



STATEMENT OPPOSING THE TERRORIST EXPATRIATION ACT

A REPORT BY THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE

May 20, 2010

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On May 6, 2010, Senators Joseph Lieberman (I-CT) and Scott Brown (R-MA) introduced S. 3327, the Terrorist Expatriation Act of 2010.¹ The bill would add a new category to 8 U.S.C. § 1481(a), which outlines limited circumstances under which U.S. citizens can be denaturalized or expatriated.² Under the bill, the government would be authorized to attempt to revoke the citizenship of any individual who has been found (presumably in an administrative hearing) to have (1) provided “material support” to foreign terrorist organizations; or (2) engaged in, or purposefully or materially supported hostilities against the United States or against other nations directly supporting U.S. armed forces.

This bill raises several serious constitutional problems. First and foremost, citizenship is a fundamental constitutional right that cannot be taken away unless it was unlawfully obtained or voluntarily renounced. Second, although the bill uses a violation of federal criminal law as the underlying act subjecting the citizen to expatriation, it does not require a *conviction* for that act, but merely an administrative determination that the offense has been committed. Third, by relying on existing laws on “providing material support” to designated terrorist groups, the bill incorporates the substantial First and Fifth Amendment flaws of those material support laws. Finally, and no less significantly, such legislation is unnecessary, because existing law already provides harsh sanctions for U.S. citizens who commit terrorist acts. In short, while the bill purports to be a patriotic effort to protect our legal system from those who would attack our nation, it is in fact wholly unnecessary for counterterrorism purposes, and would set a dangerous precedent for the dilution of our most important constitutional rights.

Thus, for the reasons outlined more fully below, we, the undersigned members of the Constitution Project’s Liberty and Security Committee, urge Congress to reject this proposal.

I. BACKGROUND

The Fourteenth Amendment mandates that “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.” This constitutionally protected right of citizenship cannot be taken away by Congress against the citizen’s will.

As the Supreme Court explained in 1967 in *Afroyim v. Rusk*, “the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. . . . [It creates] a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.”³ Thirteen years later, the Court in *Vance v. Terrazas* again reiterated that a citizen may only lose

1. A comparable bill—H.R. 5237—was introduced in the House of Representatives by Congressmen Jason Altmire (D-PA) and Charlie Dent (R-PA).

2. Federal law separately provides for “revocation of naturalization” in those circumstances where naturalization was obtained through fraud or other malfeasance. See 8 U.S.C. § 1451.

3. 387 U.S. 253, 268 (1967).

his or her citizenship by voluntarily renouncing it.⁴ Thus, under the Supreme Court's jurisprudence (and under § 1481 as amended to reflect these holdings),⁵ the government must prove that the predicate act was voluntarily committed *with the specific intent* of renouncing citizenship.

II. 8 U.S.C. § 1481(A) AND THE TERRORIST EXPATRIATION ACT OF 2010

a. The Structure of Current 8 U.S.C. § 1481

Present-day § 1481(a) covers two broad categories of acts that can form the basis for losing one's citizenship: acts indicating a desire to renounce one's American citizenship, such as taking an oath of allegiance to a foreign government or serving as an officer in the armed forces of that foreign nation; and under § 1481(a)(7), by committing crimes such as treason or conspiracy to overthrow the U.S. government "if and when [the citizen] is convicted thereof by a court martial or by a court of competent jurisdiction."⁶

Thus, of the existing statutory list in § 1481, only subsection (a)(7) provides for loss of citizenship in cases where the citizen did not either (1) clearly express loyalty to a foreign government; or (2) clearly renounce his or her citizenship to a U.S. government officer. In "(a)(7)" cases, however, the statute requires a *conviction* as proof of the expatriating act, as well as the separate proof of an affirmative intent to renounce citizenship.

b. Constitutional Flaws with the Terrorist Expatriation Act

The Terrorist Expatriation Act would add a new category of expatriating acts—new § 1481(a)(8)—whenever a citizen is determined by the Secretary of State to have (1) provided "material support" to foreign terrorist organizations; or (2) engaged in, or purposefully or materially supported hostilities against the United States or against other nations directly supporting U.S. armed forces.⁷ The bill incorporates the language from existing laws barring material support for foreign terrorist organizations. Even with the Supreme Court's requirement that the government must separately prove an intent to renounce citizenship, this provision raises two distinct constitutional problems.

i. Not Requiring a Conviction

As noted above, the language of § 1481(a)(7) expressly requires a conviction as a necessary prerequisite to denaturalization or expatriation proceedings. This requirement protects the constitutional right of due process, since one cannot actually be said to have committed the acts specified in § 1481(a)(7)—each of which are crimes against the United States—until and unless those acts have been proven to a jury beyond a reasonable doubt. As the Supreme Court expressly held in *Kennedy v. Mendoza-Martinez*, Congress cannot deprive an individual of his or

4. 444 U.S. 252, 260 (1980).

