finally provided an opportunity to become citizens, the Congress was taking steps to further entrench and expand racially-based restrictions on naturalization.

### **1. The Expatriation Act of 1868**

The year 1868 was an important year for matters pertaining to loss and acquisition of U.S. citizenship, as it saw the enactment of the Expatriation Act of 1868, as well as the establishment of early treaties reflecting agreements with foreign nations regarding our mutual understanding of the effects and consequences to aliens of naturalization as a U.S. citizen. The principle—founded on conceptions of natural law and the natural rights of man—that an individual could throw off allegiance to one sovereign and acquire allegiance to another, was first announced in our federal law in the preamble of the Expatriation Act of 1868: “Whereas, the right of expatriation is a natural and inherent right of all people...”<sup>38</sup> The Act asserted that the right of expatriation is a fundamental principle of our government. It said, “...all naturalized citizens of the United States, while in foreign states, shall be entitled to, and shall receive from this government, the same protection of persons and property that is accorded to native-born citizens in like situations and circumstances.”<sup>39</sup>

The purpose of the 1868 Act was to declare publically that the force and authority of the federal government was behind U.S. citizens, including naturalized citizens, travelling abroad. It was an act supporting the right of foreign citizens to divest themselves of their original citizenship in favor of acquiring U.S. citizenship. As Daniel Klubock noted in his article, *Expatriation — Its Origin and Meaning*, “[t]his Act was directed at other countries, and served notice that the United States would extend its protection to all citizens, naturalized as well as native-born. There was no question that expatriation here meant the transfer of citizenship from a foreign country to the United States.”<sup>40</sup> The Act itself did not articulate any grounds, process, procedure, or acts by

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<sup>38</sup> *An Act Concerning the Rights of American Citizens in Foreign States*, 15 Stat. 223 (1868), commonly known as the Expatriation Act of 1868.

<sup>39</sup> *Ibid.*

<sup>40</sup> Daniel Klubock, “Expatriation — Its Origin and Meaning,” *Notre Dame Law Review* 38 (1962): 1–49, accessed September 10, 2016, <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=3425&context=ndlr>.

which U.S. citizens could divest themselves of U.S. citizenship, or indeed acquire U.S. citizenship. Rather, it put foreign governments on notice that the United States intended to defend the rights of all of its citizens, and authorized the President to take appropriate action to obtain the release of United States citizens unjustly held overseas, excepting only that the President could not take actions amounting to acts of war. Also notable, the Act was passed into law on July 27, 1868, just more than two weeks after the 14th Amendment to the United States Constitution was adopted (July 9, 1868).

## **2. The Burlingame and Bancroft Treaties**

Between 1868 and 1907 there was no federal law expressly enumerating the circumstances under which a U.S. citizen would lose his or her U.S. citizenship, excepting the Enrollment Act of 1865, a Civil War-era law which provided for loss of citizenship under some circumstances upon desertion from the armed forces.<sup>41</sup> It fell to the Department of State to address and resolve most loss of citizenship issues, which efforts are reflected largely in treaties such as the Burlingame Treaty, and the Bancroft series of treaties.

The Burlingame Treaty of 1868 was a treaty between the United States and China. It stated under Article V, “The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.”<sup>42</sup> Although the language of this treaty encompasses matters of migration and emigration, concerns related to Chinese laborers in the United States would soon lead Congress to exclude the Chinese from eligibility to naturalize as U.S. citizens.

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<sup>41</sup> *An Act to Amend the Several Acts Heretofore Passed to Provide For the Enrolling and Calling Out the National Forces, and for Other Purposes*, 13 Stat. 487 (1865), § 21, commonly known as the Enrollment Act of 1865, <http://legisworks.org/sal/13/stats/STATUTE-13-Pg487.pdf>.

<sup>42</sup> Burlingame-Seward Treaty of 1868, U.S. Department of State, accessed September 10, 2016, <http://content.cdlib.org/ark:/13030/hb4m3nb03h/?order=2&brand=calisphere>. For more on the Burlingame Treaty, see “The Burlingame-Seward Treaty of 1868,” U.S. Department of State, Office of the Historian, accessed September 10, 2016, <https://history.state.gov/milestones/1866-1898/burlingame-seward-treaty>.

The Bancroft series of treaties, which also addressed matters related to naturalization and loss of citizenship, were entered into between the United States and a variety of other nations, beginning with Prussia in 1868.<sup>43</sup> Other signatories included Albania, Austria-Hungary, Baden, Bavaria, Belgium, Bulgaria, Brazil, Costa Rica, Czechoslovakia, Denmark, El Salvador, Haiti, Hesse, Honduras, Lithuania, Mexico, Nicaragua, Peru, Portugal, the United Kingdom, Uruguay, and Wurttemberg. These treaties persisted for a long time, with the last terminating in the late 20<sup>th</sup> century.<sup>44</sup>

### **3. The Expatriation Act of 1907**

The Expatriation Act of 1907 articulated for the first time a collection of acts that, by statute, would result in a United States citizen losing his or her citizenship.<sup>45</sup> Loss of citizenship under the 1907 Act could occur for a variety of reasons including taking an oath of allegiance to a foreign state, and for women, marrying a foreign citizen. In addition, the 1907 Act addressed some issues related to the citizenship status of children born abroad of alien parents who later naturalize, and regarding children born abroad of U.S. citizen parents.<sup>46</sup> Portions of the 1907 Act were repealed by the Cable Act of 1922, also known as the Married Women's Independent Nationality Act, and which provided that if a woman married a foreigner who was eligible to naturalize as a U.S. citizen, she would not lose her U.S. citizenship.<sup>47</sup>

### **4. Racial Bars to Naturalization**

The longstanding rule dating back to 1790 that naturalization was limited to white aliens was disrupted following the conclusion of the Civil War, when, pursuant to the

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<sup>43</sup> Charles Munde, *The Bancroft Naturalization Treaties with the German States; the United States' Constitution and the Rights and Privileges of Citizens of Foreign Birth* (Wurtzburg, 1868), accessed September 10, 2016, <https://archive.org/stream/cu31924005227503#page/n3/mode/2up>.

<sup>44</sup> 7 U.S. Department of State Foreign Affairs Manual § 1270, appendix A (2013), <https://fam.state.gov/fam/07fam/07fam1200apA.html>.

<sup>45</sup> *An Act In Reference to the Expatriation of Citizens and their Protection Abroad*, 34 Stat. 1228 (1907), commonly known as the Expatriation Act of 1907.

<sup>46</sup> *Ibid.*

<sup>47</sup> *An Act Relative to the Naturalization and Citizenship of Married Women*, 42 Stat. 1021 (1922), commonly known as the Cable Act of 1922 or the Married Women's Independent Nationality Act.

Naturalization Act of 1870, individuals having African heritage were permitted to naturalize as citizens.<sup>48</sup> The changes resulting from the Naturalization Act of 1870 did not extend to other ethnicities. Ethnicity-based bars to naturalization persisted. For example, the Chinese Exclusion Act of 1882 prevented Chinese laborers brought to the United States from becoming citizens.<sup>49</sup> Litigation related to this controversial legislation helped to further develop the law regarding acquisition and loss of citizenship and the scope of constitutional protections.

In 1898 the Supreme Court in *U.S. v. Wong Kim Ark* overturned part of the Chinese Exclusion Act amid a challenge by a man who was born in the United States to Chinese laborers.<sup>50</sup> The Supreme Court did not disturb or challenge the ability of Congress to legislate a uniform rule of naturalization, which at that time included ethnicity-based restrictions, but it did conclude that the 14th Amendment guaranteed citizenship to individuals born in the United States, even individuals born to Chinese parents who were not eligible to naturalize. Still, ethnicity-based naturalization prohibitions under U.S. law continued to expand. The Chinese Exclusions Act was reenacted and extended in 1902 and again in 1904.<sup>51</sup> Later the Immigration Acts of 1917 and 1924 established the “Asiatic Barred Zone,” restricting immigration from most of Asia, including Turkey, Afghanistan, India, Pakistan, Bangladesh, Nepal, Myanmar,

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<sup>48</sup> *An Act to Amend the Naturalization Laws and to Punish Crime Against the Same, and for Other Purposes*, 16 Stat. 254 (1870).

<sup>49</sup> *An Act to Execute Certain Treaty Stipulations Relating to Chinese*, 22 Stat. 58 (1882), commonly known as the Chinese Exclusion Act.

<sup>50</sup> *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898). The decision in this case, and the extensive dissent, provide an excellent historical review of the law affecting acquisition and loss of citizenship in the 19th century and earlier.

<sup>51</sup> *An Act to Prohibit the Coming Into and to Regulate the Residence Within the United States, its Territories, and All Territory Under its Jurisdiction, and the District of Columbia, of Chinese and Persons of Chinese Descent*, 32 Stat. 176 (1902).



Laos, Thailand, Vietnam, Cambodia, Malaysia, Indonesia, and other Pacific islands with the exception of the Philippines.<sup>52</sup>

The Chinese Exclusion Act was formally repealed in 1943 by the Magnuson Act.<sup>53</sup> The Luce-Cellar Act of 1946 further eroded the restrictions against immigration from Asia. Ultimately, racial exclusions were eliminated with the passage of the Immigration and Nationality Act of 1952.

### C. THE NATIONALITY ACT OF 1940

The Nationality Act of 1940 was the next major event reflecting significant growth and change in the law affecting acquisition and loss of citizenship.<sup>54</sup> The loss of citizenship provisions in the 1940 Act, which resemble current law in many respects, were organized under Chapter IV of the Act, §§ 401–410. Pursuant to the 1940 Act, loss of citizenship could take place under a variety of circumstances, including naturalizing in a foreign nation, taking an oath of allegiance to a foreign nation, serving in the armed forces of a foreign nation, serving in a position in a foreign government for which only nationals are eligible, voting in a foreign election, making a formal renunciation before a diplomatic or consular officer, deserting the armed forces in time of war (requires conviction by court martial), and treason (requires conviction by court martial or a court of competent jurisdiction).<sup>55</sup>

The 1940 Act also created a presumption of loss of citizenship when a U.S. citizen born in the United States or outside the United States of citizen parents resided for six months or more in a foreign country in which his/her parents had naturalized. In

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<sup>52</sup> *An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States*, 39 Stat. 874 (1917), commonly known as the Immigration Act of 1917. See also, *An Act to Limit Immigration of Aliens Into the United States, and for Other Purposes*, 43 Stat. 153 (1924), commonly known as the Immigration Act of 1924. For further information regarding the United States' troubling historic discrimination against Asians, see "Closed Borders and Mass Deportations: The Lessons of the Barred Zone Act," American Immigration Council, January 1, 2005.

<sup>53</sup> *An Act to Repeal the Chinese Exclusion Acts, to Establish Quotas, and for Other Purposes*, 57 Stat. 600 (1943).

<sup>54</sup> *An Act to Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code*, 54 Stat. 1137 (1940), commonly known as the Nationality Act of 1940.

<sup>55</sup> *Ibid.*

addition, it created a complicated system providing for loss of citizenship for naturalized citizens depending upon the duration of an individual's residence outside the United States, and in some instance whether the person resided outside of the United States in the land of his or her birth. In all instances, a naturalized U.S. citizen who resided for five continuous years outside the U.S. (other than while working for the U.S. government or under other limited enumerated circumstances) would lose his or her U.S. citizenship.<sup>56</sup>

#### **D. THE 1944 RENUNCIATION ACT — A CAUTIONARY TALE**

Following the bombing of Pearl Harbor, the government of the United States took action to address security concerns. The potential threat of aliens in the United States loyal to the Axis powers demanded action. Under authority conferred by Chapter 3, Title 50 of the United States Code regarding "Alien Enemies"<sup>57</sup> and by presidential proclamations on December 7 and 8 of 1941, citizens of Germany, Italy, and Japan who were present in the United States were made subject to detention and removal.<sup>58</sup> Another perceived threat was the potential for espionage and sabotage. President Roosevelt issued Executive Order 9066 to address those problems. Executive Order 9066 authorized the Secretary of War to designate protected military areas in the United States, and to exclude from those areas "any or all persons."<sup>59</sup> This order was applied to exclude from the west coast of the United States approximately 120,000 United States citizens and lawful residents, primarily individuals having Japanese heritage, but also including a

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<sup>56</sup> Ibid.

<sup>57</sup> 50 U.S.C. §§ 21–24 (1940), accessed September 10, 2016, <http://loc.heinonline.org/loc/Page?handle=hein.uscode/usc1940003&id=1419&collection=journals&index=uscode/uscc#1420>.

<sup>58</sup> U.S. President, Proclamation, "Alien Enemies—Japanese, No. 2525," December 7, 1941, accessed September 10, 2016, <http://www.foitimes.com/internment/Proc2525.html>; U.S. President, Proclamation, "Alien Enemies—German, No. 2526," December 8, 1941, accessed September 10, 2016, <http://www.foitimes.com/internment/Proc2526.html>; U.S. President, Proclamation, "Alien Enemies—Italians, No. 2527," December 8, 1941, accessed September 10, 2016, <http://www.foitimes.com/internment/Proc2527.html>.

<sup>59</sup> Exec. Order 9,066 of February 19, 1942, Authorizing the Secretary of War to Prescribe Military Areas, accessed September 10, 2016, <https://www.ourdocuments.gov/doc.php?doc=74&page=transcript>.

smaller number of individuals having German and Italian heritage.<sup>60</sup> The bulk of these individuals were relocated and compulsorily interned in camps located in remote regions of California, Idaho, Utah, Wyoming, Arizona, Colorado, and Arkansas.<sup>61</sup> It took Congress 46 years to acknowledge that these actions constituted “a grave injustice ...to both citizens and permanent resident aliens of Japanese ancestry...”<sup>62</sup>

The Attorney General was aware of the potential constitutional infirmity of the ongoing internment of Japanese-Americans, a process by which, “American citizens, not charged with crime and not under martial law could be detained by administrative, military or civil officials or upon a mere administrative determination of loyalty.”<sup>63</sup> Congress requested that the Attorney General identify an alternate process by which individuals “could be detained as alien enemies without doing violence to our traditional constitutional safeguards.”<sup>64</sup> Congress quickly considered and enacted a renunciation of citizenship law intended to resolve that problem.<sup>65</sup>

Taking advantage of the evident unrest and coercive conditions associated with internment, U.S. authorities planned to offer individuals suspected of disloyalty the opportunity to renounce their U.S. citizenship. In doing so, it was believed two benefits would obtain. First, administrative suspicions regarding loyalty would be confirmed, as a loyal U.S. citizen would never renounce his or her citizenship. Second, upon renouncing

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<sup>60</sup> “Teaching With Documents: Documents and Photographs Related to Japanese Relocation During World War II National Archives,” National Archives, accessed September 10, 2016, <https://www.archives.gov/education/lessons/japanese-relocation/#documents>; and “Brief Overview of the World War II Enemy Alien Control Program,” National Archives, accessed September 10, 2016, <http://www.archives.gov/research/immigration/enemy-aliens-overview.html>. See also *An Act to Provide for the Preparation of a Government Report Detailing Injustices Suffered by Italian Americans During World War II, and a Formal Acknowledgment of Such Injustices by the President*, Public Law 106–451, 114 Stat. 1947 (2000), <https://www.congress.gov/106/plaws/publ451/PLAW-106publ451.pdf>.

<sup>61</sup> “Teaching With Documents: Documents and Photographs Related to Japanese Relocation During World War II,” National Archives.

<sup>62</sup> *An Act to implement recommendations of the Commission on Wartime Relocation and Internment of Civilians*, Public Law 100–383, 102 Stat. 903 (1988).

<sup>63</sup> *Abo v. Clark*, 77 F. Supp. 806, 809 (N.D. Cal. 1948).

<sup>64</sup> *Ibid.*

<sup>65</sup> *An Act to Provide for Loss of United States Nationality Under Certain Circumstances*, Public Law 78–405, 58 Stat. 677 (1944), commonly known as the Renunciation Act of 1944, accessed September 10, 2016, <http://legisworks.org/sal/58/ stats/STATUTE-58-Pg677a.pdf>.

citizenship, the individual would be subject to lawful detention pursuant to the Enemy Aliens Act. Regulations were subsequently promulgated at 8 C.F.R. part 316, and consisting of §§ 316.1-316.9.<sup>66</sup>

Although the 1944 regulations terminated at the close of World War II,<sup>67</sup> the statutory renunciation provision at 8 U.S.C. § 801(i) remained in the 1946 version of the U.S. Code, and was included, without apparent debate or discussion, in the 1952 enactment of the Immigration and Nationality Act, where it can currently be found today at INA § 349(a)(6).<sup>68</sup>

World War II renunciations under these conditions were later deemed coercive, hearings and procedures failed to meet minimum due process requirements, and individuals who renounced under this provision but regretted it were permitted to recover their United States citizenship.<sup>69</sup> The 1944 Renunciation Act serves as a cautionary reminder of how legislation directed at facilitating the withdrawal of citizenship from a targeted group based on perceived national or homeland security interests can fail in a number of different ways.

## **E. THE IMMIGRATION AND NATIONALITY ACT OF 1952**

The last major overhaul of the United States immigration system occurred with passage of the Immigration and Nationality Act of 1952, which brought the basic structure of expatriation and renunciation forward to the present. Prior to and during

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<sup>66</sup> Renunciation of United States Nationality, 9 Fed. Reg. 12241 (October 7, 1944), 8 C.F.R. § 316.1-316.9 (1944).

<sup>67</sup> 8 C.F.R. § 316.9 was entitled “Effective period of these regulations” and stated, “These regulations shall be effective from the date hereof and until cessation of the present state of war unless sooner terminated by the Attorney General.”

<sup>68</sup> Immigration and Nationality Act § 349(a)(6), 8 U.S.C. § 1481(a)(6)(1952)(as amended).

<sup>69</sup> *Abo v. Clark*, 77 F. Supp. 806 (N.D. Cal. 1948). See also, *Japanese Renunciation of Nationality*, 32 Fed. Reg. 9636, 8 C.F.R. § 349.1 (1967), <https://www.gpo.gov/fdsys/pkg/CFR-2010-title8-vol1/pdf/CFR-2010-title8-vol1-sec349-1.pdf>. For additional documents and information regarding the 1944 Renunciation Act, its consequences, and ultimately the restoration of citizenship to most affected renunciants: “Renunciation of Citizenship.” Densho Digital Repository, accessed September 10, 2016, <http://ddr.densho.org/browse/topics/87/>.

World War II, unfounded fears of a fifth column<sup>70</sup> within the United States comprised of U.S. citizens of having Japanese ancestry who were loyal or sympathetic to Japan, infused U.S. leaders with a sense of nationality and loyalty fueled in part by racial and ethnic prejudice.<sup>71</sup> Some of that prejudice had previously been incorporated into U.S. law, as evidenced by the 1917 Act, the 1924 Act, and the creation of the Asiatic Barred Zone. The Immigration and Nationality Act of 1952 Act began to undo some of those legal changes, perhaps reflecting a fledgling civil rights movement in the United States and decolonization around the world.

Since its enactment, a collection of constitutional challenges related to the expatriation provisions under the INA have been considered by the Supreme Court, further reshaping the statute and establishing additional protections associated with citizenship.

In *Perez v. Brownell*, 356 U.S. 44 (1958) the Supreme Court found that the legislature’s authority to pass laws regarding loss of citizenship was inherent in the power to conduct foreign affairs under the Necessary and Proper clause of the Constitution (Article I, Section 8, clause 18). In *Trop v. Dulles*, 356 U.S. 86 (1958) the Supreme Court found that loss of citizenship as a criminal penalty for desertion was cruel and unusual punishment, thus invalidating part of 1940 Act. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) the Supreme Court reached a similar result for individuals who evaded military service, invalidating part of the 1952 Immigration and Nationality Act. In *Schneider v. Rusk*, 377 U.S. 163 (1964), the Court held that applying different loss of citizenship criteria to naturalized vs. natural-born citizens was unconstitutional. *Afroyim v. Rusk*, 387 U.S. 253 (1967) established the constitutional requirement that relinquishment of U.S. nationality must be

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<sup>70</sup> The term “fifth column” refers to a situation in which enemy supporters have infiltrated society, weakening resistance and preparing the way for the enemy to invade and conquer. It is commonly attributed to General Emilio Mola Vidal, who, while marching four columns of troops toward Madrid during the Spanish Civil War, noted that upon his arrival in Madrid, he expected support from his “fifth” column, consisting of supporters of his Nationalist cause who were already in Madrid. *Encyclopedia Britannica Online*, s.v. “Fifth Column,” September 10, 2016, <https://www.britannica.com/topic/fifth-column>.

<sup>71</sup> Richard Reeves, *Infamy: The Shocking Story of the Japanese American Internment in World War II* (New York: Henry Holt and Company, 2015), 8–16.

voluntary. *Vance v. Terrazas*, 444 U.S. 252 (1980) established that loss of nationality requires proof of specific intention to relinquish nationality, that it is constitutional for Congress to establish criteria regarding a presumption of voluntariness, that proof by a preponderance of the evidence was an appropriate standard of proof, and that intent can be determined by a person's words and also by a fair inference from proven conduct.

## **F. INTERNATIONAL LAW BACKGROUND**

The following is not an exhaustive review of every international treaty, agreement, or convention that has some bearing on the ability of a member nation to implement terrorism-related loss of citizenship laws. Rather, this section provides an overview of three significant sources of international law affecting the loss of citizenship, including the Universal Declaration of Human Rights, the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 United Nations Convention on the Reduction of Statelessness. These were selected because they represent key post-World War II efforts by the international community to establish relevant ground rules for dealing with loss of citizenship. In many ways they are the international community's answer to the U.S. statement of principle embodied in the preamble to 1868 Act. Where many world nations previously balked at the notion of loss and acquisition of nationality as fundamental human rights, these modern documents reflect statements of international principle and in some instances international law that embrace those concepts, and attempt to establish protections and constraints on nations to ensure uniform treatment of individuals, regardless of whether they are seeking or suffering from loss of nationality.

### **1. The Universal Declaration of Human Rights**

The United Nations was established in 1945 after the conclusion of World War II to promote international cooperation, avoid more war, and "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."<sup>72</sup> It is the successor to the League of

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<sup>72</sup> "United Nations Charter," United Nations, accessed September 10, 2016, <http://www.un.org/en/sections/un-charter/un-charter-full-text/index.html>. See also, "About the UN," United Nations, accessed September 10, 2016, <http://www.un.org/en/about-un/index.html>.

Nations, which was formed with similar goals following World War I, but which lapsed into irrelevancy with the advent of illiberal regimes in Europe on the eve of World War II.<sup>73</sup>

Among the first efforts undertaken by the fledgling UN was the drafting of a document intended to reflect consensus on human rights, recognized by all nations. The chairperson of the United Nations Commission on Human Rights, which was charged with drafting the document that became the Universal Declaration of Human Rights, was Eleanor Roosevelt, widow of the late President Franklin D. Roosevelt.<sup>74</sup> Mrs. Roosevelt was a vocal proponent of, and America's first delegate to the United Nations. She considered her work drafting and ultimately "securing adoption of the Declaration as her greatest achievement."<sup>75</sup> The legal effect and consequence of the UDHR on the member states of the United Nations is a subject of some debate. The UDHR is not a treaty or convention, and as such does not establish any binding obligations.<sup>76</sup> Nevertheless, it has been very influential. Certainly it has been an important source of principle and ethical guidance for nations, courts, and lawmakers for more than 60 years.<sup>77</sup>

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<sup>73</sup> "History of the United Nations," United Nations, accessed September 10, 2016, <http://www.un.org/en/sections/history/history-united-nations/>.

<sup>74</sup> "History of the Document" United Nations, accessed September 10, 2016, <http://www.un.org/en/sections/universal-declaration/history-document/index.html>.

<sup>75</sup> John F. Sears, "Eleanor Roosevelt and the Universal Declaration of Human Rights," Franklin and Eleanor Roosevelt Institute, 2008, accessed September 10, 2016, <https://fdrlibrary.org/documents/356632/390886/sears.pdf/c300e130-b6e6-4580-8bf1-07b72195b370>.

<sup>76</sup> "[O]n December 10, 1948, the United Nations (UN) adopted the Universal Declaration of Human Rights (UDHR) without dissent. Although the UDHR has no legal force, as the single most important statement of ethics, its authority is unparalleled. Many legal experts estimate that it has acquired the status of international customary law." Antoon De Baets, "The Impact of the Universal Declaration of Human Rights on the Study of History," *History and Theory* 48 (2009): 20–43, accessed September 10, 2016, <http://www.inth.ugent.be/wp-content/uploads/2012/05/Impact-UDHR.pdf>.

<sup>77</sup> For more information on the legal status of the Universal Declaration of Human Rights, see Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International & Comparative Law* 25 (1995-96): 287–397, accessed September 10, 2016, <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1396&context=gjicl>.

Some argue the UDHR, or parts of it, have acquired the status of customary international law.<sup>78</sup> Customary international law can be defined as follows: “*Customary international law* refers to international obligations arising from established state practice, as opposed to obligations arising from formal written international treaties...[It is] one of the sources of international law...Put another way, ‘customary international law’ results from a general and consistent practice of states that they follow from a sense of legal obligation.”<sup>79</sup>

The portion of the UDHR directly relevant to the issue of terrorism-related loss of citizenship is Article 15, which states, that “[e]veryone has the right to a nationality, [and that] [n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>80</sup> This guiding statement of principle acknowledges that individuals are vested with certain rights relating to acquisition and loss of nationality. In many ways, this is nothing more than a restatement and further explication of the principles embedded in the preamble to the Expatriation Act of 1868, which declared, “expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and pursuit of happiness...”<sup>81</sup>

Article 15 has proved to be an enduring and influential statement regarding matters pertaining to the loss and acquisition of citizenship.

## **2. The 1954 Convention Relating to the Status of Stateless People**

In the aftermath of World War II, the emergence of international human rights as a cause to be pursued, combined with the absence of international agreement regarding

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<sup>78</sup> See e.g., “International Human Rights Law: Non-Treaty Standards,” Lawyers Rights Watch Canada, accessed September 10, 2016, <http://www.lrwc.org/education/international-law/non-treaty-standards/>; “What is the Universal Declaration of Human Rights?,” Australian Human Rights Commission, accessed September 10, 2016, <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights>. Customary international law is a species of international common law which in some instances attains the status and force of actual law through consistent adoption, practice, and general consensus. See generally, Wex, s.v. “Customary International Law,” accessed September 10, 2016, [https://www.law.cornell.edu/wex/customary\\_international\\_law](https://www.law.cornell.edu/wex/customary_international_law).

<sup>79</sup> Wex, s.v. “Customary International Law.”

<sup>80</sup> “The Universal Declaration of Human Rights,” United Nations, accessed September 10, 2016, <http://www.un.org/en/universal-declaration-human-rights/>.

<sup>81</sup> *An Act Concerning the Rights of American Citizens in Foreign States*, 15 Stat. 223 (1868).



the treatment of both refugees and stateless persons, resulted in the fledgling United Nations undertaking efforts to address these problems.<sup>82</sup> In particular, the UN's Commission on Human Rights began efforts to study and address these problems shortly after it came into existence, and initially under the leadership of Eleanor Roosevelt. It is perhaps not a coincidence that major changes in U.S. law relating to immigration, including the Immigration and Nationality Act of 1952, which was the last instance of comprehensive immigration reform in the United States, and later in the interpretation of U.S. law relating to loss of nationality, took place in the 1950s and 1960s while the international community was continuing to recover from the effects of World War II.

Statelessness as a matter of modern international concern came to the fore following World War I, and was exacerbated by the events of, and following World War II. One commentator has identified five causes for the problem of statelessness in Europe: (1) Nationality laws allowing nations to expatriate their citizens; (2) International treaties and agreements intended to resolve territorial disputes following the collapse of "old empires" like Austria-Hungary but that failed to resolve questions of citizenship; (3) the longstanding notion that a woman's citizenship followed her husband's, which resulted in loss of citizenship upon marriage but didn't necessarily result in acquisition of citizenship upon marriage, and became more problematic on divorce; (4) inadequate laws addressing children's acquisition of citizenship; and (5) individuals voluntarily or involuntarily displaced from their home country who can't or won't acknowledge citizenship of any nation out of fear of forced repatriation.<sup>83</sup>

The 1954 Convention defined statelessness and endeavored to establish basic ground rules for the treatment and management of stateless individuals by member countries. A stateless person is defined in Article I of the convention as "a person who is

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<sup>82</sup> See generally, Elizabeth G. Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution Press, 2001), Chapter 2. See also, Nehemiah Robinson, "Convention Relating to the Status of Stateless Persons, Its History and Interpretation," Institute of Jewish Affairs, World Jewish Congress 1955, accessed September 10, 2016, [https://www.oas.org/dil/1954\\_Convention\\_relatig\\_to\\_the\\_Status\\_of\\_Stateless\\_Persons.pdf](https://www.oas.org/dil/1954_Convention_relatig_to_the_Status_of_Stateless_Persons.pdf).

<sup>83</sup> Miariam Rurup, "Lives in Limbo: Statelessness after Two World Wars," *Bulletin of the German Historical Institute* 49 (2011): 113–134, accessed September 10, 2016 [http://www.ghi-dc.org/fileadmin/user\\_upload/GHI\\_Washington/Publications/Bulletin49/bu49\\_113.pdf](http://www.ghi-dc.org/fileadmin/user_upload/GHI_Washington/Publications/Bulletin49/bu49_113.pdf)

not considered as a national by any State under the operation of its law.”<sup>84</sup> Relevant to this thesis, countries bound by the 1954 Convention include the United Kingdom, Australia, and France.<sup>85</sup>

### 3. The 1961 Convention on the Reduction of Statelessness

A barrier some countries will face when considering new measures to strip citizens of nationality as a result of terrorist activity is the 1961 United Nations Convention on the Reduction of Statelessness.<sup>86</sup> The 1961 Convention presently has five signatories and 66 parties.<sup>87</sup> Included among the nations bound by the 1961 Convention are the United Kingdom, Australia, and France.<sup>88</sup> Although the United States supports

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<sup>84</sup> “1954 United Nations Convention Relating to the Status of Stateless People,” UNHCR, accessed September 10, 2016, <http://www.unhcr.org/3bbb25729.html>.

<sup>85</sup> The United States has traditionally taken the position that one of the rights an individual has in the context of expatriation is the right to render himself or herself stateless. “The Stateless in the United States,” Center for Migration Studies, May 28, 2013, accessed September 10, 2016, <http://cmsny.org/the-stateless-in-the-united-states/>. As such, the U.S. has declined to sign on to both the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

<sup>86</sup> “1961 Convention on the Reduction of Statelessness,” UNHCR.

<sup>87</sup> *Ibid.* The complicated language and procedures associated with international treaties/conventions merits a short discussion. The meaning of treaties and international agreements and the language and processes by which nations agree to be bound are, themselves, governed or at least informed by a collection of international agreements, including the “1969 Vienna Convention on the Law of Treaties,” United Nations, accessed September 10, 2016, <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>; And in addition, the “1978 Vienna Convention on the Succession of States in respect of Treaties,” United Nations, accessed September 10, 2016, [http://legal.un.org/ilc/texts/instruments/english/conventions/3\\_2\\_1978.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf). “Parties” refers to States and other entities with treaty-making capacity which have expressed their consent to be bound by a treaty and where the treaty is in force for such States and entities.” “Definition of key terms used in the UN Treaty Collection,” United Nations, accessed September 10, 2016, [https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1\\_en.xml#signatories](https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml#signatories). A “signatory” is a “country that ...indicates its intention to “ratify” (become a “party”) [to a treaty or agreement] at a later date. Signing a treaty does not bind the country to it. However, it assumes an obligation of good faith to refrain from acts which would defeat the object and purpose of the treaty.” “Glossary of Terms,” UNHCR, accessed September 10, 2016, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=44b5021d2&query=meaning%20of%20accession%20to%20a%20treaty%20or%20convention>. “Succession” generally refers to a situation in which a one state has taken over the territory and responsibilities of another state. “1978 Vienna Convention on the Succession of States in respect of Treaties,” United Nations. “Accession” and “ratification” have the same effect, in that they reflect a nation’s consent to be bound by an agreement. “What is the difference between signing, ratification and accession of UN treaties?,” Ask DAG! - United Nations Dag Hammarskjöld Library, accessed September 10, 2016, <http://ask.un.org/faq/14594>.

<sup>88</sup> “State Parties to the 1961 Convention on the Reduction of Statelessness,” UNHCR, accessed September 10, 2016, <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3bbb24d54&query=1961%20convention>.

the fundamental principles underlying the 1961 Convention and the goal of reducing statelessness generally, it declined to join. The United States has long maintained a self-deterministic view of loss of nationality. In particular, the U.S. takes the position that an individual has the right to renounce his or her citizenship, even if that decision would leave the individual stateless. The U.S. also balked at other restrictions contained in the 1961 Convention relating to how states may confer citizenship.<sup>89</sup>

The 1961 Convention was an effort to further the work begun with the 1954 Convention. Where the 1954 Convention was fundamentally focused on recognizing and providing basic rights to those afflicted by statelessness, the 1961 Convention was focused on reducing or eliminating the legal hurdles leading to the creation or perpetuation of statelessness as a condition.<sup>90</sup> The key limiting language in the 1961 Convention is found in Article 8, which provides, “A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”<sup>91</sup> It is notable in this regard that there is a distinction between deprivation of nationality and loss of nationality for purposes of the 1961 Convention. Loss of nationality under the 1961 Convention refers to “withdrawal of nationality which is automatic, by operation of law (‘ex lege’). The term ‘deprivation’ (‘privation’ in French) is used in the Convention in Article 8 to describe situations where the withdrawal is initiated by the authorities of the State. [By comparison], UDHR Article 15 forbids ‘arbitrary deprivation’ and makes no mention of loss of nationality.”<sup>92</sup>

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<sup>89</sup> “Nationality, Citizenship, and Immigration,” Chapter 1 of *Digest of United States Practice of International Law 2006*, ed. Sally J. Cummins (Oxford University Press International Law Institute, 2006), accessed September 10, 2016, [https://books.google.com/books?id=izjRCwAAQBAJ&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.com/books?id=izjRCwAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false).

<sup>90</sup> It had previously been presumed, for example, that some stateless persons would qualify as refugees under the 1951 United Nations Convention Relating to the Status of Refugees, entitling them seek and obtain asylum from member nations; however, in practice it shortly became evident that many were unable to “acquire citizenship in their country of habitual residence yet do not qualify as refugees...and have no claim to asylum.” “Nationality and Statelessness, A Handbook for Parliamentarians,” UNHCR, 2005, available at [http://www.europarl.europa.eu/hearings/20070626/libe/leclerc\\_en.pdf](http://www.europarl.europa.eu/hearings/20070626/libe/leclerc_en.pdf).

<sup>91</sup> “1961 Convention on the Reduction of Statelessness,” UNHCR.

<sup>92</sup> “Expert Meeting, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions,” UNHCR, October 31-November 1, 2013, <http://www.unhcr.org/5465e2cb9.pdf>.

While the 1961 Convention expressly prohibits states from enacting laws that would create stateless people through deprivation of nationality, this prohibition is subject to a variety of caveats.<sup>93</sup> For example, a state that, prior to agreeing to the 1961 Convention, had a law providing for forfeiture of citizenship flowing from actions “seriously prejudicial to the vital interests of the State,” could retain and continue to apply that law, even if it resulted in statelessness. Retention required that, at the time of joining the 1961 Convention, the State in question must have issued an express statement to that effect.<sup>94</sup> Similarly, with a proper written statement issued at the time of agreeing to be bound by the 1961 Convention, another exception allows continued withdrawal of citizenship even if statelessness would result, from individuals who, “in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State.”<sup>95</sup>

The practical meaning of these exceptions has been a matter of further discussion for the UNHCR. In 2013, a meeting took place in Tunisia to examine issues related to the ongoing interpretation and application of the 1961 Convention and its exceptions.<sup>96</sup> This meeting was one in a series that took place for the purpose of “drafting guidelines under UNHCR’s statelessness mandate.”<sup>97</sup> Perhaps unsurprisingly, the issue of terrorism came up. Regarding the exception for “conduct seriously prejudicial to the vital interests of the State,” the UNHCR expert group concluded that while it “does not cover criminal offences of a general nature...acts of treason, espionage and—depending on their interpretation in domestic law— ‘terrorist acts’ may be considered to fall within the scope of this paragraph.”<sup>98</sup>

Still, the 1961 Convention does not constrain member states’ ability to use deprivation of citizenship as a tool combat terrorism as much as one might think. As a

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<sup>93</sup> “1961 Convention on the Reduction of Statelessness,” UNHCR.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> “Expert Meeting, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions,” UNHCR.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

general matter, a member state cannot, consistent with its obligations under the 1961 Convention, use deprivation of citizenship as a tool to combat terrorism if it would lead to statelessness. But, if an individual is a dual citizen, a member state could deprive him or her of citizenship because the individual would continue to hold citizenship elsewhere. Further, a member state that made an express reservation under Article 8 of the 1961 Convention could, in reliance on pre-existing law, “deprive a person of his nationality...[for conduct] seriously prejudicial to the vital interests of the State,” even he or she would be left stateless.<sup>99</sup>

As noted previously, the United Kingdom, Australia, and France all agreed to be bound by the 1961 Convention; however, among them, only the United Kingdom and France expressly reserved rights under Article 8.

The United Kingdom, an original signer of the Convention, made the following reservation:

[The Government of the United Kingdom declares that], in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.<sup>100</sup>

According to the foregoing, the U.K reserved the power to “deprive a naturalised person of his nationality.” This functionally creates two classes of citizenship in the U.K. The U.K. cannot, consistent with its duties under the 1961 Convention, withdraw citizenship from a person who was born a British citizen under circumstances that would render the person stateless, but it can take such action with regard to a naturalized citizen.

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<sup>99</sup> “Convention on the Reduction of Statelessness – Declarations and Reservations,” United Nations, accessed September 10, 2016, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-4&chapter=5&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en).

<sup>100</sup> Ibid.

France, which signed the 1961 Convention on May 31, 1962, and thus was also among the first to join the Convention, made the following express reservation:

At the time of signature of this Convention, the Government of the French Republic declares that it reserves the right to exercise the power available to it under article 8 (3) on the terms laid down in that paragraph, when it deposits the instrument of ratification of the Convention.

The Government of the French Republic also declares, in accordance with article 17 of the Convention, that it makes a reservation in respect of article 11, and that article 11 will not apply so far as the French Republic is concerned.

The Government of the French Republic further declares, with respect to article 14 of the Convention, that in accordance with article 17 it accepts the jurisdiction of the Court only in relation to States Parties to this Convention which shall also have accepted its jurisdiction subject to the same reservations; it also declares that article 14 will not apply when there exists between the French Republic and another party to this Convention an earlier treaty providing another method for the settlement of disputes between the two States.<sup>101</sup>

Australia made no express reservation when it joined the 1961 Convention, and thus cannot implement withdrawal of citizenship provisions that could render an individual stateless while remaining compliant with its obligations under the 1961 Convention.

A final note regarding the 1961 Convention: The UNHCR expert group that commented on the meaning of the 1961 Convention in 2013 raised an interesting point regarding the practical consequences resulting from the creation of stateless people. The group noted that, “[t]he experience of some States indicates that governments do not gain from rendering individuals stateless...because it may be difficult in practice to expel the persons concerned.”<sup>102</sup> This cautionary comment acknowledges the reality that a State that withdraws citizenship from a citizen within that State’s borders, rendering the individual stateless, can create a potentially insurmountable problem. A State that rendered stateless a citizen presently located within its borders based on terrorist acts

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<sup>101</sup> Ibid.

<sup>102</sup> “Expert Meeting, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions,” UNHCR.

would find it difficult or impossible to remove or otherwise deport that person. Which nation would voluntarily agree to accept such an individual? What international air carrier would accept such a person aboard a flight? States considering loss of citizenship solutions to the problem of terrorism must consider these and other diplomatic and practical consequences that may obtain upon rendering a person stateless.

## **G. CONCLUSION**

The development of U.S. law regarding acquisition and loss of citizenship reflects the evolution of our understanding of what citizenship means in America, how U.S. citizenship affects our citizens at home and abroad, and the meaning and interpretation of the Constitution. At the birth of our nation, the United States, out of necessity, welcomed individuals from Europe and elsewhere, even as we struggled as a nation to acknowledge the basic humanity and fundamental rights of slaves brought to or born in the United States. As our nation grew in the 19<sup>th</sup> century, pressures exerted by forces in the United States began to affect our willingness as a nation to continue to welcome what Emma Lazarus would describe in her poem *The New Colossus* as “your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore.”<sup>103</sup> As we fought amongst ourselves about slavery, U.S. citizens travelling abroad were imperiled by foreign nations who refused to acknowledge their U.S. citizenship, and U.S. citizens at home began to see immigration as both a benefit to business, and a threat to the U.S. labor market. These forces simultaneously drove efforts to bring in immigrant workers and to restrict their ability to become citizens.

In the context of loss of nationality, important milestones occurred, including the 1868 Act, which acknowledged as a fundamental right the ability of an individual to exchange one nationality for another, and the 14th Amendment, which defined who is a citizen for Constitutional purposes.

The somewhat expansive view of U.S. citizenship incorporated into the 14th Amendment and the tumultuous nature of world events, including World War I, perhaps

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<sup>103</sup> Emma Lazarus, “The New Colossus,” 1883, accessed September 10, 2016, <https://www.poets.org/poetsorg/poem/new-colossus>.

contributed to U.S. isolationism as reflected in U.S. immigration law in the early 20<sup>th</sup> century, culminating in the Asiatic Barred Zone, which prevented immigration to the U.S. from most of the world's largest continent. In the context of loss of nationality, U.S. law finally began to reflect Congressional understanding of the events that should trigger loss of U.S. citizenship. Later, World War II taught us a shameful lesson about how loss of citizenship could be abused to allay unfounded fears about the loyalty of U.S. citizens having a particular ethnic heritage.

The post-World War II era saw significant change in U.S. immigration law, particularly regarding loss of citizenship. The passage of the Immigration and Nationality Act of 1952 replaced ethnic bars to immigration with immigration quotas. It also codified a more constrained collection of expatriating acts than existed in prior statutory enactments. In addition, the Supreme Court undertook review of a series of loss of citizenship cases which served to further map out the metes and bounds of Congress' authority to strip citizenship from U.S. citizens. Those efforts culminated in the Court's acknowledgement of significant protections to U.S. citizenship, including the fact that U.S. citizenship can only be withdrawn from a U.S. citizen if the individual commits a statutory expatriating act voluntarily, and does so with the intention of losing his or her citizenship. But these important decisions rested on narrow margins, and left open important questions, such as how Congress, and executive branch agencies administering loss of citizenship law, can interpret the "intent" requirement, and what if any statutory presumptions might be appropriate.



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### III. FOREIGN LOSS OF CITIZENSHIP SOLUTIONS — U.K., AUSTRALIA, AND FRANCE

This chapter provides a review of post-9/11 terrorism-related loss-of-nationality provisions that have been considered and either adopted or rejected by the United Kingdom, Australia, and France. The efforts of other western nations to draft and implement terrorism-related loss-of-citizenship laws provides insights into process, language, and legal mechanisms that can inform the review of comparable laws being considered in the United States.

#### A. THE UNITED KINGDOM

The United Kingdom is no stranger to the effects of terror-motivated violence. In the 20<sup>th</sup> century, the conflict in Northern Ireland was the chief source of terror in Great Britain. Despite the prevalence and persistence of bombings as a tool of that conflict, loss of nationality was not a tool employed by the government to fight that wave of terror.<sup>104</sup> Following the events of September 11, 2001, efforts were made to “expand the powers of the Secretary of State to deprive someone of citizenship.”<sup>105</sup> The Nationality, Immigration and Asylum Act of 2002, the Nationality, Immigration and Asylum Act of 2006, and the Immigration Act 2014 effected changes to the law that conferred expansive powers on the British Secretary of State to deprive citizens of their British nationality.<sup>106</sup> In addition, the Counter-Terrorism and Security Act of 2015 expanded the power of the government to seize passports, temporarily exclude citizens from returning to the UK, and gave the government additional tools to use to address the problems of radicalization.

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<sup>104</sup> Sandra Mantu, “Citizenship Deprivation in the United Kingdom,” *Tilburg Law Review* 19 (2014): 163–170 at 163 note 1. “Prior to 2002, the last case of citizenship deprivation was documented in 1974.” Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Compare British Nationality Act 1981 Chapter 61, Part 1, § 40 (1991 ed.) accessed September 10, 2016, <http://www.legislation.gov.uk/ukpga/1981/61/1991-02-01?timeline=true>, with British Nationality Act 1981 Chapter 61, Part 1, § 40 (2015 ed.) accessed September 10, 2016, <http://www.legislation.gov.uk/ukpga/1981/61/2015-11-12?timeline=true>. See also, Sandra Mantu, “Citizenship in times of terror: citizenship deprivation in the UK,” (paper prepared for ECPR Standing Groups, Warsaw, March 29-April 2, 2015.)

Although the events of 9/11 provided the last big push necessary to get the ball rolling with regard to changing British loss of citizenship law to expand the government's power to deprive a person of citizenship, in the U.K. loss of citizenship had been a subject of concern simmering just beneath the surface. As commentator Bobbi Mills noted, "The reappearance of this disused power in 2002 was part of the response to the attacks on the World Trade Centre. However, a conversation about 'making British citizenship mean something' had been underway before the terror attacks. The so-called race riots of early 2001 involved clashes between young Asian men and members of the English Defence League in northern England. The 1990s vision of multiculturalism was declared a failure as claims emerged about a lack of integration of Asian communities, and particularly of Muslims in Britain. The changes enacted in the [Nationality, Immigration, and Asylum Act of 2002] were therefore partly responding to debates on integration, although the advent of the War on Terror lit a fire under these debates."<sup>107</sup>

In 2014, further changes in the law were proposed and ultimately passed, resulting from difficulties associated with withdrawing British citizenship from individuals involved in terrorist activities in specific situations<sup>108</sup> (see Appendix A).

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<sup>107</sup> Bobbie Mills, "A Privilege, not a right: Contemporary debates on citizenship deprivation in Britain and France," Working Paper No. 130, University of Oxford, 2016 WP-16-130, accessed September 10, 2016, <https://www.compas.ox.ac.uk/media/WP-2016-130-Mills-Privilege-Right.pdf>.

<sup>108</sup> Hilal Abdul-Razzaq Ali al-Jedda, a refugee from Iraq, was granted U.K. citizenship in 2000, and deprived of citizenship by the Home Secretary in December of 2007 for support of terrorism. In 2013, on appeal to U.K. Supreme Court, the court overturned the deprivation order, finding that under existing U.K. law the Home Secretary did not have authority to deprive a person of citizenship if it would lead to statelessness. The Home Secretary had argued unsuccessfully that Mr. al-Jedda was eligible for alternate nationality, and thus the statelessness restriction did not apply. The U.K. Supreme Court blog noted, "The Supreme Court was unconvinced by the Secretary of State's view that Mr. Al-Jedda could have applied for his Iraqi nationality to be restored and rejected it as "unrealistic." The Secretary of State's argument that Mr. Al-Jedda's statelessness was the result of his own inaction was given short shrift by the Supreme Court, which held that the law "does not permit, still less require, analysis of the relative potency of causative factors of the individual's statelessness." Resulting in part from this case, the Immigration Act 2014 was enacted, providing the Home Secretary with additional authority, including the power to deprive a naturalized U.K. citizen of citizenship if "conducive to the public good" and if "the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory." Grace Capel, Dec. 17, 2013, comment on Al Jedda v. SSHD, "Al Jedda v. SSHD [2013] UKSC 62," *UKSC Blog*, <http://ukscblog.com/case-comment-al-jedda-v-sshd-2013-uksc-62/>. See also, Secretary of State for the Home Department v. Al-Jedda, [2013] UKSC 62, accessed September 10, 2016, [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0129\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0129_Judgment.pdf). See also, Bobbie Mills, "A Privilege, not a right: Contemporary debates on citizenship deprivation in Britain and France."