5. In response to *Terrazas*, Congress in 1986 amended § 1481(a) to require that the delineated acts be "voluntarily perform[ed]" "with the intention of relinquishing United States nationality." See Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, §§ 18, 100 Stat. 3655, 3658.

6. 8 U.S.C. § 1481(a)(7).

7. See S. 3327, 111th Cong., 2d Sess., § 2 (2010).

her citizenship as a “punishment” absent the procedural safeguards of a criminal trial.⁸ In contrast, the new material support provision that would be added by the Terrorist Expatriation Act does not require a prior conviction. Indeed, it does not appear to require more than an administrative finding by an unspecified government official. This incorporation of Title 18’s definition of “material support” as a new expatriating act under proposed § 1481(a)(8), without requiring the procedural protections of a criminal trial, is likely unconstitutional.

ii. Incorporating Existing Flaws With Federal Material Support Laws

Further, the bill’s incorporation of federal “material support” laws means that this new statute suffers from the same fundamental and well-documented constitutional flaws that plague the existing material support laws.⁹ As the Constitution Project’s Liberty and Security Committee explained in a November 2009 report:

In their current form, these laws raise serious concerns under the First and Fifth Amendments, because they define “material support” so expansively and vaguely as to criminalize pure speech furthering only lawful, nonviolent ends. The legal prohibitions . . . criminalize even speech that is intended to further, and in fact only furthers, lawful, peaceful, and nonviolent activities. Indeed, the criminal bar is so sweeping that it applies even to aid that is designed to reduce a group’s resort to violence by encouraging the peaceful resolution of disputes, and even where the aid can be shown to have had precisely that beneficial effect. In addition, because the law likely criminalizes any conduct undertaken under a designated group’s direction or control, it appears to penalize pure association. These aspects of the “material support” definition go far beyond the criminalization of financial support, and trench on important First and Fifth Amendment rights.¹⁰

Constitutional challenges to four provisions of the material support statute are currently before the U.S. Supreme Court in *Holder v. Humanitarian Law Project*.¹¹ Further, as a practical matter, providing “material support” to a group designated by the State Department as a foreign terrorist organization often will *not* indicate any desire to renounce American citizenship. Aiding groups such as the Kurdistan Workers Party, one of the groups at issue in the *Humanitarian Law Project* case before the Supreme Court—which do not seek to harm the United States—would not seem to indicate any intent to abandon one’s American citizenship. And although the

8. See 372 U.S. 144, 165–68 (1963).

9. See 18 U.S.C. § 2339A.

10. CONSTITUTION PROJECT, REFORMING THE MATERIAL SUPPORT LAWS: CONSTITUTIONAL CONCERNS PRESENTED BY PROHIBITIONS ON MATERIAL SUPPORT TO “TERRORIST ORGANIZATIONS” 2 (2009), available at <http://www.constitutionproject.org/manage/file/355.pdf>.

11. See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir.), cert. granted, 130 S. Ct. 438 (2009). The challenged provisions include those defining “training” as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” *id.* § 2339A(b)(2), and “expert advice or assistance” as “advice or assistance derived from scientific, technical or other specialized knowledge,” *id.* § 2339A(b)(3). The Constitution Project filed an *amicus* brief in this case arguing that the challenged provisions of the material support laws chill free speech and free association that is protected by the First Amendment.

constitutionally compelled requirement to separately prove an intent to renounce citizenship—as articulated by the Supreme Court in *Terrazas*—may limit the potential abuses that could result from using the provision of material support as a basis for expatriation, it will not alleviate those concerns altogether. Finally, the sweeping and undefined scope of the material support laws contrasts sharply with the highly limited nature of the criminal offenses already included under § 1481, such as treason and conspiracy to overthrow the government.

III. CONCLUSION

The Terrorist Expatriation Act raises several serious constitutional concerns. Moreover, there is no need for such a law. Whether they are American citizens or not, terrorism suspects can and should be prosecuted in court to the full extent of the law. Congress should reject such expatriation proposals as being both unnecessary and dangerous: Unnecessary because existing laws already provide more than adequate penalties for U.S. citizens who engage in acts of terrorism; dangerous because such proposals would forever dilute one of our most fundamental constitutional rights.

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