## 1. U.K. Terrorism-Related Loss of Citizenship

The authority granted to the Home Secretary under law to deprive British citizens of their citizenship is quite broad. The Home Secretary can deprive a citizen of British nationality<sup>109</sup> under circumstances common to most immigration systems, such as when a naturalized citizen obtained citizenship by fraud or otherwise improperly; however, under section 40 of the British Nationality Act (as amended) the Home Secretary can also deprive someone of British Citizenship if she is “satisfied that deprivation is conducive to the public good.”<sup>110</sup> In applying this provision, “Conduciveness to the Public Good” is defined as “depriving [of citizenship] in the public interest on the grounds of involvement in terrorism, espionage, serious organized crime, war crimes or unacceptable behaviours.”<sup>111</sup> Interestingly, while as a general matter the Home Secretary cannot deprive a person of British citizenship if it would render the person stateless, that limitation does not apply in all instances. If a naturalized citizen acts in a manner that is “seriously prejudicial to the vital interests of the United Kingdom...” and if the Secretary “has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory” the Secretary may deprive the person of citizenship.<sup>112</sup> In such an instance, the Secretary is empowered to deprive an individual of British citizenship, even if it would render the person stateless.<sup>113</sup>

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<sup>109</sup> “British nationality law provides for six different types of British nationality/citizenship status, of which ‘British Citizen’ is the most common. The deprivation of citizenship powers apply to all of these categories.” Melanie Gower, “Deprivation of British Citizenship and Withdrawal of Passport Facilities,” House of Commons Home Affairs Section, January 30, 2015, accessed September 10, 2016, <http://researchbriefings.files.parliament.uk/documents/SN06820/SN06820.pdf>. For more on the types of British citizenship/nationality see “Types of British Nationality,” GOV.UK, accessed September 10, 2016, <https://www.gov.uk/types-of-british-nationality>.

<sup>110</sup> Immigration Act of 2014 Part 6, Section 66, <http://www.legislation.gov.uk/ukpga/2014/22/section/66/enacted>.

<sup>111</sup> “Chapter 55: Deprivation (section 40) and nullity (nationality instructions),” UK Visas and Immigration, last updated September 10, 2015, accessed September 10, 2016, <https://www.gov.uk/government/publications/chapter-55-deprivation-section-40-and-nullity-nationality-instructions>.

<sup>112</sup> Immigration Act of 2014 Part 6, Section 66.

<sup>113</sup> British Nationality Act 1981 Chapter 61, Part 1, § 40(4A). See also, Sandra Mantu, “Citizenship in times of terror: citizenship deprivation in the UK” (“the Secretary of State can make such an order even if the person will be made stateless, provided that nationality was obtained through naturalization.”)

The U.K. recently published a review of its own withdrawal of nationality law, and changes to it, that dealt in part with compliance with treaties and conventions, including the 1961 Convention on the Reduction of Statelessness and the 1997 European Convention on Nationality, which is a treaty drafted under the auspices of the Council of Europe and that the United Kingdom has thus far declined to join.<sup>114</sup> It concluded that U.K. law, as revised and amended, is compliant with the U.K.'s international law obligations.<sup>115</sup> However, commentators raised interesting concerns about the consequences of the U.K. using its deprivation authority to create a stateless person outside of the U.K.<sup>116</sup> For example, one commentator suggested that the U.K. should only consider using its deprivation authority to render a person stateless if the person is in the U.K.<sup>117</sup> Where a primary basis for withdrawing British citizenship in this instance would be that it was "conducive to the public good,"<sup>118</sup> it is difficult to understand how the public good would be served by allowing a person who joined a terrorist organization, or otherwise engaged in or supported terrorism, to become stateless and remain in the U.K.

A report published in 2015 indicates that since 2006, the U.K. has deprived 53 people of their British citizenship.<sup>119</sup> The bulk of these cases involved individuals who had dual citizenship in a broad range of countries, including without limitation Russia, Somalia, Yemen, Australia, Pakistan, Afghanistan, Albania, Egypt, Lebanon, Sudan,

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<sup>114</sup> Melanie Gower, "Deprivation of British Citizenship and Withdrawal of Passport Facilities." See also, "Chart of signatures and ratifications of Treaty 166, European Convention on Nationality," Council of Europe, accessed September 11, 2016, [http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p\\_auth=VfYPrBbj](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/signatures?p_auth=VfYPrBbj).

<sup>115</sup> Melanie Gower, "Deprivation of British Citizenship and Withdrawal of Passport Facilities." See also, Guy S. Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," revised draft of paper presented at a Seminar at Middlesex University on February 14, 2014, <https://www.parliament.uk/documents/joint-committees/human-rights/GSGGDeprivationCitizenshipRevDft.pdf> ("Given the UK's declaration under Article 8(3)(a) and its non-ratification of the 1997 European Convention, the United Kingdom would not appear to be in breach of its international obligations, merely by virtue of the fact that the law was changed to permit deprivation of citizenship resulting in statelessness.")

<sup>116</sup> Guy S. Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law."

<sup>117</sup> Guy S. Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law."

<sup>118</sup> British Nationality Act of 1981 Chapter 61 Part 1, § 40(2).

<sup>119</sup> Melanie Gower, "Deprivation of British Citizenship and Withdrawal of Passport Facilities."

Vietnam, Iran, Iraq and Nigeria.<sup>120</sup> A 2014 article described one such case, in which a “51-year-old man, who was born in Newcastle-upon-Tyne, and his London-born sons, who are all in their twenties, had their British nationality rescinded ...while they were out of the country.”<sup>121</sup> The man alleged that he and his sons were improperly targeted for deprivation of citizenship based on the fact that his daughter had previously, “travelled to Syria with a jihadist.” The Secretary of State, on the other hand, indicated that the man and his sons “are active members of Lashkar-e Tayyiba (LeT) and...that they have links to al-Qaeda...”<sup>122</sup> In another recent case, a naturalized citizen described in public documents only as “M2” was deprived of U.K. citizenship while outside of the U.K. on the basis of having provided support to al-Qaida, but was nonetheless able to return to the U.K. using an Afghan passport bearing appropriate reentry stamps.<sup>123</sup>

## **2. Lessons for the U.S. from U.K. Law**

U.K. law provides few if any examples that U.S. legislators could look to for purposes of modifying or improving comparable bills in the U.S. Current U.S. law regarding loss of citizenship is focused on specific actions, such as joining a foreign armed force, accepting a senior position in a foreign government, or committing treason. U.K. law instead relies on broadly worded discretion invested in the Home Secretary, and focuses not on the specific action committed by the citizen, but on the consequence to the U.K. Fundamentally, U.K. laws are constructed differently than their U.S. counterparts in this area. It is qualitative where U.S. law is more enumerative. In addition to this very different approach to assessing loss of citizenship, it is unclear whether U.S. law could support deprivation of U.S. citizenship under the broad banner of conduciveness to the

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<sup>120</sup> Melanie Gower, “Deprivation of British Citizenship and Withdrawal of Passport Facilities.” See also, “Individuals deprived of British citizenship since 2013,” GOV.UK, December 18, 2014, accessed September 11, 2016, <https://www.gov.uk/government/publications/individuals-deprived-of-british-citizenship-since-2013/individuals-deprived-of-british-citizenship-since-2013>.

<sup>121</sup> David Barrett, “Theresa May cancels family’s British citizenship,” *The Telegraph*, December 7, 2014, accessed September 11, 2016, <http://www.telegraph.co.uk/news/uknews/law-and-order/11278517/Theresa-May-cancels-familys-British-citizenship.html>.

<sup>122</sup> David Barrett, “Theresa May cancels family’s British citizenship.”

<sup>123</sup> Victoria Parsons, “UK government faces long legal battle after man stripped of citizenship returns,” *The Guardian*, Aug. 20, 2015.

public good, even given the further definition to include espionage, terrorism, and the broad catchall “unacceptable behaviors.”<sup>124</sup> Likewise, “conduct seriously prejudicial to the vital interests” of the nation is also a qualitative standard tied to the effect on the nation, rather than an enumerative standard focused on the individual’s specific act.

U.K. law also treats naturalized citizens differently than individuals who acquired U.K. citizenship at birth. Under the U.K. system, as most recently amended, only naturalized U.K. citizens may be deprived of citizenship under circumstances that would leave them stateless. While most nations, including the U.S., have processes to denaturalize citizens who fraudulently acquire citizenship through the naturalization process, a consequence necessarily inapplicable to individuals born citizens and thus suggesting some difference between naturalized and natural born citizens, that difference is inapposite here. Preventing fraud is not an instance of disparate treatment, but rather a necessary part of ensuring the integrity of a country’s naturalization system. U.S. law would likely prohibit disparate treatment of properly naturalized citizens in the context of deprivation of nationality.<sup>125</sup>

## **B. AUSTRALIA**

In December of 2015 Australia modified its law to permit the withdrawal of Australian citizenship on terrorism grounds by passing the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, and creating new terrorism-related mechanisms by which Australians can lose their citizenship.<sup>126</sup> (See Appendix A.) An explanatory memorandum issued by Parliament explained need for the bill. It noted that the Australian government had conducted an assessment and determined that a variety of troubling terrorism risk factors were increasing, including “the number of foreign

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<sup>124</sup> “ILPA Briefing for the Immigration Bill, House of Lords Committee stage, Part 6, Miscellaneous, Clause 60 Deprivation if conduct seriously prejudicial to the vital interests of the UK,” Immigration Law Practitioners Association, March 15, 2014, accessed September 11, 2016, <http://www.ilpa.org.uk/data/resources/25900/14.03.15-Deprivation-of-citizenship-HL-Comm-finalpdf.pdf>. It is notable that a “public good” standard is the same standard that the U.K. applies in the context of deporting foreign nationals. *Ibid.*

<sup>125</sup> U.S. Const. amend. XIV. See also *Schneider v. Rusk*, 377 U.S. 163 (1964).

<sup>126</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, accessed September 11, 2016, [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5507](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5507).

fighters” the “number of known sympathizers and supporters of extremists,” and “the number of potential terrorists.”<sup>127</sup> The Australian Citizenship Amendment bill was proposed as part of an effort by the government to address what Australian legislators perceived as a growing terrorist threat to Australia and its citizens. The explanatory memorandum provided additional detail, explaining why loss of citizenship was being pursued as a means of addressing this problem. It stated:

As the basic requisite for participation in and adherence to the values and institutions of Australia’s secular democracy, citizenship does not simply bestow privileges or rights, but entails fundamental responsibilities. As set out in the preamble to the Citizenship Act, Australian citizenship gives full and formal membership of the Australian community and is a common bond, involving reciprocal rights and obligations, uniting all Australians while respecting their diversity. Those who are citizens owe their loyalty to Australia and its people. This applies to those who acquire citizenship automatically through birth in Australia and to those who acquire it through application. Where a person is no longer loyal to Australia and its people, and engages in acts that harm Australians or Australian interests, or engages in acts that are intending to harm Australian or Australia’s interest, they have severed that bond and repudiated their allegiance to Australia.<sup>128</sup>

This statement of purpose is consistent with the language and spirit of Senator Joe Lieberman’s statement that, “If you have joined an enemy of the United States in attacking the United States and trying to kill Americans, I think you sacrifice your rights of citizenship.”<sup>129</sup>

### **1. Australian Terrorism-Related Loss of Citizenship Law**

Australia’s version of terrorism-related loss of citizenship is quite different from that of the U.K. Where U.K. law incorporates broad discretionary concepts, Australian law, like U.S. law, ties specific enumerated acts and associated intention to the expatriation consequence. Australia avoids the difficulty associated with creating

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<sup>127</sup> “Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 Explanatory Memorandum,” Parliament of the Commonwealth of Australia, House of Representatives, accessed September 11, 2016, [http://www.austlii.edu.au/au/legis/cth/bill\\_em/acatab2015529/memo\\_0.html](http://www.austlii.edu.au/au/legis/cth/bill_em/acatab2015529/memo_0.html).

<sup>128</sup> “Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 Explanatory Memorandum,” Parliament of the Commonwealth of Australia, House of Representatives.

<sup>129</sup> Kasie Hunt, “Lieberman bill would strip citizenship.”



stateless persons in the context of terrorism-related loss of nationality by requiring alternate nationality, without exception, in the context of terrorism-related withdrawal of citizenship. This legislative drafting decision renders most statelessness-related concerns effectively moot.<sup>130</sup>

Australia also avoids concerns regarding unequal application of loss of citizenship provisions, or the notion of creating different classes of citizen for purposes of terrorism-related withdrawal of citizenship. All of Australia's new terrorism-related provisions apply to all dual nationals, regardless of how they acquired Australian citizenship. Unlike the U.K., which applies its most severe form of deprivation of citizenship only to naturalized citizens,<sup>131</sup> Australia makes no distinction between naturalized citizens and individuals who were born with Australian citizenship.

Australia's overseas terrorism-related expatriation provisions are generally restricted to activities performed on behalf or for the benefit of a declared terrorist organization.<sup>132</sup> The list of declared terrorist organizations is available online.<sup>133</sup> Domestically, loss may take place as a result of conviction of designated crimes, including terrorism offenses, and is not limited to activities related to declared terrorist organizations.<sup>134</sup> The requirement that an individual be a dual national also applies when loss of citizenship occurs following conviction of an applicable offense; however, the loss determination is not made by the convicting court. In all instances, loss of citizenship is determined administratively by the Minister for Border Immigration and Border

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<sup>130</sup> Some legitimate concerns do remain. Dual nationals who acquire Australian citizenship as refugees from another nation might formally retain their former nationality, but may nevertheless be rendered "de facto" stateless because returning to that former nation may be impossible. See "Submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015," Refugee Council of Australia, July 2015, accessed September 11, 2016, <http://www.refugeecouncil.org.au/wp-content/uploads/2015/10/1507-Citizenship.pdf>.

<sup>131</sup> Under certain circumstances the U.K. may deprive a naturalized citizen of citizenship even if it renders them stateless. See, Immigration Act of 2014 Part 6, Section 66.

<sup>132</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(4), 35(1)(b)(ii).

<sup>133</sup> "Listed terrorist organisations," Australian National Security, Australian Government, accessed September 11, 2016, <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>.

<sup>134</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 35A.

Protection personally and cannot be delegated;<sup>135</sup> however, in support of the Minister and for purposes of providing guidance and recommendations regarding the exercise of this new loss of citizenship authority, the Australian Department of Immigration and Border Protection established a Citizenship Loss Board, made up of representatives from a variety of federal government bodies.<sup>136</sup>

No published statistics exist regarding use of the new Australian law to withdraw citizenship from Australian dual nationals. The bill only became law in December of 2015. In response to a Freedom of Information request, Australia's Department of Immigration and Border Protection released the minutes of the first Citizenship Loss Board, held on February 23, 2016. In the draft minutes under the heading "Agenda Item 5—progress of cases" it states as follows: "[Department of Immigration and Border Protection] provided a general update on the progress of potential candidates for citizenship loss. The Board discussed potential timeframes for consideration of the cases," followed by markings indicating redaction of additional text accompanied by a code relating to the Freedom of Information section justifying the redaction. Based on this document, it is reasonable to hypothesize that Australia is presently considering potential cases to which the new law may be applied.

Australia's amended terrorism-related loss of citizenship law results in loss occurring immediately. Both the "renunciation by conduct" (33AA of the amended law) and "service outside Australia in the armed forces of a ... declared terrorist organization" (35 of the amended law) sections provide that loss takes place at the time the person engages in the prohibited conduct.<sup>137</sup> The extraordinary discretion extended to the Home

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<sup>135</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(20), 35(15), 35A(10).

<sup>136</sup> The board includes "Deputy Secretary level" members from the Department of the Prime Minister and Cabinet; Department of Foreign Affairs and Trade; Australian Secret Intelligence Service; Attorney-General's Department; Australian Crime Commission; Australian Federal Police; Australian Security Intelligence Organization; Deputy Secretaries regarding Policy, Visa and Citizenship Services, Intelligence Capability, and Deputy Commissioner of Operations; and the Department of Defense. "Citizenship Loss Board IDC Draft minutes of meeting held on Tuesday, 23 February 2016 at DIBP, 2 Constitution Avenue Canberra," Department of Immigration and Border Protection, February 23, 2016, accessed September 11, 2016, [https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160520\\_FA160401379\\_Documents\\_Released.pdf](https://www.border.gov.au/AccessandAccountability/Documents/FOI/20160520_FA160401379_Documents_Released.pdf).

<sup>137</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(9), 35A(2).

Secretary in the U.K. version of these laws is to some degree mirrored in the discretion necessary to implement 33AA and 35 of the amended law. As noted by the Refugee Council of Australia in its commentary regarding these amendments, “There is no requirement, for example, that a person must have been convicted of a terrorist offence. Indeed, proposed sections 33AA(12) and 35A allow the Minister to rely on intelligence information, including information that does not amount to a security assessment.”<sup>138</sup> In this way, a great deal of discretion is incorporated into the government’s administration of these provisions. It is unclear whether deprivation of nationality under these circumstances would be considered “arbitrary” as that term is used in the UDHR.

Australia significantly shields its decisions under 33AA and 35 from scrutiny and appeal by limiting those decisions to actions by Australians outside of Australia.<sup>139</sup> Although remedial measures exist to challenge loss decisions,<sup>140</sup> the difficulty an individual may experience in successfully challenging his or her loss of citizenship, after the fact, from outside of Australia, suggests that obtaining review will be, at best, difficult for affected former Australians. Limiting the effectiveness of these provisions to individuals outside of Australia also means that Australia will in many situations avoid the often-difficult question of what to do with a person after citizenship is withdrawn. It will not be able to avoid this problem in all instances. Decisions under 35A, which permits the Minister to withdraw citizenship from an individual convicted of certain terrorism or related offenses enumerated in the statute, will take place in most instances regarding individuals in Australia.

Removing or deporting individuals found to have engaged in terrorism-related activities poses difficulties for any nation, inasmuch as no nation can effectively remove or deport an individual from that nation to an alternate nation without permission from that alternate nation. In most instances, nations will reject requests to accept non-citizens

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<sup>138</sup> “Submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015,” Refugee Council of Australia.

<sup>139</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(7), 35(2).

<sup>140</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at note to 33AA(10) (“A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.”)

removed or deported from another nation, but cannot reject their own citizens. As such, deporting or removing a stateless person is difficult if not impossible. Australia has avoided these problems by limiting most terrorism-related expatriation to individuals already outside of Australia, and in all instances making terrorism-related loss of citizenship only applicable to individuals who hold alternate nationality.

## **2. Lessons for the U.S. from Australian Law**

The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 both in structure and content is considerably more like legislation that might be considered by the U.S. Congress than the U.K. legislation. But there are differences between U.S. and Australian law that are significant. In particular, the bill does not reflect the concept intrinsic to U.S. law that an individual can only lose citizenship if he or she commits an expatriating act intending by that act to lose citizenship. The new Australian law does incorporate an intent requirement in the context of “Renunciation by Conduct,” but the required intent relates to the purpose of the act itself, and amounts to a requirement that the government establish terrorist intent (i.e., acts done with the intention of “...advancing a political, religious, or ideological cause...” and “coercing, or influencing by intimidation, the government... or...intimidating the public or a section of the public.”)<sup>141</sup>

Despite this difference, Australia’s creation of an intent requirement led to the creation of another legal provision that might be of interest to U.S. lawmakers. Australia incorporated into its law a statutory presumption regarding intent. Under the new Australian law, the required intent is presumed satisfied if at the time a statutory expatriating act was committed the individual was “a member of a declared terrorist organisation...or...acting on instruction of, or in cooperation with, a declared terrorist organisation.”<sup>142</sup> While U.S. law regarding expatriation contains a legal presumption regarding voluntariness, and in some instances an administrative/regulatory presumption regarding intent, no statutory presumption regarding intent exists in U.S. law. U.S.

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<sup>141</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(3).

<sup>142</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 at 33AA(4).

lawmakers may take particular note of the “Renunciation by Conduct” and “Service outside Australia in armed forces of an enemy country or a declared terrorist organization” provisions under Australian law, which at their core reflect concepts analogous to existing U.S. law.<sup>143</sup> Other than treason, U.S. law does not presently provide for loss of citizenship resulting from a criminal conviction.<sup>144</sup> For example, a provision previously existed which provided for loss of citizenship upon conviction of desertion during a time of war, but was later deemed unconstitutional as a “cruel and unusual punishment.”<sup>145</sup>

There are other aspects of Australia’s new law that could provide ideas and guidance to U.S. legislators considering comparable legislation in Congress. Australia’s concern with statelessness as reflected in this new legislation derives in part from its obligations under the 1961 Convention on the Reduction of Statelessness, which does not bind the United States;<sup>146</sup> however, in addition to obligations arising under international law and pursuant to treaty, both from a humanitarian and practical perspective, Australia’s legislative decision regarding this issue suggests a blueprint for U.S. legislators. The Australian bill applies only to individuals who already possess alternate nationality. From a humanitarian perspective, Australia avoids creating stateless individuals, a matter of great concern to the international community and to human rights organizations. From a practical perspective, creating stateless ex-citizens in the context of terrorism-related loss of citizenship would result in problems for Australia.

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<sup>143</sup> See generally, Immigration and Nationality Act § 349(a)(1)-(6), 8 U.S.C. § 1481(a)(1)-(6) (1952)(as amended).

<sup>144</sup> Immigration and Nationality Act § 349(a)(7), 8 U.S.C. § 1481(a)(7) (1952)(as amended).

<sup>145</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>146</sup> Australia agreed to be bound by the 1961 United Nations Convention on the Reduction of Statelessness, which contains a variety of provisions restricting Australia’s ability to create stateless people including: Article 1 (“A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless...”); Article 7(1)(a)(“If the law of a Contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person possesses or acquires another nationality.”); Article 7(6)(“Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.”); and Article 8(1)(“A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.”). “1961 Convention on the Reduction of Statelessness,” UNHCR.

A hypothetical stateless ex-citizen within Australia who lost citizenship on terrorism grounds would be difficult or impossible to remove from Australia, as no nation could be reasonably expected to admit that person. Likewise, if Australia were to create stateless ex-citizens outside of Australia, that action would affect Australia's relationship with other nations. When a foreign nation accepts an Australian (or indeed any foreigner) into its territory on a non-immigrant basis (i.e., not as a potential immigrant), the admission is made in part in reliance on the individual's intention and ability to return to his or her home nation. By rendering a person stateless in a foreign nation's territory, Australia would be liable to diplomatic complaint, and could be forced to accept return of the individual.<sup>147</sup>

American legislators considering terrorism-related loss of citizenship legislation would benefit from reviewing the Australian dual-citizenship requirement. Although U.S. law presently incorporates provisions, such as the voluntary renunciation provision at INA § 349(a)(5), which leave open the opportunity for U.S. citizens to potentially seek and achieve intentional statelessness, that concept need not be pervasively incorporated into all loss of citizenship provisions under U.S. law. Considering a dual-nationality restriction in the context of possible U.S. terrorism-related loss of citizenship legislation might prove beneficial.

### **C. FRANCE**

Following the Paris attacks in November of 2015, a proposal to amend French loss of citizenship law was offered. Unlike the U.K. and Australia, French law already contained provisions enabling withdrawal of French citizenship for conviction of terrorist acts. However, in late 2015 and early 2016 France considered, but ultimately rejected a constitutional amendment that would have permitted the passage of even broader terrorism-related deprivation of nationality (*déchéance de nationalité*) laws, including

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<sup>147</sup> “Any State which admitted an individual on the basis of his or her British passport would be fully entitled to ignore any purported deprivation of citizenship and, as a matter of right, to return that person to the United Kingdom. If the United Kingdom were to refuse re-admission, and if no other country had expressed its willingness to receive that person, the United Kingdom would be in breach of its obligations towards the receiving State.” Guy S. Goodwin-Gill, “Mr Al-Jedda, Deprivation of Citizenship, and International Law.”

laws permitting withdrawal of citizenship from individuals who acquired French citizenship at birth.<sup>148</sup> The proposed constitutional change relevant to terrorism-related loss of citizenship<sup>149</sup> was a consequence of prior failed efforts to expand the loss of citizenship provisions under the Civil Code of France. Sandra Mantu, in her review of the proposed constitutional amendment, explained as follows: “Prior to this constitutional bill, there have been several unsuccessful attempts to modify the provisions of the Civil Code in respect of citizenship deprivation. In 2014 proposals were put forward to deprive of citizenship all French dual nationals if arrested, caught or identified fighting against the French armed forces, their allies or the French police forces. The proposal was rejected by the Constitutional Law Commission of the French Parliament. This failure explains the need to amend the French Constitution since most political parties and the executive believed that the Constitutional Council will not approve an ordinary law allowing dual nationals to lose French nationality acquired at birth.”<sup>150</sup>

In support of this change French President Francois Hollande had announced to a special joint session of Parliament that France was “at war” and the change was necessary.<sup>151</sup> Despite some public support,<sup>152</sup> the proposed amendment was ultimately abandoned.<sup>153</sup> France has a history of denaturalizing certain disfavored citizen groups. During World War II, the Vichy government denaturalized, “110,000 Algerian Jews and

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<sup>148</sup> James McAuley, “French Senate effectively kills controversial nationality law,” *Washington Post*, March 18, 2016, accessed September 11, 2016, <https://www.washingtonpost.com/news/worldviews/wp/2016/03/18/french-senate-effectively-kills-controversial-nationality-law/>.

<sup>149</sup> French National Assembly, “Projet de Loi Constitutionnelle de Protection de la Nation,” February 10, 2016, <http://www.assemblee-nationale.fr/14/pdf/ta/ta0678.pdf>.

<sup>150</sup> Sandra Mantu, “Citizenship Deprivation in France: Between Nation and the Republic,” *Jurist*, March 16, 2016, accessed September 11, 2016, <http://www.jurist.org/forum/2016/03/sandra-mantu-french-citizenship.php>.

<sup>151</sup> “‘France is at war’: Hollande urges more security spending & stripping of citizenship after attacks,” RT, November 16, 2015, accessed September 11, 2016, <https://www.rt.com/news/322323-hollande-france-war-terror/>.

<sup>152</sup> “They’ve lost their right to be French when they choose to attack their country and kill their fellow citizens and should be kicked out, so the basic argument goes. And it’s a message that has won over 90 percent of the French population according to recent opinion polls.” “Why stripping jihadists’ French nationality is mad,” *The Local*, January 5, 2016, accessed September 11, 2016, <http://www.thelocal.fr/20160105/why-stripping-jihadists-of-french-passports-wont-work>.

<sup>153</sup> Adam Nossiter, “François Hollande Cancels Plan to Strip French Citizenship in Terrorism Cases,” *New York Times*, March 30, 2016, accessed September 11, 2016, [http://www.nytimes.com/2016/03/31/world/europe/francois-hollande-france-citizenship-terrorism.html?\\_r=0](http://www.nytimes.com/2016/03/31/world/europe/francois-hollande-france-citizenship-terrorism.html?_r=0).

a further 15,152 French citizens who had naturalised since 1927.”<sup>154</sup> In addition to concerns grounded in the historical echoes of World War II, one critic noted, “The constitution is a text that is written to unify the people and this does the opposite. People know that reinforcing the cohesion of the nation is, in the long term, the only way to defeat terrorism, and this proposal creates an immediate division in the country.”<sup>155</sup>

### **1. French Terrorism-Related Loss of Citizenship Law**

Unlike the U.K. and Australia, France first addressed terrorism-related loss of nationality before the events of 9/11. Resulting from terrorist activities in the 1990s related to the Algerian Civil War, which included bombings in France, France amended Article 25 of the French Civil Code, adding a provision for loss of citizenship upon conviction and sentencing for “an offence which constitutes an act of terrorism.”<sup>156</sup> It was already possible to withdraw citizenship from an individual after conviction and sentencing for acts constituting “an injury to the fundamental interests of the Nation.”<sup>157</sup> These provisions only apply to naturalized French citizens, and are subject to time limitations which make terrorism-related loss possible only if the act giving rise to the conviction occurred within 15 years of acquisition of French citizenship, and further a decision regarding terrorism-related loss must take place, if at all, within fifteen years of acquiring French citizenship.<sup>158</sup>

As further described by Dr. Sandra Mantu, the deprivation process in France provides that, “[t]he person concerned must be notified of the government’s intention to deprive, and be given the opportunity to make observations and mount an appeal. The order to deprive has to specify the legal and factual grounds upon which the measure is taken; the authorities can proceed with deprivation only after the favorable opinion of the

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<sup>154</sup> Bobbie Mills, “A Privilege, not a right: Contemporary debates on citizenship deprivation in Britain and France.”

<sup>155</sup> “Why stripping jihadists’ French nationality is mad,” The Local.

<sup>156</sup> Civil Code of France, Article 25, accessed September 11, 2016, [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_civil\\_textA.htm#Section III - Of Forfeiture of French Nationality](http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#Section III - Of Forfeiture of French Nationality).

<sup>157</sup> Civil Code of France, Article 25.

<sup>158</sup> Civil Code of France, Article 25,



Council of State. The Council of State is a body of the French government with a dual function: (a) legal adviser of the executive branch on state issues and legislation, and (b) supreme court for administrative justice. The concurring opinion is issued as part of its consultative function. Citizenship deprivation operates only for the future.”<sup>159</sup> Since 9/11 France has used Article 25’s terrorism and fundamental interests provisions to withdraw citizenship from 13 people.<sup>160</sup>

## **2. Lessons for the U.S. from French Law**

French law provides few lessons for U.S. legislators. In France, a dual national who acquired French citizenship by naturalization can lose French citizenship if sentenced for certain crimes, including terrorism, as well as for acts “committed for the benefit of a foreign state...[that are] incompatible with the status of being French and detrimental to the interests of France,” and provided the acts were committed within 10 years (or in the case of terrorism 15 years) of acquiring French nationality.<sup>161</sup> This French statute as model for U.S. legislators is likely unworkable. Loss of citizenship as criminal punishment in the U.S., with the exception of Treason, has previously been held unconstitutional.<sup>162</sup> An alternate perspective on this aspect of French law might view it as part of a secondary vetting process. French law provides elsewhere that conviction of a terrorist offense renders an individual ineligible to naturalize as a French citizen.<sup>163</sup> Similarly, under U.S. law, prior conviction of serious crimes, including terrorism crimes, renders an individual inadmissible to the United States and would disqualify such an

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<sup>159</sup> Dr. Sandra Mantu, “Citizenship Deprivation in France: Between Nation and the Republic.”

<sup>160</sup> Dr. Sandra Mantu, “Citizenship Deprivation in France: Between Nation and the Republic.”

<sup>161</sup> Civil Code of France, Article 25.

<sup>162</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>163</sup> Civil Code of France, Articles 21–27 (“No one may acquire the French nationality or be reinstated in that nationality if he has been sentenced either for ...an act of terrorism...”) accessed September 11, 2016, [https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code\\_civil\\_20130701\\_EN.pdf](https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf)

individual from eligibility to naturalize as a U.S. citizen.<sup>164</sup> While French law could perhaps be viewed as offering an opportunity to engage in a species of post-naturalization vetting that may be necessary or appropriate considering the structure of French naturalization law, such a process would not fit well within the American legal scheme. It is notable that Article 25 applies to acts committed prior to acquisition of French nationality, as well as acts committed during a limited period of time following naturalization.<sup>165</sup> In this way French law could also be viewed as creating a limited probationary period during which naturalized French citizenship is subject to forfeiture. There is no corollary in U.S. law to a probationary citizenship period.

French citizenship law is quite complex, creating the potential for outcomes that diverge significantly from anything likely to arise under U.S. law.<sup>166</sup> This is not surprising, as French and U.S. law treat people born in our respective nations differently, even at birth. Under U.S. law, a person born in the United States is citizen in virtually all instances;<sup>167</sup> however, the mere fact of birth in France, without more, does not necessarily confer French citizenship.<sup>168</sup> Regardless of whether current French

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<sup>164</sup> “Terrorism-Related Inadmissibility Grounds,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissability-grounds-trig>; “Form I-485, Application to Register Permanent Residence or Adjust Status,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/sites/default/files/files/form/i-485.pdf>; “Form N-400, Application for Naturalization,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/sites/default/files/files/form/n-400.pdf>.

<sup>165</sup> Civil Code of France, Article 25–1.

<sup>166</sup> For example, under French law repealed in 2006, a citizen of a former French colony or territory could naturalize as a French citizen immediately, without the probationary period normally required. See former Article 21–19(5), French Civil Code (“May be naturalised without the requirement of a probationary period...<sup>5</sup> A national or former national of territories and States on which France exercised sovereignty, or a protectorate, a mandate or a trusteeship...”). The terrorism bar to naturalization in France relates to having been sentence for a terrorist crime. Thus, it may have been possible for a national of a former French colony or territory who engaged in terrorism but had not been convicted or sentence, to acquire French citizenship under circumstances that would not have rendered the naturalization fraudulent, but who would be subject to loss of citizenship under Article 25 based on a post-naturalization conviction of terrorist acts that occurred before naturalization. This complicated hypothetical is not likely to be duplicated in the United States.

<sup>167</sup> The children of accredited foreign diplomats do not fall within the jurisdiction of U.S. law, and as such do not acquire U.S. citizenship if born in the United States. “Green Card for a Person Born In the United States to a Foreign Diplomat,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-person-born-foreign-diplomat-united-states/green-card-person-born-united-states-foreign-diplomat>.

<sup>168</sup> Civil Code of France, Article 17–22.

terrorism-related loss of citizenship law is viewed as a punitive consequence for conviction of certain serious crimes, as a secondary vetting process, or as part of a probationary citizenship period, U.S. legislators are unlikely to find much of interest in French loss of citizenship law. Its focus on naturalized citizens, and its basic structure and conditions, do not provide a model that would likely be workable in the U.S.

Efforts to amend the French Constitution to permit expanded loss of citizenship legislation capable of withdrawing citizenship from individuals born French citizens are unnecessary in the United States, as loss of citizenship law in the United States would apply equally to naturalized citizens and individuals born citizens.

Some have characterized recent efforts to expand the opportunity under French law to withdraw citizenship from a broader group of people, including individuals born French, as an effort to bring the “British Model” to France.<sup>169</sup> Should France continue to consider modifying its law relevant to terrorism-related loss of citizenship, additional review would be appropriate to determine whether future proposed, or actual, changes to French law might offer innovative new ideas or valuable cautionary lessons to U.S. legislators.

#### **D. CONCLUSION**

This review of terrorism-related expatriation provisions pursued by the U.K., Australia, and France reflects very different approaches undertaken by these nations. The U.K. adopted legislation that relies heavily on governmental exercise of discretion, and that treats naturalized citizens differently than individuals born citizens. Under U.K. law, naturalized citizens can have their citizenship withdrawn, even if it would leave them stateless, and even if they happened to be in Britain at the time. Australia, on the other hand, implemented legislative changes that provide for less discretion, and establish clearer guidance. Australia’s laws draw no distinctions among citizens (naturalized or natural born), only permit loss of citizenship to take place regarding citizens located

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<sup>169</sup>“The extension of the powers to citizens by birth was infrequently alluded to as the ‘British model’. These amendments were dismissed outright in the National Assembly as disproportionate and unconstitutional.” Bobbie Mills, “A Privilege, not a right: Contemporary debates on citizenship deprivation in Britain and France,”

outside of Australia, and do not permit loss to take place if it would render the individual stateless. However, under the Australian legislation, loss is effective immediately upon completion of the expatriating act, as opposed to upon completion of some administrative or formal legal process. The law provides for an appeal mechanism, but as practical matter, such a challenge would be difficult as the ex-citizen would be overseas. French law, which was amended before 9/11 to provide for limited terrorism-related loss of citizenship, provides little additional guidance for U.S. legislators.

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## **IV. U.S. TERRORISM-RELATED LOSS OF CITIZENSHIP BILLS AFTER 9/11**

This chapter reviews bills introduced to Congress since September 11, 2001, to address national security and related concerns arising from United States citizens engaging in or supporting terrorism through loss of citizenship.

### **A. LOSS OF CITIZENSHIP UNDER CURRENT U.S. LAW — INA § 349**

Currently, loss of United States citizenship, other than as a result of fraud or misrepresentation in the naturalization process or in the acquisition of documents reflecting citizenship, occurs pursuant to INA § 349(a) and results from undertaking one of seven expatriating acts, including naturalizing as a citizen of a foreign state (§ 349(a)(1)), taking an oath of allegiance to a foreign state (§ 349(a)(2)), serving in the armed forces of a foreign state (§ 349(a)(3)), accepting employment by a foreign government under certain circumstances (§ 349(a)(4)), renouncing your citizenship (§§ 349(a)(5) & (a)(6)), or treason (§ 349(a)(7)).<sup>170</sup> (See Appendix B.)

Loss of citizenship occurring as a result of acts described in subparagraphs (1) – (5) of section § 349(a) is generally administered by the United States Department of State.<sup>171</sup> Determination of loss of nationality under § 349(a)(6)(wartime domestic renunciation) was previously administered by the Department of Justice, but following the creation of the Department of Homeland Security, authority to administer this section transferred to DHS component United States Citizenship and Immigration Services.<sup>172</sup>

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<sup>170</sup> Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (1952)(as amended).

<sup>171</sup> See generally, 7 U.S. Department of State Foreign Affairs Manual § 1200 (2014), Loss and Restoration of U.S. Citizenship, <https://fam.state.gov/fam/07fam/07fam1210.html>.

<sup>172</sup> *An Act to Establish the Department of Homeland Security, and for other purposes*, Public Law 107–296, 116 Stat. 2135 (2002), commonly known as the Homeland Security Act of 2002, accessed September 11, 2016, [https://www.dhs.gov/xlibrary/assets/hr\\_5005\\_enr.pdf](https://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf). See also, *Kaufman v. Holder*, 686 F.Supp.2d 40 (D.D.C. 2010).

Section 349(a)(7) requires conviction by a court martial or other court of competent jurisdiction of treason and/or related specific crimes.<sup>173</sup>

## **B. TERRORISM-RELATED LOSS OF CITIZENSHIP BILLS INTRODUCED TO CONGRESS SINCE 9/11**

Since the events of September 11, 2001, the United States Congress has undertaken a variety of extraordinary legislative measures aimed at reconceiving and strengthening the security of the American people and the nation. The most prominent feature of that reform was the creation of the Department of Homeland Security by virtue of the Homeland Security Act of 2002.<sup>174</sup> The term “homeland security” was not in common use in the United States before the attacks of 9/11, but has since become ubiquitous in the lexicon of U.S. domestic security issues, and the federal agency bearing that name.

Another legislative effort that began shortly after 9/11, and that has continued in various forms, involves legislation proposing mechanisms by which a U.S. citizen could lose citizenship as a result of engaging in or supporting terrorism. To date those legislative efforts have not been successful. U.S. law regarding loss of citizenship is subject to significant restrictions which primarily arose from Supreme Court cases decided during a period beginning in the late 1950s and continuing through 1980. Those cases include, most significantly, 1967’s *Afroyim v. Rusk*, which held perhaps

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<sup>173</sup> Conviction of treason and related crimes is exceedingly rare. Treason is the only crime expressly defined in the Constitution. U.S. Const. art. III, § 3. The last individual convicted of treason in the United States was Tomoya Kawakita. “The Case For Treason,” CBS News, December 17, 2001, accessed September 11, 2016, <http://www.cbsnews.com/news/the-case-for-treason/>. See also, *Kawakita v. U.S.*, 343 U.S. 717 (1952). Mr. Kawakita was born in the United States in 1921 but qualified for Japanese citizenship as well. He travelled to Japan in 1939 with a relative and remained there throughout the war. While in Japan, in furtherance of the Japanese war effort, Mr. Kawakita was employed by a mining company as an interpreter. The mining company used United States prisoners of war as factory labor. Evidence demonstrated that while working for the mining company, Mr. Kawakita physically abused United States POW laborers and made repeated statements consistent with treasonous intent. The Supreme Court upheld his conviction. *Ibid.* Originally sentenced to death, his sentence was later commuted to life, and he was ultimately released and permitted to travel to Japan in 1963 on condition that he not return to the United States. “Kawakita, War Criminal, In Tokyo as a Japanese,” *New York Times*, December 13, 1963, accessed September 11, 2016, <http://www.uniset.ca/other/cs5/kawakita2.pdf>. See also, David Rosenzweig, “POW Camp Atrocities Led to Treason Trial,” *Los Angeles Times*, September 20, 2002, accessed September 11, 2016, <http://articles.latimes.com/2002/sep/20/local/me-onthelaw20>.

<sup>174</sup> Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135 (2002).

unsurprisingly that only a voluntary act can result in loss of citizenship, and 1980s *Vance v. Terrazas*, which somewhat more surprisingly held that an individual must affirmatively intend, when committing an expatriating act, to lose citizenship by virtue of that act.<sup>175</sup> These decisions wrested primary control over loss of citizenship from the federal government, and placed that control in the hands of the citizen. In post-9/11 America, this shift in control suggests questions about the meaning of citizenship in the United States. What is the meaning citizenship, who deserves to be a citizen, and if we decide someone has acted in a manner that should cause them to lose their citizenship, what can be done? Post-9/11 legislative proposals suggesting terrorism-related loss of citizenship consequences provide possible answers to those questions.

Expanding statutory expatriation provisions under law is an issue likely to generate controversy, particularly as most Americans are not familiar with the legal prerequisites that underlie loss of citizenship in the United States. Further, these specific proposals are presented in the context of the politically and emotionally charged issue of terrorism, and in particular U.S. citizens alleged to support terrorism.

### **1. The SAFER Act**

On November 19, 2003, Representative James J. Gresham Barret introduced H.R. 3522, the SAFER Act of 2003.<sup>176</sup> SAFER is an acronym derived from the full title of the act, “Securing America’s Future through Enforcement Reform.”<sup>177</sup> At more than 200 pages, the SAFER Act was directed at a variety of immigration reforms, including an amendment to INA § 349.<sup>178</sup> Representative Barret proposed the following amendments to Section 349(a)(3) and 349(b) of the Immigration and Nationality Act:

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<sup>175</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980).

<sup>176</sup> SAFER Act of 2003, H.R. 3522, 108th Congress (2003), accessed September 11, 2016, <https://www.govtrack.us/congress/bills/108/hr3522>.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*



(3)(A) entering, or serving in, the armed forces of a foreign state if—  
    (i) such armed forces are engaged in hostilities against the United States;  
or  
    (ii) such person serves as a commissioned or non-commissioned officer; or  
    (B) in the case of a naturalized American citizen, joining or serving in, or providing material support (as defined in section 2339A of title 18, United States Code) to a terrorist organization designated under section 212(a)(3) or 219 or designated under the International Emergency Powers Act, if the organization is engaged in hostilities against the United States, its people, or its national security interests.’; and

...by adding at the end of subsection (b): “The voluntary commission or performance of an act described in subsection (a)(3)(A)(i) or (B) shall be prima facie evidence that the act was done with the intention of relinquishing United States nationality.”<sup>179</sup>

Representative Barrett’s SAFER Act of 2003 was not seriously considered by Congress. He resubmitted the SAFER Act in 2005 as H.R. 688, with similar results.<sup>180</sup>

*a. Analysis and Issues under U.S. Law*

The SAFER Act included novel ideas, but also raised constitutional and other questions. Chief among the constitutional questions is the fact that the SAFER Act proposed to amend to INA § 349(a)(3)(B) to create a loss of citizenship consequence that would apply only to naturalized citizens. Although it is not uncommon among the loss of nationality laws of other nations to draw a distinction between naturalized citizens and individuals born with citizenship, such a distinction is problematic under U.S. law. The 14th Amendment’s citizenship clause defines as citizens as “all persons born or naturalized in the United States.”<sup>181</sup> Drawing a distinction for loss of citizenship purposes among United States citizens based on the manner in which they acquired citizenship raises significant constitutional concerns. Such a distinction was previously struck down by the Supreme Court in 1964 in *Schneider v. Rusk*, for relegating

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<sup>179</sup> SAFER Act of 2003, H.R. 3522, § 404, Expatriation of Terrorists.

<sup>180</sup> SAFER Act of 2005, H.R. 688, 109th Congress (2005), <https://www.govtrack.us/congress/bills/109/hr688>.

<sup>181</sup> U.S. Const. amend. XIV, § 1.

naturalized citizens to “a second-class citizenship.”<sup>182</sup> Although the Supreme Court in 1971 in *Rogers v. Bellei* concluded that individuals who naturalize outside of the United States, or who acquire citizenship as a result of a statutory process while outside of the United States, necessarily fall outside of protection of the 14th Amendment and may be subject to requirements and restrictions that would not be possible if the 14th Amendment applied, that decision was fundamentally directed at acquisition of citizenship.<sup>183</sup> For loss of citizenship purposes, drawing a distinction among United States citizens based on the manner in which the acquired citizenship, even after *Rogers v. Bellei*, is likely to fail.

The SAFER Act also proposed to tie loss of citizenship to actions constituting “material support” to a designated terrorist organization, “if the organization is engaged in hostilities against the United States, its people, or its national security interests.” Tying loss of nationality to “material support” poses potential problems from an evidentiary and practical perspective. Use of “material support” by the federal government as a basis for agency decision-making has proved controversial and

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<sup>182</sup> *Schneider v. Rusk*, 377 U.S. 163 (1964). In this case a naturalized U.S. citizen challenged her loss of nationality resulting from law existing at that time at and which only applied to naturalized U.S. citizens who returned and resumed living for three continuous years in “the territory of a foreign state of which [they were] formerly a national or in which the place of [their] birth is situated...” In reversing the finding of loss, Justice Douglas writing for the majority identified the fundamental problem with this provision. “[A] native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. **It creates indeed a second-class citizenship.** Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance, and in no way evidences a voluntary renunciation of nationality and allegiance.” *Ibid.* at 169 (emphasis added). The Court’s decision was 5–3, with justices Clark, Harlan, and White dissenting. Justice Brennan did not participate in this decision. Justice Harlan, writing for the minority, accurately noted that “[t]here is nothing new about the practice of expatriating naturalized citizens who voluntarily return to their native lands to reside. It has a long-established and widely accepted history.” *Ibid.* at 170.

<sup>183</sup> *Rogers v. Bellei*, 401 U.S. 815 (1971).

challenging.<sup>184</sup> In other contexts commentators have argued that the use of material support as a basis for administrative decision making is problematic because it “casts a broad net” capable of catching individuals “who do not present a risk to U.S. national security.”<sup>185</sup>

Further, the proposal to establish a loss of citizenship consequence flowing from material support to a designated terrorist organization engaged in hostilities against our American “national security interests” is exceedingly vague.<sup>186</sup> A federal agency attempting to administer a loss of citizenship provision based on actions against our national security interests would face a host of problems. There is no list or repository of U.S. national security interests, and the bill offers no formula or guidance about how this criterion should be determined, or what agency, agencies, or authorities would be

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<sup>184</sup> “The notion of material support to terrorism—the contribution of money, food, clothing, shelter, and other services to terrorist organizations—has been particularly harmful and has distracted policymakers from the humanitarian concerns that drive refugee resettlement and asylum.” Swetha Sridharan, “Material Support to Terrorism – Consequences for Refugees and Asylum Seekers in the United States,” Migration Policy Institute, January 30, 2008, accessed September 11, 2016, <http://www.migrationpolicy.org/article/material-support-terrorism-%E2%80%94consequences-refugees-and-asylum-seekers-united-states>. See also, Susan Hennessey, “Is DOJ Rethinking Material Support Laws and Domestic Terrorism,” Lawfare, February 5, 2016, accessed September 11, 2016, <https://www.lawfareblog.com/doj-rethinking-material-support-laws-and-domestic-terrorism>. Ms. Hennessey’s article raises questions regarding the disparate treatment under U.S. law of foreign and domestic terrorism in the context of material support, which has a disproportionate effect on Muslims.

<sup>185</sup> Bryan Clark and William Holahan, “Material Support: Immigration and National Security,” *Catholic University Law Review* 59 (2010): 935–948, accessed September 11, 2016, available at: <http://scholarship.law.edu/lawreview/vol59/iss4/2>. Concerns relating to the broad interpretation of material support provisions under law have arisen in a variety of circumstances, particularly following the Supreme Court’s decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2011). See generally, Justin A. Fraterman, “Criminalizing Humanitarian Relief: Are U.S. Material Support For Terrorism Laws Compatible With International Humanitarian Law?,” *NYU Journal of International Law and Politics* 46, (2014): 399–470, <http://nyujilp.org/wp-content/uploads/2014/05/46.2-Fraterman.pdf>. In one “concrete (and particularly absurd) example of this chill factor, it was reported in October 2009 that the U.S. State Department was sitting on USD \$50 million worth of much-needed aid to Somalia out of fear that U.S. government employees administering this assistance would be exposed to prosecution under Executive Order 13,224 due to the fact that large parts of the country are controlled by Shabab, an Islamist group designated as a terrorist group by the Office of Foreign Asset Control (OFAC). In fact, the State Department went so far as to send a letter to the Treasury Department seeking assurances that OFAC would not launch prosecutions or asset freezes against any government employees providing humanitarian relief.” *Id.* at 403 (internal citations omitted). Executive Order 13,244 was a post September 11, 2001 order directed at helping disrupt the financing of international terrorism, and that “authorizes the U.S. government to block the assets of individuals and entities that provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations designated under the Order, as well as their subsidiaries, front organizations, agents, and associates.” Exec. Order. No. 13,244, 3 C.F.R. §13244 (2001), <https://www.gpo.gov/fdsys/pkg/CFR-2002-title3-vol1/pdf/CFR-2002-title3-vol1-eo13224.pdf>.

<sup>186</sup> SAFER Act of 2003, H.R. 3522.

involved. Absent a clearly defined or definable basis for determining what constitutes “our national security interests” for loss of citizenship purposes, this aspect of the SAFER Act could struggle against legal challenges such as a charge of unconstitutional vagueness.<sup>187</sup>

An interesting aspect of the SAFER Act was the proposed amendment to INA § 349(b). That amendment would have established a statutory presumption regarding intent, pursuant to which “serving in the armed forces of a foreign state...engaged in hostilities against the United States,” or “joining or serving in, or providing material support” to a designated terrorist organization would constitute “prima facie evidence” of intention to relinquish citizenship.<sup>188</sup> Prima facie evidence is evidence “sufficient to establish a fact or raise a presumption unless disproved or rebutted.”<sup>189</sup> No statutory presumption presently exists regarding intent as it relates to loss of citizenship, although the U.S. Department of State has adopted an administrative presumption applicable to some expatriating acts.<sup>190</sup>

It is notable that, because the SAFER Act proposed to amend INA § 349(a)(3) as a mechanism to implement loss of citizenship consequences, loss would presumably be subject to the provisions of INA § 351, “Restrictions on Loss of Nationality.”<sup>191</sup> Those restrictions include protections for minors, and more importantly prevent loss of citizenship under INA § 349(a)(3) from taking place while a person is in the United

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<sup>187</sup> See generally, Eugene Volokh, “The Void-for-Vagueness/Fair Notice Doctrine and Civil Cases,” *The Volokh Conspiracy*, June 21, 2012, accessed September 11, 2016, <http://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/>.

<sup>188</sup> SAFER Act of 2003, H.R. 3522.

<sup>189</sup> *Wex*, s.v. “Prima Facie,” accessed September 11, 2016, [https://www.law.cornell.edu/wex/prima\\_facie](https://www.law.cornell.edu/wex/prima_facie).

<sup>190</sup> Certification of loss of U.S. Nationality, 22 C.F.R. § 50.40(a), <https://www.gpo.gov/fdsys/pkg/CFR-2010-title22-vol1/pdf/CFR-2010-title22-vol1-sec50-40.pdf>.

<sup>191</sup> Immigration and Nationality Act § 351, 8 U.S.C. § 1483 (1952)(as amended).

States.<sup>192</sup> The SAFER Act does, however, have the potential to create stateless ex-citizens overseas, which has been and remains a potential outcome from other loss of citizenship provisions under U.S. law.

***b. Viability of the SAFER Act and Conclusions***

The SAFER Act was not likely a viable bill, owing to the constitutional questions raised by its' proposed disparate treatment of naturalized and natural born citizens, and the predictable and practical difficulties applying vague and broadly worded criteria like U.S. "national security interests" in the context of the administration of a loss of citizenship statute. Creating the kind of two-tiered citizenship system that the Supreme Court rejected in *Schneider v. Rusk* would likely have doomed this bill.<sup>193</sup> In a similar way, by tying loss of citizenship to vague concepts such as our "national security interests," the SAFER Act strayed from the clearly enumerated expatriating acts that are a consistent aspect of U.S. loss of citizenship law under INA § 349(a), and attempted to incorporate something closer to a qualitative standard that would be difficult to implement, and that raises question about notice and intent. There is no list or description of U.S. national security interests, or of organizations presently acting contrary those interests. It thus unclear how a person could join or support such an organization with the intention of losing citizenship, when the status of the organization as one acting contrary to the national security interests of the U.S. may not be known at the time the act was committed, and may only be determined based on a post-hoc analysis.

These problems notwithstanding, the SAFER Act offered some interesting ideas.

The SAFER Act proposed adding terrorism-related loss of citizenship to U.S. law by organizing the bulk of the amendment under INA § 349(a)(3), the section presently focused on serving in the armed forces of a foreign nation. Analogizing the decision to

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<sup>192</sup> "Except as provided in paragraphs (6) and (7) of section 349(a) of this title, no national of the United States can lose United States nationality under this Act while within the United States or any of its outlying possessions, but loss of nationality shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this chapter if and when the national thereafter takes up a residence outside the United States and its outlying possessions." Ibid.

<sup>193</sup> *Schneider v. Rusk*, 377 U.S. 163 (1964).

join or support a terrorist organization to the decision to join or support the armed forces of a foreign nation, particularly one hostile to the United States, was a sensible and predictable approach.

The SAFER Act proposed at least one novel concept, involving the creation of a statutory presumption regarding intent. Intent is a key analytical point for loss of citizenship, as the federal government is no longer empowered to involuntarily strip citizenship from citizens. When a citizen commits a statutory expatriating act, he or she must do so voluntarily and with the intention of losing citizenship. The Supreme Court has indicated that intent can be determined from “words or ... found as a fair inference from proved conduct.”<sup>194</sup> Absent an express statement to the contrary, government adjudicators considering possible terrorism-related loss of citizenship cases will likely face assertions by citizens that they did not intend to lose their U.S. citizenship in the context of joining or supporting a terrorist cause or organization. To reach a loss of citizenship determination over such objection, it may be necessary to infer intent from the expatriating act or acts alleged to have been committed. Inferring intent on a case-by-case basis may prove challenging, both in the context of the adjudication itself, and defending that adjudication against a legal challenge. By establishing a statutory presumption regarding intent, Congress would put the public on notice regarding the consequences of engaging in particular potentially expatriating acts, while simultaneously conveying both to adjudicators and federal courts how terrorism-related loss of citizenship was intended to be applied, facilitating implementation and review. By including a statutory presumption regarding intent, the SAFER Act suggests an innovation that could be one key to unlocking the problem of how the federal government might remain compliant with existing voluntariness and intent mandates under law, while at the same time having a genuine opportunity to create a workable terrorism-related loss of citizenship mechanism. A similar presumption was incorporated into Australia’s new loss of citizenship law,<sup>195</sup> and may prove an attractive provision for future U.S. legislators to consider when drafting legislation.

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<sup>194</sup> Vance v. Terrazas, 444 U.S. 242 (1980)

<sup>195</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

A final note on the creation of stateless ex-citizens. Although the SAFER Act doesn't present an opportunity for loss of citizenship to take place regarding individuals in the United States, owing to its organization under INA § 349(a)(3) and the limitations imposed by INA § 351, it does suffer from a problem common to U.S. loss of citizenship law generally, which is the potential for creation of stateless ex-citizens overseas. A U.S. citizen overseas who also possesses citizenship of another nation could, following loss of U.S. citizenship, effectively be prevented from returning to the United States. However, an individual overseas who is rendered stateless following loss of U.S. citizenship may nevertheless be returned to the U.S. under some circumstances.<sup>196</sup> From a homeland security perspective, it is unclear what benefit flows from a law that withdraws U.S. citizenship from an overseas citizen on the basis of joining a terrorist organization or supporting terrorism, when that individual could nevertheless be returned to the U.S.

## **2. The Terrorist Expatriation Act**

On May 6, 2010, Senator Joseph Lieberman of Connecticut introduced in the U.S. Senate S. 3327, the Terrorist Expatriation Act. Simultaneously, Representative Jason Altmire of Pennsylvania introduced an identical bill, H.R. 5237, in the House of

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<sup>196</sup> Loss of “American nationality does not necessarily prevent a former national’s deportation from a foreign country to the United States as an alien.” “Renunciation of U.S. Nationality by Persons Claiming a Right of Residence in the United States,” U.S. Department of State, accessed September 11, 2016, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship-right-of-residence.html>. See also, Kim Boatman, “A Man Without A Country, Literally – Ex-U.S. Citizen Has Become A Drifter Among Nations,” *The Seattle Times*, November 27, 1992, accessed September 11, 2016, <http://community.seattletimes.nwsourc.com/archive/?date=19921127&slug=1526849>.

“In 1979, Paul Weis pointed out the potential illegality to which deprivation of citizenship may give rise, particularly where, ‘it affects the right of other States to demand from the State of nationality the readmission of its nationals...[I]ts extraterritorial effect would be denied as regards the duty of admission. He distinguishes between denationalization before leaving and denationalisation after leaving the State of nationality, but is of the view that in both cases, the duty to permit residence or to readmit the former national persists, and is further supported in the latter case: ‘The good faith of a State which has admitted an alien on the assumption that the State of his nationality is under an obligation to receive him back would be deceived if by subsequent denationalisation this duty were to be extinguished.’ These propositions are unexceptional as a matter of international law. As Judge Read remarked in the *Nottebohm* case, when a non-citizen appears at the border, the State has an right to refuse admission. If, however, it allows the non-citizen to enter, then it brings into being a series of legal relationships with the State of which he or she is a national, which status will be commonly evidenced by production of a passport. This relative relationship of rights and duties is the source of the receiving State’s right to terminate the non-citizen’s stay by deporting him or her to the State which issued the passport (‘returnability’ being central to the passport regime), and of the State of nationality’s obligation to admit its citizens expelled from other States.” Guy S. Goodman-Gill, “Mr. Al-Jedda, Deprivation of Citizenship, and International Law.”

Representatives.<sup>197</sup> The Terrorist Expatriation Act proposed a different loss of citizenship mechanism than Rep. Barrett’s SAFER Act. Representative Barrett’s SAFER Act was formally a proposal to amend INA § 349(a)(3), regarding service in the armed forces of a foreign state, and which included the novel legal mechanism of creating a statutory presumption regarding intent to lose United States citizenship. The Terrorist Expatriation Act proposed amending INA § 349(a) by adding a new subparagraph 8. The new subparagraph would have provided for loss of citizenship as a result of:

- (A) providing material support or resources to a foreign terrorist organization;
- (B) engaging in, or purposefully and materially supporting, hostilities against the United States; or
- (C) engaging in, or purposefully and materially supporting, hostilities against any country or armed force that is—
  - (i) directly engaged along with the United States in hostilities engaged in by the United States; or
  - (ii) providing direct operational support to the United States in hostilities engaged in by the United States.<sup>198</sup>

*a. Analysis and Issues under U.S. Law*

Like the SAFER Act, the Terrorist Expatriation Act proposed concepts new to U.S. loss of citizenship law. But unlike the SAFER Act, the Terrorist Expatriation Act was directed at a much broader scope of potentially expatriating terrorism-related conduct, extending the possibility of loss for individuals engaging in or materially supporting “hostilities” against the United States or our military allies.<sup>199</sup> The Terrorist Expatriation Act presumably adopted the concept of “hostilities against the United States” from INA § 349(a)(3)(A), but uses it in a different context. INA § 349(a)(3)(A) establishes as an expatriating act, joining the “armed forces of a foreign state” if those forces are “engaged in hostilities against the United States.” Under 349(a)(3)(A) the “hostilities” clause modifies the meaning of “armed forces of a foreign state.” The

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<sup>197</sup> Terrorist Expatriation Act, S. 3327, 111th Congress (2010), <https://www.govtrack.us/congress/bills/111/s3327>; Terrorist Expatriation Act, H.R. 5237, 111th Congress (2010), <https://www.govtrack.us/congress/bills/111/hr5237>.

<sup>198</sup> Ibid.

<sup>199</sup> Although not expressly referenced, the term “foreign terrorist organization” presumably refers to the Foreign Terrorist Organizations (FTO) list maintained by the U.S. Department of State. “Foreign Terrorist Organizations,” U.S. Department of State, accessed September 11, 2016, <http://www.state.gov/j/ct/rls/other/des/123085.htm>.



proposed Terrorist Expatriation Act bill shifts the focus from membership in a hostile state’s armed forces, to simply engaging in or materially supporting hostilities against the United States or our key military allies. Although not referenced in the law, this usage appears likely to have been drawn from the U.S. Manual for Military Commissions, which was created to facilitate “the full and fair prosecution of alien unlawful enemy combatants by military commissions.”<sup>200</sup> The 2007 version of the manual defines an “Unlawful Enemy Combatant” as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents...”<sup>201</sup> Neither the Terrorist Expatriation Act, nor the Manual for Military Commissions defines the term “hostilities.”<sup>202</sup>

The potential scope of the Terrorist Expatriation Act could include actions taken overseas, or actions taken domestically. Further, it is not limited to actions supporting foreign terrorist organizations, and thus presumably could encompass actions taken in furtherance of domestic terrorism, or other actions determined to constitute “hostilities” against the United States or our allies. Domestic terrorist movements and organizations exist in the United States.<sup>203</sup> For example, groups like the Animal Liberation Front and

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<sup>200</sup> *Manual for Military Commissions*, Department of Defense, January 18, 2007, accessed September 11, 2016, <http://archive.defense.gov/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>.

<sup>201</sup> *Manual for Military Commissions*, Department of Defense, Rule 103(a)(24). A “lawful enemy combatant” is defined in manual in part as “a member of the regular forces of a State party engaged in hostilities against the United States...,” broadly corresponding to a person to whom INA §349(a)(3)(A) would apply. The manual was updated in 2010 and 2012, changing the term “Unlawful Enemy Combatant” to “Unprivileged Enemy Belligerent,” but the definition remained largely unchanged.

<sup>202</sup> “Hostilities” is defined in the Military Commissions Act. 10 U.S.C. § 948a(9)(2006)(“ The term “hostilities” means any conflict subject to the laws of war.”)

<sup>203</sup> The Department of Justice has provided the following presumably non-exhaustive list of domestic terror threats in the United States, which include: “animal rights extremists, eco-terrorists, anarchists, antigovernment extremists such as “sovereign citizens” and unauthorized militias, Black separatists, White supremacists, anti-abortion extremists, and other unaffiliated disaffected Americans, including “lone wolfs.” Domestic terrorism cases often involve firearms, arson or explosive offenses, crimes relating to fraud, and threats and hoaxes.” “Domestic Terrorism,” Office of the United States Attorneys, last updated December 8, 2014, <https://www.justice.gov/usao/priority-areas/national-security/domestic-terrorism>. See also, “Sovereign Citizens A Growing Domestic Threat to Law Enforcement,” Federal Bureau of Investigations, September 2011, <https://leb.fbi.gov/2011/september/sovereign-citizens-a-growing-domestic-threat-to-law-enforcement>.

Earth Liberation Front were active in the United States primarily in the 1990s and early to mid-2000s.<sup>204</sup>

Finally, as proposed, the Terrorist Expatriation Act has the potential to create stateless ex-citizens in foreign nations, as well as within the United States.

***b. Viability of the Terrorist Expatriation Act and Conclusions***

The bulk of the Terrorist Expatriation Act was likely not viable, owing to its' reliance on the term "hostilities" as a key analytical point; however, standing alone, the proposed new section 8(A), which would have made loss of citizenship a potential consequence of for "providing material support or resources to a foreign terrorist organization" could have been viable.

Some commentators asserted that the Terrorist Expatriation Act was an unconstitutional effort to strip "people of citizenship for joining terrorist organizations..."<sup>205</sup> Others, including Secretary of State Hillary Clinton, suggested that the bill might have merit.<sup>206</sup> The viability of this and any other terrorism-related loss of citizenship proposal would certainly hinge on its ability to be implemented in a manner consistent with constitutional and existing statutory restrictions. Stripping someone of citizenship implies unintended involuntary loss of citizenship, which is not possible under U.S. law. U.S. law permits loss of citizenship to occur only when an individual voluntarily undertakes a statutory expatriating act with the intention of losing citizenship.<sup>207</sup> Voluntariness is presumed under U.S. law (subject to rebuttal), but intent requires proof based upon a preponderance of the evidence.<sup>208</sup> The Supreme Court has

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<sup>204</sup> "Testimony of John E. Lewis, Deputy Assistant Director, Before the Senate Judiciary Committee," Federal Bureau of Investigation, May 18, 2004, accessed September 11, 2016, <https://www.fbi.gov/news/testimony/animal-rights-extremism-and-ecoterrorism>.

<sup>205</sup> Charlie Savage and Carl Hulse, "Bill Targets Citizenship of Terrorists' Allies," *New York Times*, May 6, 2010, accessed September 11, 2016, [http://www.nytimes.com/2010/05/07/world/07rights.html?\\_r=0](http://www.nytimes.com/2010/05/07/world/07rights.html?_r=0).

<sup>206</sup> Ibid.

<sup>207</sup> Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (1952)(as amended); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980).

<sup>208</sup> Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (1952)(as amended); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Vance v. Terrazas*, 444 U.S. 252 (1980).

previously held that intent in the context of an expatriating act can be determined, in part, “as a fair inference from proved conduct.”<sup>209</sup> Thus, hypothetically, had this bill been passed into law, or at least section 8(A), an administrative agency considering a loss of citizenship case resulting from an individual providing material support to a terrorist organization could lawfully presume that such an individual acted voluntarily (subject to rebuttal). In addition, it is conceivable that a fair inference drawn from specific acts of material support to a terrorist organization could support the conclusion that the individual had acted with the intention of losing his or her U.S. citizenship. Under such circumstances, administration of section 8(A) of the bill could have occurred consistent with existing legal requirements and restrictions, and would not fairly be characterized as “stripping” someone of their citizenship.

The incorporation of “material support” as an expatriating act poses some potential problems, but inasmuch as providing “material support” to terrorism or a terrorist organization is already a feature of both U.S. criminal law<sup>210</sup> and immigration law,<sup>211</sup> incorporation of that concept into loss of citizenship law is not particularly surprising.

Another potential viability concern with the Terrorist Expatriation Act arises from the possible association of this bill with efforts to expand use of military commissions. Following the passage of the Military Commission Act of 2006, and in conjunction with the Military Commissions Manual, it appears that this bill may have been formulated to provide an opportunity for U.S. citizens captured on the battlefield, or elsewhere, to lose their citizenship and then be subjected to trial by a military commission, rather than trial before a Federal Court in the United States.<sup>212</sup> Initiating an administrative loss of citizenship proceeding under such circumstances could have been characterized as an

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<sup>209</sup> Vance v. Terrazas, 444 U.S. 242 (1980).

<sup>210</sup> Providing Material Support to Terrorists, 18 U.S.C., § 2339A (1994)(as amended); Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C., § 2339B (1996)(as amended).

<sup>211</sup> Immigration and Nationality Act, § 212, 8 U.S.C. § 1182 (1952)(as amended). See also “Terrorism-Related Inadmissibility Grounds” U.S. Citizenship and Immigration Services.

<sup>212</sup> Peter J. Spiro, “Expatriating Terrorists,” *Fordham Law Review* 82 (2014): 2175 fn. 45.

effort to deprive U.S. citizens of important rights at the very moment when those rights were most critical to the individual, and most inconvenient to the federal government. This brings to mind echoes of the coercive renunciation process initiated in the 1940s for compulsorily interned U.S. citizens having Japanese heritage. Had the Terrorist Expatriation Act been implemented in this manner, it could have proved extraordinarily controversial.

In addition, the scope of proposed section 8(B) of this bill regarding acts “of hostility against the United States,” does not preclude application to domestic acts. Consider the Oklahoma City bombing, which involved the destruction of a federal building and the killing of 168 people, motivated by antipathy toward the Federal Government following the Ruby Ridge and Waco incidents. That bombing could be characterized as an act of hostility against the United States. As a consequence, the bombers were tried and convicted, and in the case of Timothy McVeigh, executed. It is hard to identify what purpose would be furthered by adding loss of citizenship to the consequences of domestic terror acts committed by Americans, and for which appropriate criminal process is available.

The Terrorist Expatriation Act also creates the possibility that a U.S. citizen could lose his or her citizenship and become stateless while in the United States. In addition to generally acknowledged humanitarian and ethical concerns associated with creating stateless people,<sup>213</sup> the practical problems associated with creating stateless ex-citizens in the United States suggest good policy reasons why that outcome should be avoided. For purposes of addressing problems related to terrorism, creating stateless ex-citizens in the United States is no solution at all. An individual who loses his or her U.S. citizenship becomes an alien with regard to the United States.<sup>214</sup> If rendered stateless while in the United States, such an individual would be functionally trapped in the United States.

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<sup>213</sup> “Statelessness,” U.S. Department of State, accessed September 11, 2016, <http://www.state.gov/j/prm/policyissues/issues/c50242.htm>. “Ending Statelessness,” UNHCR, accessed September 11, 2016, <http://www.unhcr.org/en-us/stateless-people.html>.

<sup>214</sup> “[T]he individual will be ineligible to receive a U.S. passport in the future unless he or she, like any other alien, subsequently naturalizes in the future as a U.S. citizen.” “Renunciation of U.S. Nationality by Persons Claiming a Right to Residence in the United States,” U.S. Department of State.

Lacking a passport or eligibility for an official U.S. travel document, a stateless ex-citizen in the United States would find it difficult or impossible to leave the United States, or gain admission to any foreign nation. Likewise, administrative removal proceedings would prove ineffective as it would be functionally impossible to successfully designate a country of removal.<sup>215</sup> If convicted of a crime, such an individual could be criminally incarcerated, but upon completion of that sentence would be subject to release. He or she could not be perpetually detained by the U.S. government as an immigration matter if removal proved impossible.<sup>216</sup> The result would be a stateless ex-citizen in the United States who, although formally an alien under U.S. law, cannot be removed from the United States. He or she would be ineligible to work absent work authorization, and would become a perpetual burden on state and federal administrative resources, while remaining at large and capable of continuing to engage in or support the terrorist groups or causes that formed the basis of his or her loss of citizenship in the first place. Loss of citizenship under such circumstances would be symbolic, but provides no evident homeland security benefit.

### **3. The Enemy Expatriation Act of 2011**

Senator Lieberman and a new joint sponsor, Representative Charles Dent from the House of Representatives, introduced the Enemy Expatriation Act in October of 2011.<sup>217</sup> The Enemy Expatriation Act was essentially a stripped down version of the Terrorist Expatriation Act, but with a new twist. Like its predecessor, this bill also proposed the addition of a new subparagraph 8 to INA § 349(a), but in this instance expatriation was a consequence for:

(8) engaging in, or purposefully and materially supporting, hostilities against the United States.

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<sup>215</sup> Immigration and Nationality Act, § 241, 8 U.S.C. § 1231 (1952)(as amended). See also, *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>216</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>217</sup> Enemy Expatriation Act, S. 1698, 112th Congress (2011), <https://www.govtrack.us/congress/bills/112/s1698>; Enemy Expatriation Act, H.R. 3166, 112th Congress (2011), <https://www.govtrack.us/congress/>

[bills/112/hr3166](https://www.govtrack.us/congress/bills/112/hr3166).

In addition, the bill proposed a new subparagraph (c) to section 349 of the INA, which defined the statutory term “hostilities” as follows:

(c) For purposes of this section, the term hostilities means any conflict subject to the laws of war.

*a. Analysis and Issues Under U.S. Law*

This revised and streamlined version of the previously-proposed Terrorist Expatriation Act makes several significant changes. Viewed from the perspective of its predecessor, this version eliminates the previously-proposed 349(a)(8)(A) and 349(a)(8)(C) from the Terrorist Expatriation Act, reintroducing the previously-proposed 349(a)(8)(B) as a stand-alone bill.

Unlike INA §§ 349(a)(1)-(7), the Enemy Expatriation Act does not focus on a specified or enumerated act, or in the case of treason, conviction for a specified heinous crime. Instead, it makes loss of citizenship a product of a qualitative analysis of the potentially expatriating act. Under the Enemy Expatriation Act, an individual must voluntarily, and with the intent to lose U.S. citizenship, engage in an act or acts constituting hostilities against the U.S., or engage in acts constituting the provision of material support to hostilities against the U.S., before he or she could be deemed to have lost U.S. citizenship under this proposed bill.

The Enemy Expatriation Act attempts to add clarity to the analysis by defining the term “hostilities” as “any conflict subject to the laws of war.”<sup>218</sup> It is notable that the term “hostilities” appears both in the proposed new subsection (8), and also in subsection (3) regarding service in the armed forces of a foreign state. With regard to the proposed new subsection (8), based on the proposed definition of the term “hostilities,” it could alternately be read as follows:

(8) engaging in, or purposefully and materially supporting, [any conflict subject to the laws of war] against the United States.

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<sup>218</sup> Ibid.

As proposed, this bill has the potential to create stateless ex-citizens in foreign nations, as well as within the United States.

Commentators have argued that this bill is likely unconstitutional as an effort to involuntarily strip Americans of their citizenship;<sup>219</sup> however, on its face, this bill does not in fact change or affect predicate statutory requirements under INA §349(a) or the Supreme Court precedent from which those requirements were drawn. If this bill were passed into law, it could only be applied in the context of voluntary acts committed by a U.S. citizen, and by which acts the citizen intended to lose his or her citizenship. As with the Terrorist Expatriation Act, implementation of this bill consistent with current constitutional restrictions would likely require use of inferred intent. Any such effort would surely generate intense scrutiny and legal challenges, but those predictable outcomes do not mean that the bill is necessarily unconstitutional. While this bill might be challenging to administer, both administratively and legally, and may have policy implications that affect the viability of the bill, the text of the bill is not inherently unconstitutional. It could be applied unconstitutionally, but that is a possibility that could only be tested in the event it was passed into law.

***b. Viability of the Enemy Expatriation Act and Conclusions***

The Enemy Expatriation Act is problematic for several reasons, and is not likely viable. It suffers from previously referenced problems associated with allowing loss of citizenship to take place while an individual is in the United States, creating stateless ex-citizens in general, as well as the challenges associated with using “material support” as a basis for loss of citizenship. The Enemy Expatriation Act also presents the novel problem of tying loss of citizenship to the laws of war. Further, changes that occurred as between this bill and its predecessor, the Terrorist Expatriation Act, provide additional support for

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<sup>219</sup> “Devon Chaffee, a legislative counsel for the American Civil Liberties Union, said the proposed amendment could theoretically be used to circumvent current laws, including the NDAA. If the amendment became law, the government could potentially revoke the citizenship of anyone deemed to be supporting hostilities against the U.S., thereby subjecting him or her to the indefinite military detention provision of the NDAA. Fortunately, it’s unlikely that Congress would pass something like this. If it did, the law would probably be found unconstitutional since the Supreme Court has ruled that Congress cannot revoke U.S. citizenship without a citizen’s consent, Chaffee said.” Ashley Portero, “Enemy Expatriation Act’ Could Compound NDAA Threat to Citizen Rights,” *International Business Times*, January 24, 2012, <http://www.ibtimes.com/enemy-expatriation-act-could-compound-ndaa-threat-citizen-rights-400024>.

the notion that the bill was intended to be complimentary with matters triable by Military Commissions.

Under the Military Commissions Act of 2006, “[a] military commission has jurisdiction to try any offense made punishable by the [Military Commissions Act] or the law of war when committed by an alien unlawful enemy combatant before, on or after September 11, 2001.”<sup>220</sup> The Military Commissions Act defines the term “hostilities” identically to the Enemy Expatriation Act.<sup>221</sup> As previously noted, if implemented, this provision would prove controversial, as at a time when rights are most important, it appears directed at potentially withdrawing those rights, including rights that would otherwise entitle a U.S. citizen to different trial procedures, and would exclude the individual from coverage under the Geneva Convention.<sup>222</sup> The “laws of war” are not a document or source. They are a collection of treaties and international law sources demanding extensive review and analysis to understand and apply in particular situations. The Department of Defense produces a document called the Law of War Manual.<sup>223</sup> At more than 1200 pages, the manual is too extensive to summarize here; however, this passage from the introduction provides an idea of what application Enemy Expatriation Act might entail. The Law of War Manual states: “For the purposes of this manual, the law of war is that part of international law that regulates the resort to armed force; the conduct of hostilities and the protection of war victims in both international and non-

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<sup>220</sup> Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice* (CRS Report No. RL33688)(Washington, DC: Congressional Research Service, September 27, 2007), <https://www.fas.org/sgp/crs/natsec/RL33688.pdf>. The Military Commissions Act has since been amended such that the term “alien unlawful enemy combatant” is now “Unprivileged enemy belligerent.” 10 U.S.C. § 948(a)(7)(2006)(as amended).

<sup>221</sup> “The term ‘hostilities’ means any conflict subject to the laws of war.” 10 U.S.C. § 948a(9)(2006)(as amended).

<sup>222</sup> 10 U.S.C. § 948(b)(e)(2006)(as amended)(“No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.”) See also, John B. Bellinger III, “Obama, Bush, and the Geneva Conventions,” *Foreign Policy*, August 11, 2010, accessed September 11, 2016, <http://foreignpolicy.com/2010/08/11/obama-bush-and-the-geneva-conventions/>.

<sup>223</sup> *Department of Defense Law of War Manual*, Department of Defense Office of the General Counsel (June 2015), <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>.



international armed conflict; belligerent occupation; and the relationships between belligerent, neutral, and non-belligerent States.”<sup>224</sup>

The U.S. Army’s Judge Advocate General also produces a manual called the Law of Armed Conflict Deskbook, which is a bit more succinct at 260 pages.<sup>225</sup> A brief review of these resources suggests associating the application of a civil expatriation provision with the law of war would be challenging. To begin with, there is no list of conflicts to which the “laws of war” apply. Conflicts subject to the laws of war are measured not by reference to a list, but rather by analysis of an event against a set of international standards.<sup>226</sup> In some instances, identifying a conflict to which the laws of war would apply may not be difficult. The clearest example is a formally declared war.<sup>227</sup> However, Congress hasn’t declared war since World War II. Modern conflicts frequently involve non-state actors. At times they involve individuals engaging in individual acts of violence in the name of a terrorist organization or movement, but which actions were not expressly directed or planned by that organization. Instead, they may reflect an expression of solidarity with the organization’s message, or perhaps a response to a published general call for violence. The unique aspects of modern violence make tying the application of this proposed expatriation legislation to an administrative interpretation of the laws of war particularly challenging.

This Enemy Expatriation Act also presents the serious potential of creating conflicts within the executive branch and the federal government itself. Administration of the expatriation provisions in the U.S. code falls primarily to the Department of State and in rare instances to the Department of Homeland Security. Rarer still is the involvement of military courts martial and the federal court system, which in the first instance only exercise expatriating authority in the extraordinarily rare instance of treason. In order to

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<sup>224</sup> *Department of Defense Law of War Manual*, Office of the General Counsel, Department of Defense.

<sup>225</sup> International and Operational Law Department, United States Army Judge Advocate General’s Legal Center and School, *Law of Armed Conflict Deskbook* (Charlottesville, VA: 2013). [https://www.loc.gov/rr/frd/Military\\_Law/pdf/LOAC-Deskbook-2013.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/LOAC-Deskbook-2013.pdf).

<sup>226</sup> *Law of Armed Conflict Deskbook*, International and Operational Law Department, United States Army Judge Advocate General’s Legal Center and School, pg. 23–28.

<sup>227</sup> *Ibid.*

administer the proposed subparagraph 8 amendment to INA § 349(a), a component of the executive branch of the United States government would have to assess whether an individual engaged in, or materially supported a conflict subject to the laws of war. That would likely fall to the Department of State for individuals overseas, and possibly to the Department of Homeland Security for individuals within the United States.

Absent clear guidance within the statute itself, the appropriate agency would be required to conduct an analysis of the event in question and reach a conclusion regarding the application of the laws of war. This analysis might conflict with the interpretation of those same events by the Department of Defense. Such a potential conflict could render this proposed provision entirely unworkable from an administrative standpoint. The Department of Defense would likely balk at the Department of State or Department of Homeland Security interpreting the laws of war in a civil context, particularly if that interpretation runs counter to its own assessment. Coordinating those decisions, in light of the possible connection to trying such an individual by a Military Commission presents further potential conflict. In addition, there is the potential that a body of decisional law could arise regarding application of the laws of war in a civil context that might challenge the Department of Defense's consistent interpretation and application of international law.

For all of these reasons, the Enemy Expatriation act would not likely prove successful.

#### **4. The Expatriate Terrorists Act of 2014 and Expatriate Terrorist Act of 2015**

In 2014, during the 113<sup>th</sup> Congress, Senator Ted Cruz and Representative Edward Royce introduced the Expatriate Terrorists Act to the Senate and House of Representatives.<sup>228</sup> This act proposed a variety of amendments to INA § 349(a) consistent with the goal of establishing an expatriation consequence related to terrorism and terrorist acts. INA § 349(a)(2), which provides for possible loss of nationality for

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<sup>228</sup> Expatriate Terrorists Act, S. 2779, 113th Congress (2014), <https://www.govtrack.us/congress/bills/113/s2779>; Expatriate Terrorists Act, H.R. 5450, 113th Congress (2014), <https://www.govtrack.us/congress/bills/113/hr5450>.

“taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or political subdivision thereof,” would be amended by adding “or a designated foreign terrorist organization.”<sup>229</sup> In addition, INA § 349(a)(3), which imposes a potential loss of citizenship consequence for service in the armed forces of a foreign state, would be amended to include service in the armed forces of a foreign terrorist organization.

Further, a new subparagraph 4 was proposed, which would provide for possible loss of citizenship for:

- (4) becoming a member of, or providing training or material assistance to, any designated foreign terrorist organization that such person knows, or has reason to know—
  - (A) will engage in hostilities against the United States; or
  - (B) will commit acts of terror against the United States or nationals of the United States.<sup>230</sup>

In 2015 a revised and updated version of the bill, now the Expatriate Terrorist Act was offered.<sup>231</sup> The updated version provided additional changes, which included clarification regarding the meaning of a key term in the bill. It defined the term foreign terrorist organization by reference to INA § 219.<sup>232</sup> It also proposed further modifications to current INA § 349(a)(4)(which would become INA § 349(a)(5) under the Expatriate Terrorist Act scheme), making it a potentially expatriating act to accept, serve in, or otherwise be employed by a foreign terrorist organization.<sup>233</sup>

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<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> Expatriate Terrorist Act, S. 247, 114th Congress (2015), <https://www.govtrack.us/congress/bills/114/s247/text>.

<sup>232</sup> Immigration and Nationality Act, § 219, 8 U.S.C. § 1189 (1952)(as amended). This section provides that the Secretary of State is the official “authorized to designate an organization as a foreign terrorist organization.” See also, “Foreign Terrorist Organizations,” U.S. Department of State.

<sup>233</sup> Expatriate Terrorist Act, S. 247. The 2015 version of the bill also proposes an additional amendment not directed at loss of citizenship. A proposal to amend the Passport Act of 1926 is included, which would enhance the Secretary of State’s authority regarding the issuance and revocation of passports in certain situations, but would eliminate some discretion. The bill directs that the Secretary “shall not issue a passport” and “shall revoke a passport previously issued” to any individual the Secretary has “determined to be a member, or is attempting to become a member” of a foreign terrorist organization.

*a. Analysis and Issues under U.S. Law*

These bills proposed creating a potential loss of citizenship consequence for acts related to joining or supporting a foreign terrorist organization. Similar to the SAFER Act, they proposed to amend INA § 349(a)(3) to include fighting in the armed forces of a designated terrorist organization, but also proposed further consistent changes for swearing an oath to, becoming a member of, or providing training or material support to a designated foreign terrorist organization, and in the 2015 version, being employed by a foreign terrorist organization.

From an administrative standpoint these proposed amendments are consistent with existing provisions under INA § 349(a), in that they enumerate specific acts, rather than relying on a qualitative assessment of generalized action. Act-based provisions facilitate notice to individuals by making it easier to understand when one is contemplating or committing a potentially expatriating act. They also simplify adjudication, and make decisions more likely to withstand scrutiny, as adjudication relies less on administrative judgment and focuses more on objective evidence. The proposed new INA § 349(a)(4), however, is subject to previously-discussed concerns associated with relying on material support as a potential loss of citizenship criterion.

One aspect of the Expatriate Terrorist Act that merits additional discussion is the fact that it proposes the addition of a new INA § 349(a) subsection, increasing the total number from 7 to 8, but it did not propose changes to INA § 351, which imposes restrictions on the loss of citizenship consequence flowing from INA § 349(a)(1)-(6).<sup>234</sup> Under current law, INA § 351 prevents loss of citizenship from taking effect under INA § 349(a)(1)-(6) until the individual takes up residence in a foreign nation. Absent an express amendment to INA § 351, it is unlikely the proposed new INA § 349(a)(4) would be included within that restrictive provision of INA § 351. Rather, a technical amendment would likely be necessary, adjusting INA § 351 to reflect that, under the amended law, its restrictions would apply to loss of citizenship under INA § 349(a)(1)-(3), and (5)-(6). But, as amended, INA §§ 349(a)(2), (a)(3), and the current (a)(4)(which would become

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<sup>234</sup> Immigration and Nationality Act, § 351, 8 U.S.C. § 1483 (1952)(as amended).

(a)(5)) would likely remain subject to the INA § 351 restrictions. This would create a curious consequence. Any loss of citizenship resulting from swearing an oath to a foreign terrorist organization (§ 349(a)(2) as amended) or serving in the armed forces of foreign terrorist organization (§ 349(a)(3) as amended), or being employed by a foreign terrorist organization (§ 349(a)(5) as amended)) would not occur until the individual takes up residence in a foreign nation; however, joining, or providing training or material support to a foreign terrorist organization (§ 349(a)(4) as amended) could result in loss of citizenship taking effect regardless of whether the individual is in the United States or elsewhere.

***b. Viability of the Expatriate Terrorist(s) Act and Conclusions***

The loss of citizenship provisions of the Expatriate Terrorist Act present many of the same viability issues as the other bills reviewed in this chapter, although in this instance, the concerns are primarily procedural. The bill does not appear, on its face, to have any provisions that could not be constitutionally implemented. As with the other legislative efforts reviewed, the Expatriate Terrorist Act would likely require reliance on inferred intent to be effective. The bill proposes a variety of different complimentary amendments, all of which are consistent with the bill's goal of establishing a potential loss of citizenship consequence for joining or supporting a foreign terrorist organization, but as written it creates the possibility for strange and seemingly contradictory outcomes. Under this bill, domestic loss of citizenship is not possible for individuals who serve in the armed forces of, are employed by, or swear an oath to a designated foreign terrorist organization; however, domestic loss of citizenship is possible for individuals who join, or provide training or material support to a designated foreign terrorist organization. Where domestic criminal law provides a sufficient means of addressing domestic terror crimes, there is no clear benefit to creating a possible domestic loss of citizenship consequence. In fact, some groups, such as sovereign citizens, might seize on that aspect of the law as an opportunity to divest themselves of U.S. citizenship, in furtherance of their world view.

As previously noted, U.S. law currently contains no express prohibition or established policy or procedural mechanism preventing the creation of stateless ex-citizens, but as a matter of policy and for practical purposes related to proper administration of the law, legislators should be wary of that outcome, particularly where a bill has the possibility of creating stateless ex-citizens within the United States. For this reason, the proposed new INA § 349(a)(4), which is likely not affected by the restrictions of INA § 351, is problematic.

The differing application INA § 351 in the context of this bill was likely accidental, deriving from an incomplete review of the law, or understanding of its consequences. There is no other rational explanation for why INA § 351 would be left presumptively applicable to some provisions of this bill and not others. To reduce problems associated with creating stateless ex-citizens, legislators should consider, at a minimum, including all new terrorism-related loss of citizenship provisions under the restrictive provisions of INA § 351, preventing loss of citizenship from taking place while an individual is in the United States. Legislators might also consider making terrorism-related loss of citizenship not applicable to individuals who would be rendered stateless.

## **5. The Enemy Expatriation Act of 2015 — Version A and B**

Representative Charles Dent of Pennsylvania submitted two separate versions of his Enemy Expatriation Act in 2015.<sup>235</sup> The first version, H.R. 545, appears identical to H.R. 3166, the bill he submitted in 2011. This version and its 2011 twin tie the term “hostilities” to the laws of war. The second 2015 version, H.R. 4168, discards reference to the laws of war, creating a potential loss of citizenship consequence for, “traveling abroad to join, participate in, train with, fight for, conspire with, or otherwise support a foreign terrorist organization designated by the Secretary of State under section 219.”<sup>236</sup>

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<sup>235</sup> Enemy Expatriation Act, H.R. 545, 114th Congress (2015), <https://www.govtrack.us/congress/bills/114/hr545>; Enemy Expatriation Act, H.R. 4186, 114th Congress (2015), <https://www.govtrack.us/congress/bills/114/hr4186>.

<sup>236</sup> Enemy Expatriation Act, H.R. 4186.

**a. *Analysis and Issues under U.S. Law***

Representative Dent's initial offering in 2015 was identical to his 2011 bill, and is subject to the same analysis as that bill. The revised 2015 bill is similarly structured as an amendment to INA § 349(a), adding a new section 8. However, the revised section 8 changes its focus in a way that is similar to, and was perhaps influenced by the Expatriate Terrorist Act. The new version creates a loss of citizenship consequence for leaving the United States for the purpose of associating with a designated foreign terrorist organization ("traveling abroad to join, participate in, train with, fight for, conspire with, or otherwise support a foreign terrorist organization"). Interestingly, it also proposes a corresponding amendment to INA § 351, expressly excluding the new section 8 from the restrictions applicable to INA § 349(a)(1)-(5). Unlike prior proposals which left questions about whether sponsors considered the issue of domestic and overseas effect for loss of citizenship, in this instance it appears Representative Dent intended the possibility that loss of citizenship under his bill could affect individuals in the United States.

As with other formulations considered, this bill would likely rely on the use of inferred intent in the context of adjudicating loss of citizenship in most instances.

**b. *Viability of the Enemy Expatriation Act of 2015***

The revised Enemy Expatriation Act submitted at the close of 2015 is consistent with other submissions in its focus and mechanisms, and suffers from common shortcomings. While viable in the sense that the bill could be constitutionally applied, it is nevertheless problematic. The possibility of creating stateless ex-citizens in the United States was intentionally included in this bill for reasons that remain unclear, particularly considering the bill's focus on acts that require "traveling abroad..."<sup>237</sup> Creating stateless ex-citizens in the United States holds no evident homeland security benefit, and instead creates a host of potential burdens and problems for federal and state authorities. The possibility of creating stateless ex-citizens overseas, although also problematic, is perhaps more understandable and less concerning where such individuals have voluntarily departed the United States, taken up residence overseas, and in this instances committed

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<sup>237</sup> Ibid.

themselves to an overseas terrorist organization or cause. Even if the United States could, in some instances, be forced to accept repatriation of such individuals based on diplomatic pressure or agreements regarding the return of stateless individuals from allied nations to the country of their birth or last citizenship, such instances would likely be rare. Until repatriation was requested, such individuals would be forced to remain outside of the United States, providing a plausible homeland security benefit.

### C. CONCLUSION

The reinvigoration of interest in withdrawing citizenship from U.S. citizens based on their participation in terrorism in the post 9/11 world raises interesting questions about the very meaning of citizenship. Our national identity has historically been synonymous with immigration and the promise of a better life. In the introduction to John F. Kennedy's *A Nation of Immigrants*, his brother Senator Edward Kennedy wrote "Immigrants today come from all corners of the world, representing every race and creed. They work hard. They practice their faith. They love their families. And they love this country. We would not be a great nation today without them. But whether we remain true to that history and heritage is a major challenge."<sup>238</sup>

Our current loss of citizenship regime emerged from the crucible of the post-World War II era, and the legislative reforms and constitutional protections that resulted. In the U.S. today, citizenship, once properly acquired, is difficult to assail. In almost all situations, the only question the government can ask regarding loss of citizenship is, do you wish to remain a citizen? The federal government, which previously exercised the power to punitively, or at any rate involuntarily withdraw citizenship from citizens has been deprived of that authority. But in reviewing loss of nationality legislation in the United States in the post-9/11 era, we can see reborn in the U.S. the dormant question, "Do you deserve to be a citizen?"

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<sup>238</sup> John F. Kennedy, *A Nation of Immigrants*, with introduction by Sen. Edward M. Kennedy (Harper Perennial, Revised ed. 2008). Introduction available online at "A Nation of Immigrants – John F. Kennedy – Introduction by Edward M. Kennedy," Anti-Defamation League Archive website, accessed September 12, 2016, <http://archive.adl.org/immigrants/introemk.html>.



The revival of this question is likely informed by a variety of issues in addition to the perceived threat terrorism poses to the United States. Americans have been voluntarily renouncing their citizenship in record numbers. More than 15,000 renunciations have taken place since 2008.<sup>239</sup> This unprecedented voluntary rejection of U.S. citizenship has been occurring concurrently with increased concerns relating to core immigration issues, including border security, vetting of immigrants, and fear that terrorist elements are using our immigration system to infiltrate America.<sup>240</sup> It has led Congress, and citizens to contemplate the meaning of citizenship.

There is certainly some tension between the meaning of citizenship under law and the contents of, for example, the Oath of Allegiance administered during a U.S. naturalization proceeding. The oath begins with the following, “I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen...”<sup>241</sup> This statement seems definitive, but it isn’t. The United States does not prohibit U.S. citizens from being or acquiring citizenship of another nation.<sup>242</sup> In fact, the U.S. Department of State has adopted an administrative presumption that an individual who takes a “routine oath of allegiance” to a foreign nation in the context of naturalizing as a citizen of that country, intends to retain U.S. citizenship.<sup>243</sup> But

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<sup>239</sup> Jethro Mullen, “Record number of Americans dump U.S. passports,” CNN Money, February 8, 2016, accessed September 11, 2016, <http://money.cnn.com/2016/02/08/news/americans-citizenship-renunciation/>.

<sup>240</sup> U.S. Congress, House of Representatives, Homeland Security Committee, *Syrian Refugee Flows - Security Risks and Counterterrorism Challenges – Preliminary Findings of A House Homeland Security Committee Review*, November 2015, accessed September 11, 2016, [https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee\\_Syrian\\_Refugee\\_Report.pdf](https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf).

<sup>241</sup> “Naturalization Oath of Allegiance to the United States of America,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/us-citizenship/naturalization-test/naturalization-oath-allegiance-united-states-america>.

<sup>242</sup> 7 U.S. Department of State Foreign Affairs Manual § 80 (2012), Dual Nationality, <https://fam.state.gov/fam/07fam/07fam0080.html>.

<sup>243</sup> “Legal Considerations - Dual Nationality,” U.S. Department of State, accessed September 11, 2016, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/citizenship-and-dual-nationality/dual-nationality.html>.

conversely, the State Department acknowledges that a U.S. citizen who is also a dual national may “owe allegiance to both the United States and the foreign country.”<sup>244</sup>

Given the foregoing, the answer to the question, “what does citizenship mean?” remains elusive. Does citizenship entail a commitment involving fidelity and loyalty which is in the nature of a legally enforceable duty, and which if violated, could cost an individual his or her citizenship? If so, how does that notion of citizenship square with the Supreme Court’s 1958 decision in *Trop v. Dulles*, which found loss of citizenship unconstitutional as a consequence for a member of the armed forces convicted of desertion during a time of war?<sup>245</sup>

Rather than a duty, is citizenship a “protected legal status”<sup>246</sup> that the Constitution, and to a lesser extent the Congress (through legislation) and the Executive Branch (through administration of the law), confers in the context of granting individuals full membership in our society?

Is it both? Is it something else?

To date, Congress has yet to seriously consider terrorism-related loss of citizenship legislation. The various bill proposals reviewed in this chapter highlight consistent themes, and ultimately demonstrate the difficulty of crafting effective legislation to implement loss of nationality consequences related to terrorism. In particular, these bills will have difficulty overcoming a key impediment. Existing Supreme Court precedent and the present loss of citizenship statute require proof of intent. This requirement, and the Supreme Court precedent establishing it, effectively means a person cannot lose his or her U.S. citizenship unless he or she intended that outcome. Put simply, the federal government cannot involuntarily strip citizenship from a U.S. citizen; however, the federal government can make a determination that a U.S.

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<sup>244</sup> Ibid.

<sup>245</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>246</sup> “Citizenship is not a privilege, but a protected legal status.” Guy S. Goodwin-Gill, opinion submitted with ILPA Briefings to the House of Lords’ Committee, “Deprivation of Citizenship resulting in Statelessness and its Implications in International Law – Opinion,” March 12, 2014, <http://www.ilpa.org.uk/data/resources/25900/14.03.00-GSGG-DeprivationCitizenshipIntLawFinal-2.pdf>.

citizen voluntarily committed a statutory expatriating act, and did so under circumstances from which it is reasonable to infer the intention to lose citizenship.

The public hue and cry about these bills has frequently been wide of the mark. A bill is not rendered unconstitutional merely because an unconstitutional application of that bill is conceivable. To be sure, some of the terrorism-related loss of citizenship bills proposed since 9/11 suffer from constitutional deficits, but others could have been passed into law and implemented consistent with U.S. law.

All of the bills proposed to date, and likely to be proposed in the future, will need to rely heavily on inferred-intent for their effective implementation. But bills that make no genuine effort to anticipate and address that challenging key analysis are likely to be impotent. A review of the terrorism-related loss of citizenship bills proposed to date reveals that they suffer from an array of common problems, including the possibility of creating stateless ex-citizens, reliance on concepts or standards that would be difficult or impossible to effectively administer, and the failure to consider the domestic, diplomatic, and humanitarian consequences. Among those bills, only the SAFER Act offered a creative solution to the difficult intent analysis, in the form of a proposed statutory presumption regarding intent.

While legislators and leaders may publically support these bills, it is reasonable to conclude that terrorism-related loss of citizenship proposals to date have been largely symbolic, as opposed to serious legislative efforts.

## **V. ANALYSIS AND RECOMMENDATIONS**

Using loss of citizenship as a tool to address problems associated with terrorism is fraught with a variety of problems. Current Supreme Court precedent recognizes constitutional protections that significantly limit the ability of the federal government to pass legislation capable of causing U.S. citizens to lose their citizenship, which makes drafting and implementing a terrorism-related expatriation bill a challenging proposition. Although it is possible, from a drafting perspective, to create a constitutional terrorism-related loss of citizenship provision, it is unclear how effective such a measure would be. Although other tools, such as passport restrictions, may be sufficient to address many practical concerns regarding United States citizens joining or supporting terrorism overseas, and would likely be easier to implement, loss of citizenship bills continue to be submitted to Congress with regularity. The attacks of 9/11 took place during the 107th session of Congress. Terrorism-related loss of citizenship legislation has been introduced in six of the seven Congressional sessions that followed, including the current 114th Congress.

Legislative offerings to date have failed to merit serious consideration by Congress. As a group, they can be characterized as largely symbolic. There may be some political hay that can be made from proposing significantly or even fatally challenged bills as a means of demonstrating the proponent's tough position regarding terrorism and its supporters. But the proverb about "making hay while the sun shines" is a curious one as applied to terrorism-related loss of citizenship efforts to date. The proverb recommends capitalizing on advantageous conditions to get something done. Here, it is unclear whether legislators' focus has been on actually achieving legislative change. Bills proposed to date, by and large, have been flawed and ill-considered.

### **A. THE MEANING OF CITIZENSHIP AND ITS EFFECT ON LOSS OF CITIZENSHIP LAW**

In the modern era, U.S. citizenship, as a legal matter, cannot be properly characterized as a relationship between citizen and nation involving a set of duties and

obligations, including a duty of allegiance by the citizen to the nation, enforceable through loss of citizenship. A citizen is obligated to report income and pay taxes, but the failure to do so is punished through civil and criminal penalties—not by loss of citizenship. A citizen has a civic duty to participate in the political activities of the nation by voting, but there is no sanction for not voting other than the sacrifice of one’s ability to help steer the ship of state. A citizen can be compelled to register for compulsory military service, but is entitled to avoid combat service by declaring as a matter of conscience his opposition to war.<sup>247</sup> A citizen who fails to register for selective service may face significant penalties, but loss of citizenship is not one of them.<sup>248</sup>

Once vested, citizenship is not a privilege subject to forcible divestiture. The Supreme Court in *Afroyim v. Rusk* and *Vance v. Terrazas* withdrew from the federal government the authority to enforce the duties and obligations of citizenship through the withdrawal of citizenship, and placed control over loss of citizenship firmly in the hands of the citizen. In the modern era, U.S. citizenship must be characterized primarily as a protected legal status,<sup>249</sup> guaranteeing the holder the protection of the state and its laws, and the full panoply of rights available under the Constitution.

Understanding how citizenship is treated under U.S. law is a necessary predicate to creating and implementing a terrorism-related loss of citizenship consequence in the United States. Bills proposed to date fail in part because they appear directed at resolving the wrong question. In a system in which citizenship is a privilege enforceable by expatriation, “Do you deserve to remain a citizen?” may be a valid question. But in the United States, consistent with existing loss of citizenship provisions and legal and constitutional restrictions, the question at issue must be, “When, if ever, should joining or supporting a terrorist organization be deemed to reflect a citizen’s intention to give up

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<sup>247</sup> “Postponements, Deferments, Exemptions,” U.S. Selective Service System, accessed September 11, 2016, <https://www.sss.gov/About/Return-to-the-Draft/Postponements-Deferments-Exemptions>.

<sup>248</sup> “Benefits and Penalties,” U.S. Selective Service System, accessed September 11, 2016, <https://www.sss.gov/Registration/Why-Register/Benefits-and-Penalties>. See also, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

<sup>249</sup> Helena Kennedy QC, “Comment – The Home Offices Attack on the Right to Have Rights,” *The Bureau of Investigative Journalism*, March 20, 2014, accessed September 11, 2016, <https://www.thebureauinvestigates.com/2014/03/20/comment-the-home-offices-attack-on-the-right-to-have-rights/>.

U.S. citizenship?” It is not sufficient simply to demonstrate that a plausible loss of citizenship analysis consistent with existing statutory and constitutional restrictions is possible. Crafting an effective bill demands consideration of why loss of citizenship is an appropriate solution to the problem at hand.

Both Senator Cruz’s and Representative Dent’s recent bills are predicated on the presumption that “[b]y fighting for ISIS U.S. citizens have expressed their desire to become citizens of the Islamic state...[T]he desire to become a citizen of a terrorist organization that has expressed a desire to wage war on the American people” is inconsistent with a desire to be and remain an American citizen.<sup>250</sup> As Representative Dent noted, “[a]n individual could make no clearer statement that they have voluntarily repudiated their American citizenship than by traveling overseas to join ISIS or any other designated terrorist organization.”<sup>251</sup> These statements, at least on their face, reflect some understanding that the federal government cannot simply take citizenship away from individuals involuntarily. Loss of nationality must flow from (1) a voluntary act, that (2) was committed with the intention of losing one’s citizenship. Due process requirements must be observed when adjudicating a loss of nationality case. Nevertheless, Senator Cruz’s and Representative’s Dent’s explanations do not provide a complete answer. These statements demonstrate that a plausible terrorism-related loss of citizenship analysis is possible, but they don’t answer why loss of citizenship is the right solution.

## **B. WHY DO WE NEED LOSS OF CITIZENSHIP TO FIGHT TERRORISM?**

Terrorism as an expatriating act is a thorny problem in part because it often defies easy definition and/or application. Proponents of the terrorism-related loss of citizenship bills currently pending before Congress argue they are necessary for two reasons. First, “the radical Sunni terrorist organization known as the Islamic State of Iraq and Syria

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<sup>250</sup> Senator Ted Cruz, speaking on S.2779, 113th Congress, 2nd Sess., *Congressional Record* 160 (September 8, 2014), <https://www.congress.gov/congressional-record/2014/09/08/senate-section/article/S5376-1>.

<sup>251</sup> Howard Sheppard, “Rep. Charlie Dent’s bill would strip citizenship of Americans who travel overseas to join ISIS,” Fox 43, December 8, 2015, accessed September 11, 2016, <http://fox43.com/2015/12/08/rep-charlie-dents-bill-would-strip-citizenship-of-americans-who-travel-overseas-to-join-isis/>.

(ISIS) poses a threat to the national security of the United States.”<sup>252</sup> Second, allowing U.S. citizens who travels to fight with or support ISIS to come home using a U.S. passport, endangers citizens at home.<sup>253</sup> Senator Cruz has suggested that his expatriation bill is a necessary component of a comprehensive strategy to combat ISIS.<sup>254</sup> These are common arguments used to support similar legislation overseas. For example, as reported by the Australian Broadcasting Corporation, Immigration Minister Peter Dutton explained the reason for its modified loss of nationality law as follows:

“We face a heightened and complex security environment—regrettably some of the most pressing threats to the security of the nation and the safety of the nation come to citizens engaged in terrorism,” Mr. Dutton said. “The intention of the changes is the protection of the community and the upholding of its values rather than punishing people for terrorist or hostile acts.”<sup>255</sup>

But the relationship between these asserted threats and terrorism-related loss of citizenship laws remains to be fully established. Bills previously proposed, and those currently pending before Congress, are not clearly directed at resolving any systemic weaknesses in U.S. law. As Justice Brennan noted in his concurrence in *Kennedy v. Mendoza-Martinez*, the Supreme Court “has never granted the existence in Congress of the power to expatriate except where its exercise was intrinsically and peculiarly appropriate to the solution of serious problems inevitably implicating nationality...For the Court has never held that expatriation was to be found in Congress’ arsenal of common sanctions, available for no higher purpose than to curb undesirable conduct, to exact retribution for it, and to stigmatize it.”<sup>256</sup> While it seems possible under current law to craft a constitutionally permissible terrorism-related loss of citizenship law, the necessity and/or utility of such a law in this instance has not been demonstrated.

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<sup>252</sup> Senator Ted Cruz, speaking on S.2779, 113th Congress, 2nd Sess.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid. (“There has been a lot of talk in recent days about developing a strategy to combat ISIS. I would like to propose a couple of commonsense steps that we should take immediately to combat this scourge.”)

<sup>255</sup> Dan Conifer, “Terror citizenship laws: Government introduces to Parliament bill to strip dual nationals of citizenship,” ABC News, June 24, 2015, accessed September 11, 2016, <http://www.abc.net.au/news/2015-06-24/government-introduces-citizenship-laws-bill-to-parliament/6569570>.

<sup>256</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 187–188 (1963)(Brennan J. concurring).

It is certainly the case that under current U.S. law, joining the armed forces of a foreign nation engaged in hostilities with the United States is a potentially expatriating act.<sup>257</sup> That statutory expatriating act has its roots in the Nationality Act of 1940, a bill conceived and passed into law during the uneasy pause between World War I and World War II, and before the key constitutional cases governing our current understanding of expatriation were decided. Even despite this heritage, expatriation based on service in a hostile foreign military has been subject to searching court inquiry.<sup>258</sup> Expanding the scope of the law today to include a modern era equivalent—joining the forces of a terrorist organization hostile to the United States—may not seem unreasonable on its face.<sup>259</sup> But the propriety of such a bill cannot be measured by the standards that governed the adoption of a seemingly analogous provision 65 years ago. It is unclear why, in the present day, a law proposing to interpret an individual’s decision to leave the United States for the purposes of joining or supporting ISIS, or another terrorist organization or cause, as an expression of the intention to lose U.S. citizenship, is necessary to effectively combat ISIS, or terrorism in general. Rather, these post-9/11 bills seem more like the legislative equivalent of “loss leaders” in commerce. Loss leaders are

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<sup>257</sup> Immigration and Nationality Act, § 349(a)(3), 8 U.S.C. § 1481(a)(3)(1952)(as amended).

<sup>258</sup> U.S. ex rel. Marks v. Esperdy, 315 F.2d 673, 675 (2d Cir. 1963)(“After a hearing upon the issues so raised, the district judge ruled that Marks had lost his American citizenship by virtue of serving in the armed forces of Cuba after the successful conclusion of the Castro revolution. Marks appeals from that determination, claiming, as he did below, that the Rebel Army did not constitute the ‘armed forces of a foreign state’, within the meaning of 8 U.S.C. § 1481(a)(3), that his service in the Rebel Army during 1959 and 1960 was involuntary, and that § 1481(a)(3) as here applied is unconstitutional in that it imposes a cruel and inhuman punishment in violation of the Eighth Amendment. Although we find great force in the constitutional arguments presented by relator’s counsel, we are constrained by the superior authority of *Perez v. Brownell*, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1948), to affirm the determination of alienage on the opinion of Judge Cashin, the district judge below, 203 F.Supp. 389 (1962).”) See generally, George Lewis Michael III, “A Legal Analysis of Loss of United States Nationality as a Result of Unauthorized Service in the Armed Forces of a Foreign State,” (master of laws thesis, George Washington University, Washington, D.C., 1970), <http://calhoun.nps.edu/handle/10945/15066>.

<sup>259</sup> Despite some legal and academic debate questioning the power of Congress to enact legislation capable of removing citizenship from an individual who joined a hostile foreign military force, other commentators have forcefully argued that denying Congress this power would create an absurd result. “Under these standards, a citizens would be free to join an enemy armed force engaged in open hostilities against the United States, and then to claim at a later date that he did not intend his conduct to be expatriative, that he was always loyal to the United States and (possibly) that he fought against the United States only because he disagreed with a particular government policy. That such a result could be obtained is nothing short of preposterous...” George Lewis Michael III, “A Legal Analysis of Loss of United States Nationality as a Result of Unauthorized Service in the Armed Forces of a Foreign State,” pg. 134–135.



unprofitable products sold to attract attention in the market place.<sup>260</sup> Proposed terrorism-related loss of citizenship bills to date have had the character of expedient politically motivated publicity exercises which lack the substance of genuine efforts to legislate.

Great care should be taken when using legislation as an expedient vehicle to address transitory problems, even problems of genuine significance. Legislation is a tool of general applicability that can have broad, lasting, and unexpected effects. A cautionary tale from World War II is instructive.

The only other loss of citizenship law introduced for a similarly specific and expedient purpose was the renunciation legislation passed in 1944, presently codified at 8 U.S.C. § 1481(a)(6), INA § 349(a)(6).<sup>261</sup> This bill was intended to remedy the perceived problem of disloyal interned U.S. citizens supporting a belligerent foreign power. The climate in which the bill was passed was infused with inaccurate presumptions based on race and identity. The flawed reasoning and assumptions underlying the belief that U.S. citizens having Japanese heritage posed a threat to the United States due to inherent sympathy or secret support for Japan led to the deplorable relocation and internment of thousands and thousands of Americans. Internment, which was upheld by the Supreme Court in the since-discredited but yet-to-be-overturned decision, *Korematsu v. United States*,<sup>262</sup> created the circumstances under which the egregiously-flawed loss of citizenship bill was proposed and passed into law.

Setting aside the broader societal issues that led first to the internment of United States citizens during World War II, and later to passage of novel loss-of-citizenship legislation, the legislation itself was poorly conceived and ill-suited to the task for which it was designed. In this regard, it failed for two reasons. First, it was implemented under plainly coercive circumstances, rendering renunciations easily and appropriately voidable through litigation. Second, it failed because, although it was implemented to address the narrow problem of disloyal interned United States citizens of Japanese descent, it in fact

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<sup>260</sup> “Loss Leader Strategy,” Investopedia.com, accessed September 11, 2016, <http://www.investopedia.com/terms/l/lossleader.asp>.

<sup>261</sup> Immigration and Nationality Act § 349, 8 U.S.C. § 1481 (1952)(as amended).

<sup>262</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

created a provision of broad applicability that relied on poorly defined terms, and that has persisted to create unintended and undesirable future consequences. Presently, wartime domestic renunciation has become a cause célèbre for incarcerated criminals and sovereign citizens, whose attempts to divest themselves of citizenship burden federal resources to no good end.<sup>263</sup>

In the modern era, expedient use of loss of citizenship in the context of efforts to combat the problem of citizens joining or supporting Islamist terror groups may satisfy the desire to ask the question, “Do you deserve to remain a citizen?” But that is not the right question. Citizenship is not a privilege. Citizenship, conceived as a protected legal status, demands an answer to the question, “Why is a new loss of citizenship law necessary?”

Alternatives to loss of citizenship exist which could address some of the concerns previously raised related to U.S. citizens travelling abroad under a U.S. passport to join or support a terrorist organization, and later returning to the United States. H.R. 237, the Foreign Terrorist Organization Passport Revocation Act of 2015, would permit the U.S. Secretary of State to revoke and/or refuse to issue a passport to an individual who has aided or assisted a foreign terrorist organization.<sup>264</sup> Similar U.K. legislation, providing for the issuance of a temporary exclusion order, would not strip individuals of citizenship, but would prevent them from benefitting from rights normally accorded citizens, including in the case of the U.S. bill, the right to a valid identity document issued by your home government.

These bills propose to curtail critically important rights associated with citizenship. Denying or revoking a passport is a severe sanction, but one that may be better tailored to address the transitory problems associated with citizens travelling to join

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<sup>263</sup> See e.g., *Sze v. Johnson, et al.*, 2015-cv-191 (D.D.C. 2016); *Kaufman v. Johnson*, 2014-cv-695 (D.D.C. 2016); *Schnitzler v. United States*, 761 F.3d 33 (D.C. Cir. 2014); *Turner v. Beers*, 5 F. Supp.3d 115 (D.D.C. 2013); *Sluss v. USCIS*, 899 F. Supp. 2d 37 (D.D.C. 2012); *Kaufman v. Holder*, 686 F. Supp. 2d 40 (D.D.C. 2010); *Kaufman v. Mukasey*, 524 F.3d 1334 (D.C. Cir. 2008).

<sup>264</sup> Foreign Terrorist Organization Passport Revocation Act of 2015, H.R. 237, 114th Congress (2015), <https://www.congress.gov/bill/114th-congress/house-bill/237>.

or support foreign terrorist organizations than loss of citizenship, which is among the most severe consequences a nation can impose on a citizen.

### **C. DRAFTING RECOMMENDATIONS**

To date, terrorism-related loss of citizenship proponents have fallen short in their effort to justify the need for such legislation. Nevertheless, efforts to legislate in this area persist. Legislators determined to continue drafting and offering terrorism-related loss of citizenship legislation should consider the following.

#### **1. Define Your Terms — Terrorist Organization and Material Support**

Any legislation purporting to establish a loss of citizenship consequence for joining a terrorist organization or materially supporting terrorism should make express reference to what those terms mean, and should do so having considered how those concepts or terms are dealt with elsewhere in U.S. law.

To begin with, terrorism is a tactic not limited to groups and organizations overseas. There are both domestic and foreign organizations that employ terror as a tool. Any law that endeavors to impose a possible loss of nationality consequence for joining or supporting a terrorist organization should be clear regarding the question of whether the term “terrorist organization” includes both foreign and domestic terrorist organizations.

The U.S. Department of State maintains a list of foreign terrorist organizations, which is compiled and maintained pursuant to authority codified at INA § 219.<sup>265</sup> There is currently no official published list of domestic terror organizations. In addition, analysis of what constitutes a terrorist organization, and material support for terrorism also occurs in a civil/administrative context elsewhere in the law. In the immigration context, INA § 212 renders inadmissible to the United States non-citizens who have engaged in terrorism-related activity, including membership in and providing material

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<sup>265</sup> “Foreign Terrorist Organizations,” United States Department of State.

support to a terrorist organization.<sup>266</sup> Material support for terrorism is also a matter addressed in Title 18 of the U.S. Code, which generally deals with crimes and criminal procedure.<sup>267</sup>

When drafting hypothetical terrorism-related loss of citizenship legislation, legislators should also be aware of the potential conflict that could arise in the context of the administration of such a bill and the consideration of terrorism-related inadmissibility grounds in the immigration context.

Adjudication of immigration benefits applications and related matters associated with terrorism-related inadmissibility grounds falls to United States Citizenship and Immigration Services. For purposes of this analysis, membership in a terrorist organizations is determined with reference to the Department of State’s foreign terrorist organizations list, as well organizations found on the separate “terrorist exclusion list,”<sup>268</sup> and in addition ““undesigned terrorist organizations’ [that] qualify as terrorist organizations based on their activities alone without undergoing a formal designation process...”<sup>269</sup> The Secretary of State and Secretary of Homeland Security, however, are afforded the ability to grant exemptions under appropriate circumstances which allow admission to the United States of individuals who would otherwise be inadmissible on terrorism grounds.<sup>270</sup> Legislators should thoroughly consider this related terrorism analysis to ensure that unexpected or inconsistent outcomes are avoided. For example, legislators may wish to avoid situations in which a citizen might be placed in jeopardy of losing his or her citizenship based on association with a group that, in another context,

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<sup>266</sup> Immigration and Nationality Act, § 212, 8 U.S.C. § 1182 (1952)(as amended). See also “Terrorism-Related Inadmissibility Grounds (TRIG),” U.S. Citizenship and Immigration Services.

<sup>267</sup> Providing Material Support to Terrorists, 18 U.S.C., § 2339A (1994)(as amended); Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 18 U.S.C., § 2339B (1996)(as amended).

<sup>268</sup> “Terrorist Exclusion List,” U.S. Department of State, accessed September 11, 2016, <http://www.state.gov/j/ct/rls/other/des/123086.htm>. See also “Terrorism-Related Inadmissibility Grounds (TRIG)” U.S. Citizenship and Immigration Services.

<sup>269</sup> “Terrorism-Related Inadmissibility Grounds (TRIG)” U.S. Citizenship and Immigration Services.

<sup>270</sup> “Terrorism-Related Inadmissibility Grounds Exemptions,” U.S. Citizenship and Immigration Services, accessed September 11, 2016, <https://www.uscis.gov/laws/terrorism-related-inadmissibility-grounds/terrorism-related-inadmissibility-grounds-exemptions>.

would not bar a noncitizen from admission to the United States on terrorism-related inadmissibility grounds.

From a policy standpoint, the scope of a hypothetical terrorism-related loss of citizenship statute could be crafted to be broader or narrower than the law, regulations, and policies that define the scope of the terrorism-related inadmissibility analysis applicable to immigration benefits applicants. Regardless of how legislators decide to proceed, the decision should be made with a clear understanding of the potential interrelationship between terrorism-related loss of citizenship decisions and other areas of law.

## **2. Require Alternate Citizenship**

One potential consequence of terrorism-related loss of citizenship would be the creation of stateless ex-citizens. A person who, upon losing U.S. citizenship, has no alternative citizenship, becomes stateless. The United States is not a signatory to any of the United Nations conventions or other international agreements that address the creation or treatment of stateless people. In fact, the United States government presently holds, as a matter of policy if not law, that a United States citizen is entitled to take action that would render him or her stateless.<sup>271</sup> This position has prevented the U.S. government from requiring, as a precondition to expatriation or renunciation of citizenship under existing law, that an individual possess alternate citizenship. The foregoing notwithstanding, an argument exists that standards governing the treatment of stateless individuals and the creation and avoidance of statelessness have become “crystalized as norms of customary international law.”<sup>272</sup>

It is reasonable for U.S. legislators to consider drafting legislation that avoids unnecessarily creating stateless individuals in the context of proposed terrorism-related

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<sup>271</sup> “Persons intending to renounce U.S. citizenship should be aware that, unless they already possess a foreign nationality, they may be rendered stateless and, thus, lack the protection of any government.” “Renunciation of U.S. Nationality,” U.S. Department of State – Bureau of Consular Affairs, accessed September 11, 2016, <https://travel.state.gov/content/travel/en/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html>.

<sup>272</sup> “Expert Meeting, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality, Summary Conclusions,” UNHCR.

loss of citizenship. Although it may at first seem counter-intuitive to focus on a fundamentally humanitarian concern in the context of hypothetical law addressing consequences flowing from joining or providing material support to terrorism, the practical realities of loss of citizenship, and the modern conditions under which citizens, particularly young citizens, may be coerced or lured into travelling to join or support a terrorist group or cause, support the argument that these concerns should not be ignored.

In this regard, and acknowledging they do have obligations under relevant international treaties, the example of our allies is also persuasive. Australia only permits terrorism-related loss of citizenship if the individual already possesses alternate nationality. While the United Kingdom has not expressly required alternate nationality in all terrorism-related loss of nationality situations, it does require a determination that the individual at least be eligible for alternate nationality before loss of nationality can occur, thus giving serious consideration to statelessness concerns.

Including an alternate citizenship requirement in a hypothetical future terrorism-related loss of citizenship law would not weaken previous positions taken by the U.S. that, for example, U.S. citizens have a right to renounce their citizenship under circumstances that would render them stateless. Renunciation of citizenship is a process exclusively initiated by U.S. citizens, and is subject to a host of warnings and advisories.<sup>273</sup> Although terrorism-related loss of citizenship, like renunciation, would require a process relying on the citizen's voluntary actions and express or reasonably-inferred intent, unlike renunciation, terrorism-related loss of citizenship proceedings would likely be initiated by the federal government and not the citizen. This is a distinction with a difference, particularly where statelessness is the potential consequence. Acknowledging the ability of a U.S. citizen, after receiving appropriate advisories, to elect statelessness in the context of a renunciation process commenced by that citizen is of a different character than a creating statutory provision by which the federal government could impose statelessness upon U.S. citizens, even if that

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<sup>273</sup> "Renunciation of U.S. Nationality," U.S. Department of State – Bureau of Consular Affairs. See also, 7 U.S. Department of State Foreign Affairs Manual § 1220 (2015), Developing a Loss-of Nationality Case, <https://fam.state.gov/fam/07fam/07fam1220.html>.

consequence were to flow from the voluntary and intentional commission of an expatriating act. Imposing statelessness involuntarily upon a U.S. citizen, even in the context of a voluntary expatriating act committed with the necessary intent, could be viewed as a cruel and unusual punishment in violation of the 8<sup>th</sup> Amendment to the Constitution, as it would bootstrap into our voluntary loss of citizenship scheme a particularly severe and, from the perspective of the citizen, potentially unintended or unexpected penalty.<sup>274</sup>

For these reasons, from both a policy, legal, and practical perspective, it would be sensible to treat terrorism-related loss of citizenship differently from voluntary renunciation and other loss of citizenship scenarios under U.S. law, and include an alternate citizenship requirement.

### **3. Loss of Citizenship Should Only Take Effect Overseas**

Consistent with the Australian model, and in recognition of the problems associated with creating stateless people in the United States, legislators should ensure that any terrorism-related loss of citizenship only take effect once the individual has taken up residence outside the United States. Allowing loss of citizenship to take effect while a person is in the United States creates a variety of potential problems for the U.S. government.

The ability to live in the United States is inexorably tied to citizenship, or acquisition of some other legal status such as asylum, or lawful permanent resident status.<sup>275</sup> Following loss of citizenship, an individual stands in relationship to the United

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<sup>274</sup> Compare with *Trop v. Dulles*, 356 U.S. 86 (1958), holding involuntary loss of citizenship for desertion of the armed forces during a time of war to be an unconstitutional violation of the 8<sup>th</sup> Amendment.

<sup>275</sup> “Potential renunciants may also express the intention to continue to reside in the United States or its territories and possessions without documentation as aliens. Since this right of residency is a fundamental right that U.S. citizens and nationals possess, potential renunciants who wish to retain this right do not possess the intent necessary for an effective renunciation.” 7 U.S. Department of State Foreign Affairs Manual § 1261(h)(2015), Renunciation of U.S. Citizenship Abroad, <https://fam.state.gov/fam/07fam/07fam1260.html>.

States as an alien, on the same footing as other aliens.<sup>276</sup> An individual permitted to lose citizenship while in the United States, but who has not acquired an alternate nationality, will in most instances find it impossible to leave the United States. The U.S. government cannot remove an individual from the United States to another nation without permission from the destination nation.<sup>277</sup> In all but the most unusual situations, permission will be denied regarding anyone not a citizen of the target nation. As such, administrative removal by the United States government of a stateless ex-citizen, particularly one whose loss of citizenship was related to terrorism, is unlikely to ever occur.

Further, a stateless ex-citizen would be unable to leave the United States by standard modes of international travel. Following loss of citizenship, the individual would not be eligible to use or obtain a passport. In the United States, a stateless ex-citizen would not be eligible for issuance of any other comparable federal travel or identity document sufficient for international travel. Absent preexisting nationality or a claim to nationality from another nation, a newly stateless ex-citizen would find it difficult or impossible to acquire permission from a foreign nation to travel to and take up residence in that nation.<sup>278</sup> Legally gaining entrance to a foreign nation is impossible in most instances absent a properly issued travel document such as a passport, and absent advance permission to enter the foreign nation, which commonly takes the form of a visa. Airlines would not allow an international traveler lacking such documentation to

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<sup>276</sup> See e.g., *Davis v. INS*, 481 F. Supp. 1178, 1180 (D.D.C. 1979) (“The Immigration and Naturalization Service argues that the petitioner is neither a citizen nor a national of the United States. He therefore qualifies only as an alien who must be excluded under 8 U.S.C. § 1182(a)(20). This statute requires exclusion if a person does not possess a “valid unexpired immigration visa.” The court agrees with the INS and will order the dismissal of the habeas petition.”)

<sup>277</sup> “ICE relies on the cooperation of foreign governments to effectuate removal of their nationals. However, ICE often cannot repatriate individuals because certain countries fail to issue required travel documents in a timely manner...” *A Review of the Department of Homeland Security Policies and Procedures for the Apprehension, Detention, and Release of Non-Citizens Unlawfully Present in the United States: Hearing Before the U.S. House of Representatives Committee on Oversight and Government Reform* (2015)(statement of Sarah R. Saldaña, Director U.S. Immigration and Customs Enforcement), [https://www.ice.gov/sites/default/files/documents/Testimony/2015/saldana\\_testimony.pdf](https://www.ice.gov/sites/default/files/documents/Testimony/2015/saldana_testimony.pdf).

<sup>278</sup> For example, see the case of Thomas Richard Jolley, who renounced his citizenship in Canada to avoid the Vietnam draft, then re-entered the United States, but was deemed a deportable alien. *Matter of Jolley*, 13 I&N Dec. 543 (BIA 1970), <https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/27/2039.pdf>. See also, John Nordheimer, “A Draft Foe Becomes Man Without Country,” *New York Times*, November 15, 1971 (“If Canada refused to receive Mr. Jolley, which it well might, he would remain indefinitely in his homeland, stripped of certain civil rights and under the permanent supervision, but not the custody, of immigration officials.”).



board.<sup>279</sup> Such an individual would be rejected at internal borders. The newly stateless ex-citizen would face a challenging, albeit ironic consequence. Having taken action deemed to express a voluntarily and intentional loss of United States citizenship, such an individual would be trapped in the United States under circumstances that would make him unable to leave, and would cause him to be or become a burden to federal, state and local authorities.

Such an outcome should, and indeed can easily be avoided by legislators through careful legislative drafting. Section 351 of the Immigration and Nationality Act provides that loss of citizenship becomes effective for most provisions only upon the individual taking up residence outside of the United States.<sup>280</sup> Any new terrorism-related loss of citizenship provision should be included among those that only take effect once a person takes up residence outside United States.

#### **4. Include a Statutory Presumption Regarding Intent**

For purposes of terrorism-related loss of citizenship, legislators should consider incorporating a statutory presumption regarding intent. It is foreseeable in the context of terrorism-related loss of citizenship that the federal government may argue an individual's actions reflect the intent to lose United States citizenship, even while the individual may dispute that conclusion. Section 349 of Immigration and Nationality Act is silent on the meaning of intent, merely reciting that "the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence."<sup>281</sup> In *Vance v. Terrazas*, the Supreme Court recognized that intent could be divined from "words or...as a fair inference from proved conduct."<sup>282</sup> If intent is susceptible to determination as an inference from proved conduct, it makes sense that a statutory presumption, or statutory guidance regarding actions that may be deemed to reflect the necessary intent, would be both appropriate and useful.

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<sup>279</sup> "International Travel Document Requirements," United Airlines, accessed September 11, 2016, <https://www.united.com/web/en-US/content/travel/destination/international/passport.aspx>.

<sup>280</sup> Immigration and Nationality Act § 351, 8 U.S.C. § 1483 (1952)(as amended).

<sup>281</sup> Immigration and Nationality Act § 349(b), 8 U.S.C. § 1481(b)(1952)(as amended).

<sup>282</sup> *Vance v. Terrazas*, 444 U.S. 252, 260 (1980).

While no statutory presumption regarding intent currently exists, the Department of State has adopted a limited administrative presumption regarding intent.<sup>283</sup> Legislators are also encouraged review the structure and content of Australia's Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, which incorporates a statutory presumption regarding intent.<sup>284</sup> Such a presumption would aid in the administration of the new law, provide clearer notice to the public regarding the consequences of their actions, and facilitate judicial review.

## 5. Wildcard

An issue about which both proponents and opponents of the concept of terrorism-related loss of citizenship should be aware is the fact that *Afroyim v. Rusk*, which introduced a novel interpretation of the 14th Amendment, failed to sway four members of the court in 1967 and might not be terribly influential to certain members of the court sitting today.<sup>285</sup> Stare decisis is a principle of decision-making that the Supreme Court applies, and that counsels but does not command that the Court defer to its own precedent.<sup>286</sup> In his influential dissent from *Burnet v. Coronado Oil & Gas Co.*, Justice Louis Brandeis described the application of stare decisis as follows:

[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function... The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting the Constitution... Moreover, the judgment of the court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned. In cases involving constitutional issues of the character discussed, this court must, in order to reach sound conclusions, feel free to

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<sup>283</sup> Certification of loss of U.S. Nationality, 22 C.F.R. § 50.40(a).

<sup>284</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

<sup>285</sup> *Afroyim v. Rusk*, 387 U.S. 253 (1967).

<sup>286</sup> Wex, s.v. "Stare Decisis," accessed September 11, 2016, [https://www.law.cornell.edu/wex/stare\\_decisis](https://www.law.cornell.edu/wex/stare_decisis).

bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may, as Mr. Chief Justice Taney said, “depend altogether on the force of the reasoning by which it is supported.”<sup>287</sup>

Since Justice Brandeis’ discussion of stare decisis in the 1930s, academics have continued to argue about, reconceive, and at times suggest further constraints on the use of stare decisis as a tool preventing courts from revisiting decisions of past courts with which they disagree.<sup>288</sup>

The federal government’s authority to withdraw citizenship from U.S. citizens is presently circumscribed by a constitutional boundary, the force of which is inherently dependent on the application of stare decisis. Justice Harlan’s detailed and thorough dissent from *Afroyim v. Rusk* is worth reading and considering, regardless of your position on the merits of terrorism-related loss of nationality or even on the meaning of the 14th Amendment.<sup>289</sup> In today’s political climate, in which significant attention is given to the makeup of the court, and to the judicial disposition and indeed predisposition that potential new members of the court may bring with them, it is conceivable that *Afroyim v. Rusk*, and its constitutionally-derived principle of voluntariness which has become inextricably associated with loss of citizenship in the United States, could be subject to debate and even reconsideration in the future.

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<sup>287</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–413 (1932)(Brandeis J. dissenting). Justice Brandeis’ analysis and assertions regarding stare decisis have been subject to criticism. See e.g., Lee J. Strang and Bryce G. Poole, “Historical (In)Accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents,” *North Carolina Law Review* 86 (2008): 969–1031 accessed September 11, 2016, <http://scholarship.law.unc.edu/nclr/vol86/iss4/4>.

<sup>288</sup> Nelson Lund, “Stare Decisis and Originalism: Judicial Disengagement From the Supreme Court’s Errors,”(George Mason University Law and Economics Research Paper Series, 12–33), accessed September 11, 2016, [http://www.law.gmu.edu/assets/files/publications/working\\_papers/1233StareDecisisandOriginalism.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/1233StareDecisisandOriginalism.pdf).

<sup>289</sup> *Afroyim v. Rusk*, 387 U.S. 253, 268–293 (1967)(Harlan J. dissenting).

## APPENDIX A. SELECTED EXTRACTS FROM FOREIGN TERRORISM RELATED LOSS OF CITIZENSHIP LEGISLATION

### A. KEY U.K. LAWS

The following are excerpts from the British Nationality Act of 1981, as amended:

#### **§ 40 Deprivation of Citizenship**

§ 40(2) The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.

§ 40(4) The Secretary of State may not make an order under subsection (2) if he is satisfied that the order would make a person stateless.

§ 40(4A) But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

- (a) the citizenship status results from the person's naturalization,
- (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
- (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

#### **§ 40A Deprivation of Citizenship: Appeal**

§ 40A(1) A person who is given notice under section 40(5) of a decision to make an order in respect of him under section 40 may appeal against the decision to the First-tier Tribunal.

§ 40A(2) Subsection (1) shall not apply to a decision if the Secretary of State certifies that it was taken wholly or partly in reliance on information which in his opinion should not be made public—

- (a) in the interests of national security,
- (b) in the interests of the relationship between the United Kingdom and another country, or
- (c) otherwise in the public interest.<sup>290</sup>

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<sup>290</sup> British Nationality Act of 1981 at §§ 40 and 40A. Immigration Act of 2014 Part 6, Section 66.

## **B. KEY AUSTRALIAN LAWS**

The following are excerpts from the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015:

### **33AA Renunciation by conduct**

#### *Renunciation and cessation of citizenship*

- (1) Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (14).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

- (2) Subject to subsections (3) to (5), subsection (1) applies to the following conduct:
- (a) engaging in international terrorist activities using explosive or lethal devices;
  - (b) engaging in a terrorist act;
  - (c) providing or receiving training connected with preparation for, engagement in, or assistance in a terrorist act;
  - (d) directing the activities of a terrorist organisation;
  - (e) recruiting for a terrorist organisation;
  - (f) financing terrorism;
  - (g) financing a terrorist;
  - (h) engaging in foreign incursions and recruitment.
- (3) Subsection (1) applies to conduct specified in any of paragraphs (2)(a) to (h) only if the conduct is engaged in:
- (a) with the intention of advancing a political, religious or ideological cause; and
  - (b) with the intention of:
    - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

- (ii) intimidating the public or a section of the public.
- (4) A person is taken to have engaged in conduct with an intention referred to in subsection (3) if, when the person engaged in the conduct, the person was:
  - (a) a member of a declared terrorist organisation (see section 35AA); or
  - (b) acting on instruction of, or in cooperation with, a declared terrorist organisation.
- (5) To avoid doubt, subsection (4) does not prevent the proof or establishment, by other means, that a person engaged in conduct with an intention referred to in subsection (3).
- (6) Words and expressions used in paragraphs (2)(a) to (h) have the same meanings as in Subdivision A of Division 72, sections 101.1, 101.2, 102.2, 102.4, 103.1 and 103.2 and Division 119 of the *Criminal Code*, respectively. However, (to avoid doubt) this does not include the fault elements that apply under the *Criminal Code* in relation to those provisions of the *Criminal Code*.
- (7) This section does not apply in relation to conduct by a person unless:
  - (a) the person was not in Australia when the person engaged in the conduct;  
or
  - (b) the person left Australia after engaging in the conduct and, at the time that the person left Australia, the person had not been tried for any offence related to the conduct.
- (8) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).
- (9) Where a person renounces their Australian citizenship under this section, the renunciation takes effect, and the Australian citizenship of the person ceases, immediately upon the person engaging in the conduct referred to in subsection (2).

*Minister to give notice*

- (10) If the Minister becomes aware of conduct because of which a person has, under this section, ceased to be an Australian citizen, the Minister:
  - (a) must give, or make reasonable attempts to give, written notice to that effect to the person:
    - (i) as soon as practicable; or
    - (ii) if the Minister makes a determination under subsection (12)—as soon as practicable after the Minister revokes the determination (if the Minister does so); and

- (b) may give notice to that effect to such other persons and at such time as the Minister considers appropriate.

Note: A person may seek review of the basis on which a notice under this subsection was given in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

- (11) A notice under paragraph (10)(a) must set out:
  - (a) the matters required by section 35B; and
  - (b) the person's rights of review.
- (12) The Minister may determine in writing that a notice under paragraph (10)(a) should not be given to a person if the Minister is satisfied that giving the notice could prejudice the security, defence or international relations of Australia, or Australian law enforcement operations. The Minister must consider whether to revoke such a determination:
  - (a) no later than 6 months after making it; and
  - (b) at least every 6 months thereafter until 5 years have passed since the determination was made.

### **35 Service Outside Australia In Armed Forces of an Enemy Country or a Declared Terrorist Organization**

#### *Cessation of citizenship*

- (1) A person aged 14 or older ceases to be an Australian citizen if:
  - (a) the person is a national or citizen of a country other than Australia; and
  - (b) the person:
    - (i) serves in the armed forces of a country at war with Australia; or
    - (ii) fights for, or is in the service of, a declared terrorist organisation (see section 35AA); and
  - (c) the person's service or fighting occurs outside Australia.

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (9).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

- (2) The person ceases to be an Australian citizen at the time the person commences to so serve or fight.

(3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).

(4) For the purposes of subparagraph (1)(b)(ii) and without limitation, a person is not in the service of a declared terrorist organisation to the extent that:

- (a) the person's actions are unintentional; or
- (b) the person is acting under duress or force; or
- (c) the person is providing neutral and independent humanitarian assistance.

### **35A Conviction for terrorism offences and certain other offences**

#### *Cessation of citizenship on determination by Minister*

(1) The Minister may determine in writing that a person ceases to be an Australian citizen if:

- (a) the person has been convicted of an offence against, or offences against, one or more of the following:
  - (i) a provision of Subdivision A of Division 72 of the *Criminal Code* ;
  - (ii) a provision of section 80.1, 80.1AA or 91.1 of the *Criminal Code* ;
  - (iii) a provision of Part 5.3 of the *Criminal Code* (except section 102.8 or Division 104 or 105);
  - (iv) a provision of Part 5.5 of the *Criminal Code* ;
  - (v) section 24AA or 24AB of the *Crimes Act 1914* ;
  - (vi) section 6 or 7 of the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* ; and
- (b) the person has, in respect of the conviction or convictions, been sentenced to a period of imprisonment of at least 6 years, or to periods of imprisonment that total at least 6 years; and
- (c) the person is a national or citizen of a country other than Australia at the time when the Minister makes the determination; and
- (d) the Minister is satisfied that the conduct of the person to which the conviction or convictions relate demonstrates that the person has repudiated their allegiance to Australia; and
- (e) having regard to the following factors, the Minister is satisfied that it is not in the public interest for the person to remain an Australian citizen:
  - (i) the severity of the conduct that was the basis of the conviction or convictions and the sentence or sentences;
  - (ii) the degree of threat posed by the person to the Australian community;
  - (iii) the age of the person;
  - (iv) if the person is aged under 18—the best interests of the child as a primary consideration;



- (v) the person's connection to the other country of which the person is a national or citizen and the availability of the rights of citizenship of that country to the person;
- (vi) Australia's international relations; and
- (vii) any other matters of public interest.

Note: A person may seek review of a determination made under this subsection in the High Court of Australia under section 75 of the Constitution, or in the Federal Court of Australia under section 39B of the *Judiciary Act 1903*.

- (2) The person ceases to be an Australian citizen at the time when the determination is made.
- (3) Subsection (1) applies to a person who is an Australian citizen regardless of how the person became an Australian citizen (including a person who became an Australian citizen upon the person's birth).
- (4) For the purpose of paragraph (1)(b):
  - (a) the reference to being sentenced to a period of imprisonment does not include a suspended sentence; and
  - (b) if a single sentence of imprisonment is imposed in respect of both an offence against a provision mentioned in paragraph (1)(a) and in respect of one or more other offences, then:
    - (i) if it is clear that only a particular part of the total period of imprisonment relates to the offence against the provision mentioned in paragraph (1)(a)—the person is taken to have been sentenced to imprisonment in respect of that offence for that part of the total period of imprisonment; and
    - (ii) if subparagraph (i) does not apply—the person is taken to have been sentenced to imprisonment in respect of the offence against the provision mentioned in paragraph (1)(a) for the whole of the total period of imprisonment.<sup>291</sup>

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<sup>291</sup> Australian Citizenship Amendment (Allegiance to Australia) Bill 2015.

**APPENDIX B. LOSS OF NATIONALITY BY NATIVE-BORN OR  
NATURALIZED CITIZEN — 8 U.S.C. § 1481 (INA § 349)**

(a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality-

(1) obtaining naturalization in a foreign state upon his own application or upon an application filed by a duly authorized agent, after having attained the age of eighteen years; or

(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof, after having attained the age of eighteen years; or

(3) entering, or serving in, the armed forces of a foreign state if  
(A) such armed forces are engaged in hostilities against the United States, or  
(B) such persons serve as a commissioned or non-commissioned officer; or

(4) (A) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years if he has or acquires the nationality of such foreign state; or  
(B) accepting, serving in, or performing the duties of any office, post, or employment under the government of a foreign state or a political subdivision thereof, after attaining the age of eighteen years for which office, post, or employment an oath, affirmation, or declaration of allegiance is required; or

(5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(6) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or

(7) committing any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of title 18,

United States Code, or willfully performing any act in violation of section 2385 of title 18, United States Code, or violating section 2384 of said title by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction. <sup>292</sup>

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<sup>292</sup> Immigration and Nationality Act § 349, 8 U.S.C., § 1481(1952)(as amended).

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